

Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause

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I. INTRODUCTION

Can an employer make his employees foot the bill for his religious beliefs? Merely to ask this question is to answer it. “Religious liberty” does not and cannot include the right to impose the costs of observing one’s religion on someone else, especially in the for-profit workplace. Until *Hobby Lobby Stores, Inc. v. Sebelius*,¹ this was a

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1. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir.) (5-3 en banc decision) (upholding exemption of for-profit employer from requirement that employer’s health

basic and unquestioned aspect of the law of freedom of religion. The Establishment Clause forbids accommodations of religion in the for-profit workplace that impose significant burdens on identifiable and discrete third parties. In *Hobby Lobby*, a group of employers are demanding the right to refuse health insurance coverage of contraception needed by women who do not share the employers' religious beliefs.

In the United States, most health insurance for the non-elderly is provided through employers. Employer-based coverage has the economic advantages of economies of scale and the creation of natural risk pools. It is also encouraged by the tax code.² Most Americans depend upon it.

The Affordable Care Act of 2010 (the "ACA") seeks to approach the goal of universal coverage by expanding employer health insurance with a requirement that large employers provide their employees with such insurance or pay an assessment fee. The requirement would, of course, accomplish little if the government said nothing about what must be covered by the insurance. So a minimum benefits package is specified. Among other things, the ACA mandates that insurers cover "preventive health services" without additional charge—that is, without co-payments, co-insurance, deductibles, or the like.

As it happens, one element of this minimum package is coverage for contraception. The options that are most effective at preventing pregnancy or medically appropriate for some women can be prohibitively expensive. Unwanted pregnancy can deprive a person of control over the entire course of her life. It also is relevant that one of the principal inequities of the health care system before the ACA was that insurance often excluded coverage of medical needs specific to women, making women bear higher health care costs than men—as much as a billion dollars a year more in the aggregate.³

Accordingly, the Department of Health and Human Services issued the "contraception mandate" (the "Mandate"), a rule that defines all FDA-approved contraceptives as preventive services, thereby requiring their coverage without charge in all healthcare plans. The rule elicited objections from churches and other

insurance plan cover contraceptives to which employer religiously objects), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013).

2. See TIMOTHY STOLTZFUS JOST, *HEALTH CARE AT RISK: A CRITIQUE OF THE CONSUMER-DRIVEN MOVEMENT* 59–61 (2007).

3. Denise Grady, *Overhaul Will Lower the Costs of Being a Woman*, N.Y. TIMES, Mar. 29, 2010; *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act*, NATIONAL WOMEN'S LAW CENTER, Mar. 16, 2012, available at <http://www.nwlc.org/resource/report-turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-ac>.

nonprofit religious entities that conscientiously objected to facilitating what they regard as evil conduct. The Obama Administration devised accommodations for objecting religious organizations,⁴ but refused accommodations to for-profit businesses whose owners religiously object to some or all of the mandated contraception coverage. The result has been dozens of lawsuits, and the Court has agreed to hear two, one of which is *Hobby Lobby*.⁵

Hobby Lobby Stores, Inc., runs a large chain of arts and crafts stores, employing 13,000 employees in 600 locations scattered throughout 39 states. Its owners also operate a much smaller group of Christian bookstores, with 400 total employees. Forbes estimates its annual revenues at more than \$2 billion.⁶

Hobby Lobby is owned by the Green family, all of whom observe an evangelical faith which holds that life begins at conception. The Greens thus believe that any form of contraception that prevents pregnancy after fertilization, which in their view includes day-after and week-after pills and some IUDs, destroys innocent human life. When the Mandate was announced, Hobby Lobby and the Greens sought a preliminary injunction under the Religious Freedom Restoration Act of 1993 (“RFRA”),⁷ exempting them from supplying mandated contraceptives to which they religiously object. Although the federal district court denied the injunction, a deeply divided Tenth Circuit granted it. The Supreme Court then granted *certiorari*.

Hobby Lobby is now asking the Court to uphold their RFRA exemption from the Mandate. The Mandate would otherwise require Hobby Lobby’s health plan to fully cover the contraceptives to which it objects at no additional cost to its employees or drop its health plan altogether. Upholding the exemption, therefore, would shift the cost of accommodating Hobby Lobby’s religious beliefs about contraception to employees who do not share them. Such cost-shifting violates the Establishment Clause.

4. See Robert Pear, *Birth Control Rule Altered to Allay Religious Objections*, N.Y. TIMES, Feb. 1, 2013.

5. See *Hobby Lobby*, 723 F.3d at 1114, *cert. granted*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sec’y U.S. Dep’t Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir.) (2-1 decision), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013). The Court of Appeals in *Conestoga Wood* held that the claimants lacked standing to bring suit under RFRA and thus did not reach the merits of their RFRA claim.

Contraception mandate lawsuits are collected on a website maintained by the Becket Fund for Religious Liberty, available at <http://www.becketfund.org/hhsinformationcentral/>, and now number nearly 100.

6. See *America’s Largest Private Companies: #194 Hobby Lobby Stores*, FORBES, available at http://www.forbes.com/lists/2011/21/private-companies-11_Hobby-Lobby-Stores_ZGO2.html

7. 42 U.S.C. § 2000bb to bb-4 (2012).

II. ESTABLISHMENT CLAUSE LIMITS

The Establishment Clause generally prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not. “The First Amendment . . . gives no one the right to insist that in pursuit of their own interest others must conform their conduct to his own religious necessities.”⁸

Throughout the litigation involving the Mandate, the lower courts have failed to examine the Establishment Clause implications of the RFRA exemption sought by Hobby Lobby and other for-profit businesses. The prohibition against cost-shifting religious accommodations does not affect the facial validity of RFRA because most accommodations do not impose significant costs on others. But the Establishment Clause does prohibit RFRA’s application when—as with the exemption sought by Hobby Lobby—a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties in the for-profit workplace. This prohibition controls the outcome of this case regardless of how the Court might rule on the *prima facie* elements of Hobby Lobby’s RFRA claim.⁹

In *Estate of Thornton v. Caldor, Inc.*,¹⁰ the Court held that a statute requiring employers to accommodate employees’ Sabbath observance violated the Establishment Clause because of the “substantial economic burdens” it imposed on employers and the “significant burdens” it imposed on other employees.¹¹ The Court has similarly rejected religious accommodations that impose costs on a class of discrete and identifiable third parties when interpreting the Free Exercise Clause and Title VII.¹² It has upheld a permissive, cost-shifting accommodation of religion in only a single decision, allowing

8. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (citation omitted).

9. Thus, if a RFRA exemption from the Mandate violates the Establishment Clause, such an exemption cannot be granted regardless of whether this Court ultimately finds that Hobby Lobby is a “person” exercising religion and that the Mandate substantially burdens Hobby Lobby’s religious beliefs. See 42 U.S.C. §§ 2000bb-1(a), (b) (2012).

10. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985), *reaffirmed and applied in* *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005).

11. *Estate of Thornton*, 472 U.S. at 710.

12. See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant employer an exemption from payroll taxes under Free Exercise Clause because of, *inter alia*, the burden the exemption would have imposed on its employees); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII to require employer accommodation of employee religious practices only when costs to employers and other employees are *de minimis*).

the nonprofit arm of a church to require its employees to adhere to its religious standards.¹³

The Mandate requires that Hobby Lobby provide insurance coverage of contraceptive drugs and services to employees and their dependents free of all co-payments, co-insurance, and other out-of-pocket payments beyond the employees' contribution to their health plan premiums. This coverage is a legally mandated and economically valuable employee entitlement, just like benefits provided by the Social Security Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and other federal statutes that mandate specific employee compensation and benefits. If the Court were to uphold Hobby Lobby's claim for a RFRA exemption from the Mandate, it would deprive Hobby Lobby's thousands of female employees and its employees' covered female dependents of this entitlement. This would saddle many employees with significant burdens ranging from the substantial out-of-pocket expense of purchasing certain contraceptives to the personal and financial costs of unintended pregnancies.

These burdens would not be imposed only on Hobby Lobby employees, or only with respect to the contraceptives to which it religiously objects. If Hobby Lobby were granted the RFRA exemption it seeks, there would be no principled way to distinguish accommodation of its objections to a few forms of contraception¹⁴ from accommodations sought by an employer who religiously opposes all forms of contraception.¹⁵ Every for-profit employer and business owner in the United States will be empowered to reject insurance coverage for contraception or any other medical prescription, procedure, treatment, or health service it finds religiously objectionable. Indeed, employers will be free to claim religious exemptions from any federal employment law to which they object, thereby forcing the government to prove that every such law satisfies strict scrutiny.¹⁶

The Establishment Clause requires that RFRA be interpreted not to authorize the sort of cost-shifting religious accommodation that Hobby Lobby seeks. Thus, even if Hobby Lobby may assert a corporate RFRA claim, and even if it can establish that the Mandate substantially burdens its religious exercise, it cannot prevail because

13. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336–40 (1987).

14. Hobby Lobby is seeking an exemption for four contraceptives, *Hobby Lobby*, 723 F.3d at 1125, while Conestoga Wood is seeking exemption for two, *Conestoga Wood*, 724 F.3d at 382.

15. See, e.g., *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1299–1300 (D. Colo. 2012) (granting for-profit corporation and its owners a preliminary injunction under RFRA, applicable to all FDA-approved contraceptive methods).

16. See, e.g., *Gilardi v. U.S. Dep't Health & Human Servs.*, 733 F.3d 1208, 1240 (D.C. Cir. 2013) (Edwards, J., concurring in part & dissenting in part).

the Constitution prevents an application of RFRA that would impose significant costs on others. Indeed, RFRA itself provides that the statutory right authorizes only “appropriate” judicial relief and gives way to a “compelling state interest”;¹⁷ violating the Constitution is never appropriate, and conforming to its requirements is always compelling.

III. UNCONSTITUTIONAL BURDEN-SHIFTING

Many permissive religious accommodations entail no burden on third parties. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,¹⁸ for example, a 130-member sect that used a controlled substance in its sacraments was excused from compliance with federal drug laws. The Court noted that the government did not identify any burdens imposed on persons not belonging to the sect,¹⁹ and that the sect’s small size prevented the government from showing that a RFRA exemption would compromise its administrative or drug enforcement interests.²⁰

Other permissive religious accommodations create third-party burdens that are insignificant because they are widely distributed among a large and indeterminate class. The prototypical example is a property tax exemption for churches, along with all other nonprofit entities, which the Court has held does not require taxpayers to make an unwilling “contribution to religious bodies” in violation of the Establishment Clause because it is not a religion-specific accommodation.²¹ There, the incremental increase in the pre-existing tax burden was spread among all owners of taxable property and did not fall on a limited, narrow, and discrete class.

Still other exemptions impose insignificant burdens because they only marginally increase an already-existing significant burden. The cases excusing religious objectors from compulsory military service pursuant to federal law show why this kind of exemption crosses no constitutional line. The exemption for religious pacifists upheld in *Welsh v. United States*²² and *United States v. Seeger*²³ resulted in a mathematical increase in the probability that nonexempt persons would be drafted in their place. But all potential draftees were already subject to a substantial risk of being drafted; the increase in

17. 42 U.S.C. § 2000bb-1(b) (2012).

18. 546 U.S. 418, 435–37 (2006).

19. *See id.* at 435–36.

20. *See id.* at 437.

21. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 667 (1970).

22. 398 U.S. 333, 343–44 (1970).

23. 380 U.S. 163, 187–88 (1965).

this risk from religious pacifists was both small and distributed among millions of nonexempt potential draftees. Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already-existing burden that was substantial in its own right and thus did not impose significant *additional* costs on others in violation of the Establishment Clause. Although whoever was drafted in place of the objectors faced the consequence of going to war, the pre-existing probability of those persons' being drafted was not significantly increased by the exemption.²⁴

By contrast, affording Hobby Lobby an exemption to the Mandate would create significant burdens and impose them on an identifiable group of persons. Thousands of female Hobby Lobby employees and covered female dependents who do not share Hobby Lobby's anti-contraception beliefs would be required to pay for or forgo contraceptives that Hobby Lobby's health plan would otherwise cover. Moreover, whereas the tax- and draft-exemption cases involved an infinitesimal, marginal increase in an already-existing burden, the religious accommodation sought by Hobby Lobby would impose on employees significant costs that would not exist without the exemption.

IV. THE COST TO EMPLOYEES

The Mandate is a valuable legal entitlement for Hobby Lobby's employees. It requires that employer health plans cover FDA-approved contraception and related services without "patient cost-sharing"—that is, without co-payments, co-insurance, deductibles, or other out of pocket expense beyond the employee's share of the basic health-insurance premium.²⁵

Congress enacted the Mandate in part in response to studies showing that "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements" and that "[u]se of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier."²⁶ In particular, Congress recognized that "women have unique health care needs . . . [that] include contraceptive services" and sought to "ensure that

24. Frederick Mark Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. (forthcoming April 2014), available at <http://ssrn.com/abstract=2328516> (Jan. 24, 2014), at 25–26, 29–30 & n.105.

25. 42 U.S.C. § 300gg-13(a)(4) (2012).

26. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013).

recommended preventive services for women would be covered adequately”²⁷

Women of childbearing age spend sixty-eight percent more in out-of-pocket health care costs than men largely because of the costs of reproductive and gender-specific conditions, including the costs of contraception.²⁸ Some contraceptive methods are not medically suitable for women with particular medical conditions or risk factors, and certain more expensive methods are more effective at preventing pregnancy than less costly alternatives.²⁹

Women take account of costs when deciding whether to use contraceptives.³⁰ If Hobby Lobby is granted an exemption, thousands of women will incur significant out-of-pocket costs or forgo altogether the contraceptives Hobby Lobby refuses to cover if they cannot afford to pay for them.³¹ For women who need a particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm, especially in emergencies entailing the risk of pregnancy from coerced sex.

In addition, there are numerous health-related and economic repercussions associated with the failure to make available the full range of contraception. For example, pregnancy may be dangerous for women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome.³² The lives of women suffering from these conditions literally depends on their access to the contraception most effective for them. Similarly, “there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy[,]” which

27. *Id.*; see also INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16–18 (2011) (“IOM Rep.”) (noting that women’s health needs differ from those of men, and these differences have a serious impact on the cost of healthcare coverage).

28. IOM Rep., *supra* note 27, at 19–20; see also Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, in GUTTMACHER REP. ON PUB. POL’Y, Aug. 1998, at 5; James Trussell et al., *Erratum to “Cost Effectiveness of Contraceptives in the United States,”* 80 CONTRACEPTION 229, 229 (2009); *Cost Comparison Chart*, PARAGARD, <http://www.paragard.com/how-do-i-get-it/Payment.aspx> (last visited Jan. 24, 2014) (product cost of \$754).

29. See 78 Fed. Reg. at 39,872; IOM Rep. at 105; e.g. *If Mirena Isn’t Covered*, MIRENA, <http://www.mirena-us.com/how-to-get-mirena/if-mirena-isnt-covered.php> (last visited Jan. 24, 2014) (noting that an IUD, the most reliable and cost-effective form of contraception, costs \$927.18).

30. See Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 REV. OF ECON. & STAT. 137 (2009) (decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies).

31. A 2007 study found that 52 percent of women (compared with only 39 percent of men) failed to fill a prescription, missed a recommended test or treatment, or did not schedule a necessary specialist appointment because of cost. Sheila D. Rustgi et al., *Women at Risk: Why Many Women Are Forgoing Needed Health Care*, THE COMMONWEALTH FUND, May 2009, at 3.

32. IOM Rep., *supra* note 27, at 103–04; see also 78 Fed. Reg. at 39,872.

include the prevention of certain cancers, menstrual disorders, and acne.³³ Again, proper treatment of women suffering from these conditions depends upon their access to particular forms of contraception.

The use of contraceptives also reduces the risk of unintended pregnancies, which comprise nearly half of all pregnancies in the United States.³⁴ Women with unintended pregnancies are less likely to receive timely prenatal care and are more likely to smoke, consume alcohol, become depressed, experience domestic violence during pregnancy, and terminate their pregnancies by abortion.³⁵ Finally, unintended pregnancies prevent women from participating in labor and employment markets on an equal basis with men.³⁶

The Tenth Circuit's exemption of Hobby Lobby from the Mandate under RFRA thus constitutes the exercise of congressional power and federal judicial power to force Hobby Lobby employees to use their after-tax wages to purchase contraception and to shoulder other burdens that they would otherwise not have to bear.

V. BEGGING THE BASELINE QUESTION

Common sense tells us that a RFRA exemption of Hobby Lobby from the Mandate deprives employees of a valuable legal entitlement. Some Mandate opponents have nevertheless suggested that because the Mandate is new and controversial, it is not a legal entitlement, and thus its loss by employees does not constitute a burden shifted to them in violation of the Establishment Clause.³⁷ But there is no "vesting period" before a mandated federal benefit becomes a legal entitlement. As Justice Scalia has observed, once the government "makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured."³⁸ For example, the Court has squarely rejected religious accommodations of

33. 78 Fed. Reg. at 39,872; IOM Rep., *supra* note 27, at 107.

34. IOM Rep., *supra* note 27, at 102–03.

35. *Id.*; *see also* 78 Fed. Reg. at 39,872.

36. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *CONTRACEPTION* 465, 465 (2012) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives particularly among young women, and increases in U.S. women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men.").

37. Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, *MIRROR OF JUSTICE: A BLOG DEDICATED TO THE DEVELOPMENT OF CATHOLIC LEGAL THEORY* (Dec. 5, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html>.

38. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting).

employers that would deprive their employees of social security benefits or the minimum wage. Depriving employees of the generally available benefits of full contraceptive coverage under the Mandate is conceptually identical to depriving them of any other generally available employee benefit mandated by federal law and thus constitutes a burden imposed on them to accommodate their employer's religious beliefs.

Other mandate opponents have made a more subtle argument that RFRA constitutes a pre-existing external limit on the ACA and the Mandate (and on the Social Security Act, the Fair Labor Standards Act, and every other federal employment statute and regulation). Accordingly, the argument goes, no employee possesses a legal entitlement to contraception coverage under the Mandate, because such coverage violates RFRA; loss of such coverage via a RFRA exemption is thus not a legally cognizable burden because employees had no legal right to coverage in the first place.³⁹

This argument begs the very question at issue: Whether the Establishment Clause precludes the application of RFRA to exempt employers from the Mandate when doing so would impose significant costs on employees and other third parties who do not share the employer's religious beliefs. Even assuming that RFRA externally limits the Mandate, the Establishment Clause limits RFRA, both externally and internally. If the Clause precludes RFRA exemptions when they impose significant costs on third parties, then the Clause denies Congress and the federal courts the authority to grant such exemptions (external limit).⁴⁰ And under the terms of RFRA itself the federal government has a compelling interest that justifies denial of such exemptions—keeping its activities within the bounds set by the Establishment Clause (internal limit).⁴¹

Josh Blackman offers this argument in its most radical form. He claims that if the state specifically licenses religious people to violate the rights of nonadherents, there is no state action and so no

39. See, e.g., Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby & Conestoga, et al., *Hobby Lobby* (No. 13-354) & *Conestoga Wood* (No. 13-356), at 3–4, 18–19; Brief of Nat'l Ass'n of Evangelicals as Amicus Curiae Supporting Hobby Lobby & Conestoga, et al., *Hobby Lobby* (No. 13-354) & *Conestoga Wood* (No. 13-356), at 2–3, 5–8.

40. Gedicks & Van Tassell, *supra* note 24, at 34–35, 37–38.

41. Brief of Amici Curiae Church-State Scholars Frederick Mark Gedicks, et al., in Support of the Government, *Hobby Lobby* (No. 13-354) & *Conestoga Wood* (No. 13-356), at 7, 27–28.

Simply avoiding the possibility of violating the Establishment Clause may also constitute a compelling government interest. *Cf. Locke v. Davey*, 540 U.S. 712 (2004) (upholding under Free Exercise Clause state's denial of scholarship to ministerial student motivated by state's desire to avoid violating state anti-establishment clause).

violation of the Establishment Clause.⁴² If this were correct, then it would be permissible for the state to exempt Aztecs from homicide laws.

In short, Mandate opponents cannot prevail on the basis of arguments about federal entitlement “baselines.” They must directly engage *Caldor*, *Cutter*, and the many other Supreme Court decisions that prohibit permissive accommodation of religion at the expense of third parties who derive no benefit from the accommodation. A RFRA exemption from the Mandate for Hobby Lobby would deprive its employees of a federal entitlement solely to facilitate the exercise of Hobby Lobby’s religion. This violates the Establishment Clause.

VI. THE IRRELEVANCE OF *AMOS*

Mandate opponents routinely cite *Corporation of the Presiding Bishop v. Amos* as authority for the proposition that the Establishment Clause does not prohibit permissive accommodations that burden third parties.⁴³ In *Amos*, the Mormon Church terminated the custodial supervisor of its nonprofit gymnasium for failing to observe the highest standards of Mormonism. The church acted under a provision of Title VII that exempts “all activities of religious organizations” from Title VII’s religious anti-discrimination provisions. Although this exemption clearly imposes significant costs on employees of exempted religious organizations, the Court upheld it against an Establishment Clause challenge.

Those who rely on *Amos* to justify cost-shifting accommodation of for-profit businesses ignore both its narrow holding and its wholly unpersuasive attempt to distinguish *Caldor*. As Professors Schragger, Schwartzman, and Tebbe have demonstrated, the Court carefully circumscribed its holding in *Amos*, expressly limiting its validation of the Title VII exemption to the *nonprofit* activities of *churches and other religious organizations*.⁴⁴ Hobby Lobby fails on both counts: It is neither a church nor a “religious organization,” and its activities are for-profit, not nonprofit.

Mandate opponents also rely on *Amos* to distinguish *Caldor* and maintain that a RFRA exemption for Hobby Lobby would entail no government action to which the Establishment Clause could

42. See Josh Blackman, *Hobby Lobby, RFRA, and a “Private Establishment Clause”*, JOSH BLACKMAN’S BLOG (Jan. 21, 2014), <http://joshblackman.com/blog/2014/01/21/hobby-lobby-rfra-and-a-private-establishment-clause/>.

43. 483 U.S. 327, 335–38 (1985).

44. Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html.

apply.⁴⁵ The *Amos* majority insisted that the exemption merely left religious organizations free to shift the costs of the exemption to third parties but did not require them to do so. Any such costs were thus the result of private action which the Establishment Clause does not and cannot restrict.

This reasoning is obscure, to say the least. The point of the Title VII exemption was precisely to excuse religious organizations from the legal duty of religious nondiscrimination which employers owe to employees under Title VII. When exempted religious organizations religiously discriminate against employees after having been freed by the government to do so, it makes utterly no sense to conclude that the government had no hand in depriving those employees of their rights against religious discrimination.⁴⁶ This is no doubt why the *Amos* majority's "distinction" of *Caldor* appears nowhere in *Cutter v. Wilkinson*, which instead reconciled its holding with *Caldor* by expressly holding that cost-shifting exemptions under the Religious Land Use and Institutionalized Persons Act are subject to as-applied challenges under the Establishment Clause.⁴⁷

RFRA itself is federal government action, as would be the order of a federal court exempting Hobby Lobby from the Mandate under RFRA's authority. The significant burdens shifted to Hobby Lobby employees as the result of a RFRA exemption, therefore, would be the result of federal government action which the Establishment Clause prohibits.

Indeed, a RFRA exemption from the Mandate would function precisely as a government license which allows Hobby Lobby to harm the legitimate interests of its employees for its own religious purposes.⁴⁸ One can hardly imagine a contemporary practice that is closer to the concerns that motivated the addition of the Establishment Clause to the Constitution.⁴⁹

45. See, e.g., Brief of Nat'l Ass'n of Evangelicals, *supra* note 39, at 15–18; DeGirolami, *supra* note 37.

46. *Amos*, 483 U.S. at 347 (O'Connor, J., concurring in the judgment) (observing that the religious organization had the power to force the plaintiff to observe its religious tenets or be fired "because *the Government* had lifted from the religious organization the general regulatory burden imposed by" Title VII).

47. See Gedicks & Van Tassell, *supra* note 24, at 30–34; Schragger, Schwartzman & Tebbe, *supra* note 44.

48. Cf. *Larkin v. Grendel's Den*, 459 U.S. 116, 124–27 (1982) (allowing church to veto liquor license application by business in the vicinity delegated government authority to religion in violation of Establishment Clause).

49. See, e.g., Thomas Jefferson, *The Virginia Act for Establishing Religious Freedom*, enacted by the General Assembly of Virginia, Jan. 19, 1786 ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."), *quoted in* *Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947)

VII. THE IRRELEVANCE OF OTHER EXEMPTIONS FROM THE MANDATE

Referring to the exemptions from the Mandate found in the ACA and its implementing regulations, the Tenth Circuit determined that “the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people.”⁵⁰

That the Mandate allows other permissive exemptions, however, has no bearing on whether a cost-shifting religious exemption violates the Establishment Clause. The existence of other exemptions cannot cure or justify an exemption that violates the Establishment Clause, because the government’s compliance with the Clause cannot be waived or balanced away. The ACA exemptions are facially permissible precisely because they do not violate the Establishment Clause or any other constitutional provision.

The Mandate provides two primary religious accommodations.⁵¹ First, it fully exempts “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as

(Rutledge, J., dissenting); Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776) (“[A]ll Dissenters of whatever Denomination from the said Church [of England] shall . . . be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Ministers.”), in 5 *THE FOUNDERS’ CONSTITUTION* 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 4 (asserting that proposed Virginia religious tax “violat[e]d equality by subjecting some to peculiar burdens” and “granting to others peculiar exemptions”), quoted in *Everson*, 330 U.S. at 66 (Rutledge, J., dissenting); see also *See Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (“[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.”).

50. *Hobby Lobby*, 723 F.3d at 1143; *accord Conestoga Wood Specialties*, 724 F.3d at 413 (Jordan, J., dissenting) (“The government’s arguments against accommodating the Hahns and Conestoga are ‘undermined by the existence of numerous exemptions [it has already made] to the . . . mandate.’” (quoting *Newland*, 881 F. Supp. 2d at 1297)).

51. The Mandate includes other exemptions and accommodations, but these are religiously neutral and thus do not implicate the Establishment Clause. See, e.g., I.R.C. § 4980H(c)(2)(A) (2012) (employers with fewer than 50 employees are not required to provide employee health insurance; however, if they choose to do so, they must adhere to the Mandate, see 42 U.S.C. § 300gg-13(a)(4) (2012)); 45 C.F.R. § 147.140 (2013) (plans that do not significantly alter their coverage after March 23, 2010, are exempt from the Mandate and most other requirements of the ACA). These do not diminish the compelling character of the state’s interest for two reasons: they are, for the most part, temporary and transitional, and even if they were not, comparative analysis of accommodations is not necessary to show that there is a compelling interest in promoting women’s health, bodily integrity, liberty, and equality. See Andrew Koppelman, “*Freedom of the Church*” and the Authority of the State, 21 J. CONTEMPORARY LEGAL ISSUES 145, 157–64 (2013).

The statute also creates a minor exemption for individuals who voluntarily join a “health care sharing ministry” through which members share medical expenses that conform to their religious beliefs. Because participation in such a ministry is voluntary, it entails no third-party burdens.

“the exclusively religious activities of any religious order,” so long as these are operated as nonprofit entities under the Internal Revenue Code.⁵² And second, it provides an accommodation to religious organizations that oppose the coverage of mandated contraceptives on religious grounds, are organized and operated as nonprofit entities, hold themselves out as religious organizations, and self-certify to these three criteria.⁵³ In this second case, contraceptive coverage is provided instead by the religious nonprofit’s health plan insurer or administrator.⁵⁴ Because payment for contraception within a health care plan is at least cost neutral, the third-party insurer is not likely to incur additional net costs from supplying contraceptives for free.⁵⁵ To the extent insurers do, in fact, incur net costs for providing mandated contraceptive coverage, the ACA and regulations thereunder permit these costs to be allocated as an administrative expense to all insured healthcare plans (other than those plans entitled to the religious accommodation) or reimbursed by a credit against the insurer’s payment of the health insurance exchange tax.⁵⁶

Neither the church exemption nor the religious nonprofit accommodation violates the Establishment Clause by shifting accommodation costs to third parties. Under *Amos*, a church is entitled to discriminate in favor of employees who observe its teachings against contraception. As the government has observed, therefore, it is likely that employees of churches that religiously object to contraception will share that objection and thus will not suffer a significant burden if the church’s health plan does not cover contraception. As for the religious nonprofit accommodation, employees of the accommodated religious employers continue to

52. 45 C.F.R. § 147.131(a) (2013) (citing I.R.C. § 6033(a)(3)(A)(i), (iii) (2012)).

53. 29 C.F.R. § 2590.715-2713A(a) (2013).

54. See 29 C.F.R. §§ 2590.715-2713A(b)(2),(3), 2590.715-2713A(c)(2)(ii) (2013); 45 C.F.R. §§ 147.131(b), 156.50(d) (2013).

55. See 78 Fed. Reg. at 39,872–73, 39,877. Studies have concluded that coverage for contraception reduces net reimbursable costs by virtue of savings in prenatal care, childbirth, and medical treatment of newborns. See, e.g., Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 366–67 & n.13, 394–95 (1998); Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL. REV. 7, 10 (2010); James Trussel et al., *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTION 5, 5 (2009) (“Contraceptive use saves nearly \$19 billion in direct medical costs each year”); C. Keanin Loomis, Note, *A Battle over Birth “Control”: Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 WM. & MARY BILL RTS. J. 463, 477–78 (2002). These savings in reimbursable costs are likely to be equal to or greater than the cost of mandated contraceptive coverage. Accordingly, premiums charged by a third-party insurer could, in fact, be lower when no-cost contraception coverage is included. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727–28 (Feb. 15, 2012).

56. 78 Fed. Reg. at 39,877–78.

receive all contraceptives covered by the Mandate without cost-sharing; they simply receive them from their employer's health insurer or plan administrator rather than the religious nonprofit employer.

Accordingly, the permissive religious accommodations afforded under the ACA pose no conflict with the Establishment Clause, because neither imposes the costs of observing the exempted employer's anti-contraception beliefs on employees who do not share them. The accommodation demanded by Hobby Lobby, by contrast, would create this precise conflict.

VIII. CONCLUSION

The most depressing aspect of discussions surrounding the *Hobby Lobby* litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate. Only recently have third parties attempted to intervene against RFRA plaintiffs in an action challenging the Mandate, though even these are students at a non-profit religious university rather than employees of a for-profit employer.⁵⁷ Of course, one can easily imagine why employees lacking contractual or collective-bargaining protection are reluctant to intervene against challenges to the Mandate by their own employer.

Instead, courts have imagined that they are balancing religious liberty against some generalized state interest in "the promotion of public health."⁵⁸ One court was clueless enough to conceptualize the problem as one of determining the harm to the *government* if the exemption is granted.⁵⁹ And we are talking about a *lot* of women. As we noted, Hobby Lobby alone has more than 13,000 full time employees.⁶⁰

Paul Brest has observed that one way in which the state can violate the Equal Protection Clause is by "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own

57. See Manya Brachear Pashman, *3 Notre Dame students weigh in on school's lawsuit against health care law*, CHI. TRIB., Jan. 8, 2014, available at http://articles.chicagotribune.com/2014-01-08/news/chi-3-notre-dame-students-weigh-in-on-schools-lawsuit-against-health-care-law-20140108_1_contraception-mandate-religious-employers-health-care-law.

58. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1297 (D. Colo. 2012).

59. *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 809 (E.D. Mich. 2013).

60. See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp.2d 1278, 1284 (W.D. Okla. 2012), rev'd, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 2013 WL 5297798 (2013).

group.”⁶¹ That kind of selective sympathy and indifference has been pervasive in this litigation.

Under the religious accommodation provisions of Title VII, employers are obligated to accommodate the religious practices of their employees only if the cost of doing so is “*de minimis*” or insignificant.⁶² If the Court grants a RFRA exemption to Hobby Lobby, however, it will create a religious accommodation regime in which the religious practices of for-profit employers are entitled to accommodation despite imposing significant costs on their female employees and covered female dependents, while those same employers are free from accommodating the religious practices of those same employees when doing so entails significant costs.⁶³

If indeed “[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination,”⁶⁴ this discrimination has consisted primarily in the systematic use of motherhood to define and limit women’s social, economic, and political capacities. When a private actor deprives women of control over their fertility, and the courts do not even notice the dramatic asymmetry that this deprivation would create in religious accommodation law, then they replicate the very discrimination that they are charged with eliminating.

It is unlikely that the victims of Hobby Lobby’s religious liberty claim would be so invisible were they owners of capital rather than female employees. Once these women *are* made visible, it becomes clear that what Hobby Lobby wants is not religious liberty for all, but only for itself, even when the cost is religious oppression of others.

61. Paul Brest, *The Supreme Court, 1975 Term – Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

62. *TWA v. Hardison*, 432 U.S. 63, 84 (1977).

63. See Ira C. Lupu & Robert W. Tuttle, *Symposium: Religious questions and saving constructions*, SCOTUSBLOG (Feb. 18, 2014), <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/>.

64. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).