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Free Exercise of Religion by Closely Held Corporations: Implications of *Burwell v. Hobby Lobby Stores, Inc.*

Cynthia Brougher
Legislative Attorney

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Summary

A 5-4 decision, issued over a highly critical dissent, *Burwell v. Hobby Lobby Stores, Inc.* resolved one of the many challenges raised in response to the contraceptive coverage requirement of the Affordable Care Act (ACA). Imputing the beliefs of owners of closely held corporations to such corporations, the U.S. Supreme Court found that closely held corporations that hold religious objections to certain contraceptive services cannot be required to provide coverage of those services in employee health plans. The Court's decision was based on the protections offered under the federal Religious Freedom Restoration Act (RFRA), a statute prohibiting the government from imposing a substantial burden on a person's religious exercise unless it can show a compelling interest achieved by the least restrictive means. The Court declined to address the constitutional challenge, holding that the companies were protected under RFRA.

In the absence of a definition under RFRA, the majority interpreted the term "person" to include closely held corporations, even if they operated for-profit, and determined that the penalties that such companies would face if they failed to comply with the contraceptive coverage requirement would impose a substantial burden. Though the Court assumed that the government had a compelling interest to require contraceptive coverage under ACA, it found that less restrictive means (e.g., expanding the regulatory accommodation available to nonprofit employers with similar objections) could achieve that interest without requiring companies with religious objections to be subject to the requirement.

Although *Hobby Lobby* resolved the question regarding the applicability of RFRA to closely held corporations—defined by the Court as "each owned and controlled by members of a single family"—the decision leaves open a number of questions about the scope of RFRA's protections and future enforcement of the contraceptive coverage requirement. Because the Court's decision was based on statutory grounds, Congress remains free to define which entities may be governed by ACA or other federal laws generally.

This report analyzes the Court's decision in *Hobby Lobby*, including arguments made between the majority and dissent, to clarify the scope of the decision and potential impacts for future interpretation of RFRA's applicability. It also examines potential legislative responses, should Congress consider addressing the current applicability of RFRA. Finally, the report addresses the decision's effect on requirements that employers offer contraceptive coverage in group health plans under federal or state law.

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One of the ongoing controversies related to the Affordable Care Act (ACA) has been the scope of exemption from certain health care coverage requirements, including the contraceptive coverage requirement.[1] Though closely divided, the U.S. Supreme Court's 5-4 decision in *Burwell v. Hobby Lobby Stores, Inc*. has settled the question of whether certain for-profit corporations must be exempt from the requirement, unless Congress chooses to amend the statute providing those corporations legal protection.[2] Imputing the beliefs of owners of closely held corporations to the corporations themselves, the Court found that the ACA could not require such companies to provide contraceptive coverage in group health plans offered to their employees. It based its decision on the Religious Freedom Restoration Act (RFRA) which provides heightened protection for burdens on religious exercise.[3] Although the case has been analogized to *Citizens United v. Federal Election Commission*, a 2010 case holding that corporations have free speech rights under the First Amendment, the *Hobby Lobby* decision was not decided on constitutional grounds.[4] Instead, it provides protection on a statutory basis, meaning that Congress has the ability to respond to the decision if it disagrees with the Court's ruling.

This report analyzes the Court's opinions in *Hobby Lobby*, examining the rights of closely held corporations under the Religious Freedom Restoration Act. It also addresses the implications for the contraceptive coverage mandate under ACA and discusses potential legislative responses to the Court's decision. Finally, it analyzes the impact that *Hobby Lobby* may have in other contexts in which employers may claim religious objections.

Rights of Closely Held Corporations Under the Religious Freedom Restoration Act

The companies challenging the contraceptive coverage requirement alleged violation of their religious exercise rights under both the First Amendment's Free Exercise Clause and RFRA. The Free Exercise Clause prohibits the government from prohibiting the free exercise of religion.[5] Traditionally it had been interpreted to require that the government show a compelling interest for any government action that interfered with a person's exercise of religious beliefs.[6] However, in 1990, the Supreme Court reinterpreted that standard, explaining that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."[7] The Court's decision lowered the baseline of protection, but emphasized that Congress remained free to consider whether additional protection would be appropriate through the legislative process.[8] Congress responded to the Court's decision by enacting RFRA, which essentially reinstated the heightened standard of protection.

[1] Patient Protection and Affordable Care Act, P.L. 111-148, § 1001(5), 111th Cong., 2nd Sess. (2010).

[2] Burwell v. Hobby Lobby Stores, Inc., Nos. 13-354 and 13-356, 2014 U.S. LEXIS 4505 (U.S. 2014).

[3] P.L. 103-141, codified at 42 U.S.C. § 2000bb et seq.

[4] 128 S.Ct. 1471 (2008).

[5] U.S. Const. amend. I.

[6] *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[7] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (internal quotes omitted).

[8] *Id*. at 890.

RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[9] Subsection (b) requires that any substantial burden must further a compelling governmental interest and use the least restrictive means to achieve that interest.[10]

Threshold Issues: Defining Person and Exercise of Religion

RFRA's language indicates that in order to raise a claim under the statute, "a person's exercise of religion" must be affected. However, when enacting RFRA, Congress never defined the term *person* for purposes of the act. Only if a court determines that the party challenging the government's action is "a person" under the terms of the statute and that the party exercises religion, can the court address the merits of the case—whether an improper substantial burden has been placed on that party.

One of the most significant points of the *Hobby Lobby* decision was its declaration that closely held corporations are "persons" eligible for protection under RFRA. The Court noted the absence of a statutory definition of *person* under RFRA and consequently relied upon the Dictionary Act to ascertain the default meaning of the term.[11] The Dictionary Act defines *person* to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[12]

Rejecting the assertion that businesses organized as corporations are divested of RFRA's protections, the majority wrote that "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate [with regard to the business structure chosen by owners] who wish to run their businesses as for-profit corporation in the manner required by their religious beliefs."[13] The Court reasoned that RFRA was enacted to provide broad protection for religious liberty and, without a specifically applicable definition provided in RFRA, 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 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.[14]

The majority acknowledged that the threshold issue arguably is conditioned on the person's ability to exercise religion, a point emphasized by the dissent.[15] However, the majority cited previous cases in which the Court had recognized claims involving exercise of religion of

[9] 42 U.S.C. § 2000bb-1.

[10] 42 U.S.C. § 2000bb-1(b).

[11] *Hobby Lobby*, 2014 U.S. LEXIS 4505 at *40-*42.

[12] *See* 1 U.S.C. § 1.

[13] *Hobby Lobby,* 2014 U.S. LEXIS 4505 at *13.

[14] *Id*. at *38-*42.

[15] *Id*. at *118 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.")

individuals who owned for-profit businesses as sole proprietorships[16] and nonprofit corporations.[17] Despite the dissent's argument that religious corporations could be distinguished from for-profit corporations because they "foster the interests of persons subscribing to the same religious faith," the majority held that the Court's precedent indicated that neither for-profit status nor corporate status are prohibitive factors in analysis of an organization's rights under RFRA.[18]

Notably, when responding to concerns that applying RFRA to for-profit corporations would raise challenges of ascertaining "the religious identity of large, publicly traded corporations," the majority emphasized that its decision applied only to such companies as the ones challenging the contraceptive coverage requirement in this case. In effect, the decision therefore is limited to "closely held corporations, each owned and controlled by members of a single family."[19] Additionally, the majority alluded to the general requirement inherent to religious exercise cases that the parties must base their challenge on sincerely held religious beliefs, meaning that even if RFRA would apply to a particular entity, if the entity is asserting a religious belief for the convenience of avoiding compliance with an unpopular mandate, it could not claim legal protection.[20] The sincerity of the companies' beliefs in *Hobby Lobby* was not disputed.

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 which are publicly traded. Instead it suggested only that "it seems unlikely" that such "corporate giants" would assert RFRA rights and that "numerous practical restraints would likely prevent that from occurring."[21] The dissent was highly critical of this point, characterizing the decision as one of "startling breadth:"[22]

> The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.[23]

Indeed the dissent's argument that the decision may provide a basis for expanding the protection of RFRA further in the future 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 between 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).

[16] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

[17] *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993); Gonzales v. o Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (2012).

[18] *Hobby Lobby*, 2014 U.S. LEXIS 4505 at *43-*44.

[19] *Id*. at *58.

[20] *Id*.

[21] *Id*.

[22] *Id*. at *97.

[23] *Id*. at *128.

Prohibition on Substantial Burden

After determining that RFRA's protections would apply, the Court examined the merits of the RFRA claim, first identifying the burden that compliance with the contraceptive coverage mandate would impose on the companies challenging the mandate. According to the Court, requiring the owners of the companies to arrange for "health insurance that covers methods of birth control that ... may result in the destruction of an embryo" means that the "mandate demands that they engage in conduct that seriously violates their religious beliefs."[24]

If the owners were to refuse to comply with the demand, the companies would face penalties under the ACA that the Court characterized as "surely substantial."[25] If the companies continued to provide their preferred health coverage without including the mandated contraceptive coverage, they would face penalties each day of noncompliance, ranging from $40,000 per day to $1.3 million per day.[26] If the companies stopped providing any insurance coverage to avoid covering contraceptives and avoid the consequent daily penalties, they would risk paying a different penalty under ACA, which could range from $800,000 per year to $26 million per year.[27]

The majority recognized the substantial burden arising from the owners' religious objections and potential financial penalties over strong objection from the dissenting Justices. Justice Ginsburg, who authored the principal dissent, criticized the majority's assessment as equating a sincere religious objection with a substantial burden, instead of distinguishing between the two.[28] In other words, simply because a government mandate conflicts with a person's religious belief, the mandate is not necessarily a substantial burden. The dissent explained that the relationship between the belief and the burden must be linked in order to identify the requisite substantial burden:

> [T]he connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. ... Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. ... Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.[29]

The dissent emphasized that the "linkage" between the burden imposed by the government's mandate and the religious beliefs offended by the mandate would be "interrupted by independent

[24] *Id*. at *63.

[25] *Id*. at *64.

[26] *Id*. at *63-*64 ("If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual.").

[27] *Id*. at *64. Under ACA, if companies stop providing "insurance coverage altogether and thus forc[e] their employees to obtain health insurance on one of the exchanges established under ACA" and one or more full-time employees "were to qualify for a subsidy on one of the government-run exchanges, ... [t]he companies could face penalties of $2,000 per employee each year." *Id*.

[28] *Id*. at *133-*134.

[29] *Id*. at *134-*135.

decisionmakers (the woman and her health counselor)" in a manner that would undermine characterization of the burden imposed by the government as "substantial."[30]

Compelling Interest

The Court's analysis of the government's interest in requiring contraceptive coverage appeared skeptical, but ultimately it assumed that the interests were sufficiently compelling.[31] The majority noted that the government's justifications—public health and gender equality—were too broadly defined, explaining that RFRA requires a "'more focused' inquiry."[32] It cited a 2006 case in which the Court held that, under RFRA, the government must demonstrate a compelling interest for prohibiting an exemption for a religious purpose while allowing exemptions for other purposes.[33] The majority's discussion suggested that the stated interests were undermined by the extent of other businesses that were exempt from offering their employees coverage (e.g., grandfathered plans, employers with fewer than 50 employees).[34]

Though the Court noted its concern regarding the sufficiency of the government's asserted interest, it conceded the compelling interest prong of the RFRA analysis with little discussion. However, the dissent addressed the compelling interest in greater detail, responding to the majority's concern about other exemptions undermining the government's alleged interest by citing a number of other federal laws that include exemptions for small employers without undermining the statutory interests.[35]

Least Restrictive Means

The Court rejected HHS's argument that it lacked other means to ensure availability of contraceptive coverage without burdening these companies' religious exercise, noting a few alternatives it considered "less restrictive."[36] First, the majority suggested that "[t]he most straightforward way ... would be for the Government to assume the cost of providing" coverage to women whose employers object to providing coverage.[37] Second, the Court highlighted the availability of the accommodation already established for nonprofit employers with religious objections, which would "protect the asserted needs of women as effectively" as the contraceptive coverage requirement without "requiring employers to fund contraceptive methods that violate their religious beliefs."[38] Though the Court cited the accommodation as one potential less restrictive alternative, it explicitly noted that it was not determining its sufficiency under RFRA for the purpose of any other legal challenge.[39] Discussed in further detail later in this report, the accommodation currently is available to certain nonprofit religious organizations who self-certify

[30] *Id*. at *135.

[31] *Id*. at *76-*77.

[32] *Id*. at *74 (quoting *O Centro*, 546 U.S. at 430-31).

[33] *Id*. at *74-*75.

[34] *Id*. at *76.

[35] *Id*. at *139-*141.

[36] *Id*. at *77-82.

[37] *Id*. at *77.

[38] *Id*. at *82-*83.

[39] *Id*. at *83.

their objection to qualify as eligible to have the insurance issuer provide coverage to the employees outside of the employer's group health plan.

In response to these alternatives, the dissent questioned the extent to which the majority would allow employers with religious objections to government mandates to avoid compliance:

> And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?[40]

According to the majority, the dissent's concern with the potential assumption of costs by the government for private objections to various legal requirements was unfounded because its decision reached only to the contraceptive coverage requirement.[41] It explained that its decision should not be interpreted to mean that insurance coverage mandates generally cannot be upheld if they conflict with an employer's religious beliefs.[42] The majority stated that "[o]ther coverage requirements, such as immunizations, may be supported by different interests ... and may involve different arguments about the least restrictive means of providing them."[43]

Selected Potential Legislative Responses Following *Hobby Lobby*

A number of potential legislative responses have been mentioned since the Court announced its decision in *Hobby Lobby*. It is important to remember that the Court's decision was based on the statutory protections in RFRA, not in constitutional protections of the First Amendment. Just as Congress may enact heightened protections for religious exercise as it did in RFRA and as it may determine the scope of protection available, it may enact statutory language to clarify the effect of RFRA regardless of the Court's decision. The Court essentially created a working definition of person under RFRA, but Congress may confirm or alter that definition at its discretion. Alternatively, it may consider preempting RFRA with respect to certain legislative requirements.

Amending RFRA to Clarify the Scope of Applicability

The most direct congressional response to *Hobby Lobby* would be to amend RFRA to include a definition of *person* and in effect clarify the scope of RFRA's applicability generally. This legislative option creates a number of possibilities, ranging from a definition of person to include only natural persons at one end to a definition that includes all natural and artificial persons at the other end, similar to the definition provided under the Dictionary Act used by the Court.

[40] *Id.* at *144-*145 (internal citations omitted).

[41] *Id.* at *86.

[42] *Id.* at *86-*87.

[43] *Id.* at *87.

Aside from these two extreme ends of the spectrum, Congress may consider a number of intermediate definitions. The working definition resulting from the Court's decision in *Hobby Lobby* has been considered as one type of compromise between eliminating protection for any corporations and extending protection for all corporations. Although not necessary in light of the decision, Congress may choose to adopt explicitly the Court's definition to avoid any future cases from expanding or restricting the status quo following *Hobby Lobby*.

Alternatively, Congress may consider other examples when considering the scope of "persons" to which it wants RFRA to apply. The preeminent example of Congress's provision of protection for potential religious objectors from a generally applicable mandate is Title VII of the Civil Rights Act of 1964. Title VII, in part, prohibits employers from discriminating against employees on the basis of their religious beliefs.[44] Because this provision may interfere with religious employers' religious practices (e.g., hiring employees of the same faith of the organization), Congress included an exemption for religious entities, stating that the prohibition against religious discrimination does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion...."[45] This provision explicitly applies only to religious organizations, and courts generally have interpreted the scope of the provision to take into account (1) the purpose or mission of the organization; (2) the ownership, affiliation, or financial support of the organization; (3) requirements placed upon staff and members of the organization; and (4) the extent of religious practices in or the religious nature of the products and services offered by the organization and whether it operates for a profit.[46] A definition of person that would include language similar to Title VII likely would cover religious nonprofit organizations (e.g., charities, hospitals, schools), but would not cover commercial entities like Hobby Lobby.[47]

Preempting RFRA

Another option that may be used in response to *Hobby Lobby* would be to consider preempting RFRA in federal legislation. Under the legal principle of entrenchment, a legislative action in one Congress cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered.[48] Accordingly, Congress may decide to enact legislation that would make RFRA not applicable to certain federal actions. For example, if Congress determined that it did not want to extend heightened protection that is otherwise provided under RFRA in certain instances (e.g., the contraceptive coverage mandate), it could enact a provision in the relevant legislation indicating that RFRA would not apply. Unlike the previous potential legislative response, this approach would mean that Congress considers RFRA's applicability to each present and future law on a case-by-case basis.

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[44] 42 U.S.C. § 2000e-2. *See also* 42 U.S.C. § 2000e(j).

[45] 42 U.S.C. § 2000e-1(a).

[46] *See, e.g.,* LeBoon v. Lancaster County Jewish Community Center Association, 503 F.3d 217, 226-27 (3rd Cir. 2007) (providing summary discussion of the circuit courts' interpretations of which organizations qualify for exemption under Title VII).

[47] *See* Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co., 859 F.2d 610 (9th Cir. 1988).

[48] *See* Fletcher v. Peck, 10 U.S. 87, 135 (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 Supreme Court has noted the long history of this rule. *See* United States v. Winstar Corp., 518 U.S. 839, 872-74 (1996).

Shortly after *Hobby Lobby* was announced, the House and Senate introduced legislation that used this approach.[49] The Protect Women's Health From Corporate Interference Act of 2014 prohibited employers from denying coverage of any health care services required to be covered under federal law or regulation.[50] However, to prevent employers from claiming exemption under RFRA, the bill stated that the prohibition "shall apply notwithstanding any other provision of Federal law, including [RFRA]."[51] Accordingly, to the extent that a party may be covered by RFRA as a general matter, such parties would not be protected from coverage requirements imposed by federal law or regulation if the bill were enacted.

Effect on Contraceptive Coverage Requirements

Hobby Lobby expanded protection under RFRA to closely held corporations and held that such companies could not be required to include contraceptive coverage in their group health plans to the extent that they objected to contraceptives based on their religious beliefs. The Court did not decide the legal issues related to the religious exemption and accommodation available for churches and religious organizations, nor did it address protection from state requirements. As a result, a number of legal questions remain with regard to the obligations of employers to provide contraceptive coverage.

Current Protection for Religious Nonprofit Organizations

Since ACA's enactment, HHS has developed various iterations of administrative regulations to address religious objections to ACA's contraceptive coverage requirement and promulgated final rules in July 2013.[52] These rules respond to religious entities' objections to contraceptive coverage in two ways: (1) an exemption for religious employers covered under subsections (a)(1), (a)(3)(A)(i), or (a)(3)(A)(iii) of Section 6033 of the tax code and (2) an accommodation for other eligible organizations.[53]

Entities covered by the relevant provisions for the exemption generally include churches, church auxiliaries, church associations, or other religious orders.[54] Under the exemption, employees of religious employers would not receive contraceptive coverage either from their employer or from the issuer directly.

Employers that are not covered by the exemption may instead seek protection through the accommodation. To qualify for the accommodation, an organization must (1) object to coverage of at least some of the contraceptive services based on religious beliefs; (2) be a nonprofit entity; (3) hold itself out as a religious organization; and (4) comply with the self-certification requirements of the rule.[55] Under the accommodation, employees of eligible organizations would

[49] H.R. 5051/S. 2578, 113th Cong. (2014).

[50] *Id*. at § 4(a).

[51] *Id*. at § 4(b).

[52] *See* CRS Report WSLG689, *History and Current Status for Enforcement of ACA's Contraceptive Coverage Requirement.*

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

[54] *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

[55] *See* 45 C.F.R. § 147.131(b).

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 the employer.

These regulations remain in effect and were not at issue in *Hobby Lobby*. Thus, churches and religious nonprofit organizations may still avoid penalties for noncompliance. However, some of the organizations that would qualify for protection under the regulations have challenged the contraceptive coverage mandate separately, claiming that the certification process for the accommodation burdens their religious exercise.[56] These cases are not directly related to the decision in *Hobby Lobby*, though the Court's opinion has been cited by some to suggest that the accommodation would be upheld if such a case reached the Court. [57]

Notably, three days after the *Hobby Lobby* decision was announced, the Court issued an injunction effectively preventing enforcement of the contraceptive coverage requirement against Wheaton College pending a final decision in its case if the school provided written notice to HHS of its qualifications for the accommodation.[58] Providing such a letter would allow the school to claim eligibility without using the official form—to which they object—prescribed by the regulations. Although the order explicitly emphasized that it was not "an expression of the Court's views on the merits" of the case, three Justices wrote in dissent from the Court's order.[59] The dissenting Justices stated that the college's assertion "that its filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects" was not a viable claim under RFRA and therefore not eligible for injunctive relief.[60] The dissenters noted that the *Hobby Lobby* decision considered the accommodation to be "'an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.'"[61] Despite the widespread attention being paid to the *Wheaton* order, it indeed does not provide any final decision on the merits of the challenge to the accommodation. Additionally, though the majority in *Hobby Lobby* noted the possibility that the accommodation could be a "less restrictive" means to achieve the government's interest in the contraceptive coverage mandate, it did not determine it to be the *least* restrictive means.[62] In other words, simply because the Court pointed to the accommodation as an option that burdened the companies' religious exercise less does not mean that there may not be a third option that minimized the burden even more effectively.

[56] *See* Wheaton College v. Burwell, No. 13A1284 (U.S. July 3, 2014); Little Sisters of the Poor v. Sebelius, No. 13A691 (U.S. Jan. 24, 2014).

[57] Jess Bravin, *Administration Points to Hobby Lobby Ruling in Wheaton College Case*, WALL STREET JOURNAL (July 2, 2014) (noting that U.S. Solicitor General Donald Verrilli argued that the Court's decision in Hobby Lobby indicated that the accommodation was not improper under RFRA).

[58] Wheaton College v. Burwell, No. 13A1284 (U.S. July 3, 2014).

[59] *Id*. at 2.

[60] *Id*. at 3.

[61] *Id*. ("After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in Hobby Lobby feared it might, retreats from that position." (citations omitted)).

[62] *See Hobby Lobby*, 2014 U.S. LEXIS 4505 at *82 ("We do not decide today whether an approach [of the accommodation] complies with RFRA for purposes of all religious claims.").

State Coverage Requirements

Hobby Lobby involved a challenge to the federal contraceptive coverage requirement by companies seeking protection under the federal RFRA. Thus, the decision to expand protection under RFRA to closely held corporations affects only federal law. A number of states have enacted separate contraceptive coverage requirements, predating the ACA.[63] Therefore, the closely held companies that now have been recognized as covered by RFRA may still be obligated to provide contraceptive coverage under state legal requirements if the states do not have an applicable exemption to such coverage requirements.

Such companies may seek protection under state versions of RFRA, as the federal RFRA only applies to protect against burdens imposed by federal actions. Many states enacted laws which may be modeled on the federal RFRA to prohibit state governments from substantially burdening religious exercise. The applicability of these state RFRAs to various types of organizations would depend on each state's legislative language. If the state RFRA did not define the entities which may claim protection, a court may look to *Hobby Lobby* as guidance in interpreting the proper scope, but would not be bound to reach the same conclusion as the Court did.

Author Contact Information

Cynthia Brougher
Legislative Attorney
cbrougher@crs.loc.gov, 7-9121

[63] *See State Policies in Brief: Insurance Coverage of Contraceptives*, Guttmacher Institute (July 2, 2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.