# THE AFFORDABLE CARE ACT AND *BURWELL V. HOBBY LOBBY STORES, INC.*: HOW FAR WILL IT GO AND AT WHAT COST?

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## I. INTRODUCTION

In 2014, the long awaited *Burwell v. Hobby Lobby Stores, Inc.* Supreme Court ruling held that religious for-profit corporations qualified under the Religious Freedom Restoration Act (RFRA) for a religious accommodation from the Patient Protection and Affordable Care Act's (ACA) contraceptive mandate.[1] The Supreme Court decided that the Department of Health and Human Services (HHS)[2] could not compel nonprofit and for-profit religious employers to pay for contraceptives for their employees if providing the contraceptives would violate the employer's religious beliefs.[3] The *Hobby Lobby* decision is consistent with prior RFRA cases wherein the Court balanced accommodating substantial burdens on religion with the costs to the Federal Government and society.[4] In the wake of the *Hobby Lobby* decision, the Court in future cases will likely accommodate religious employers who claim that the contraceptive mandate substantially burdens their religion but it is difficult to determine at what cost.

In order to consider the ramifications of *Hobby Lobby*, this Note will first discuss the ACA employer mandate and religious accommodation provision that created the *Hobby Lobby* controversy and then analyze the Court's *Hobby Lobby* decision. Next, this Note will assess the implications after *Hobby Lobby*, including (1) how far the Court is willing to extend the ACA's religious accommodation and (2) what costs the ACA's religious accommodation pass onto the Federal Government and others. First, it is most likely that the Court is willing to accommodate religious employers' desire not to pay for contraceptives as long as women still have free access to contraceptives. The Supreme Court will decide in *Zubik v. Burwell* if the ACA's religious accommodation framework balances the Government's interest in providing women with free access to contraceptives with religious employers' religious beliefs.

Second, the Court, in its *Hobby Lobby* decision, did not fully consider the costs passed onto the taxpayers. Following the *Hobby Lobby* decision, many assume that the ACA's religious accommodation is cost-neutral, but the Court failed to consider the costs taxpayers will incur

1. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2782-85 (2014).

2. In this discussion, for clarity's sake, "HHS" will encompass all relative statute and rules to HHS, the Department of Labor, and the Treasury Department. Information, rules, and statutes tend to crossover. Departments other than HHS are mentioned if a statute or rule is particular to that department.

3. *Hobby Lobby*, 134 S. Ct. at 2782-83.

4. *See generally* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (3d ed. 2011).

when paying for religious self-insured employers' contraceptives. The Court also failed to consider costs taxpayers could incur if other services, like vaccinations, were included in the ACA's religious accommodation framework. Finally, the Note's conclusion will show that since the Court in *Hobby Lobby* failed to establish a definitive balance between the substantial burden on Hobby Lobby's religious exercise and the cost of accommodation, also known as the Government's compelling governmental interest, it is difficult to predict the outcome of future ACA religious accommodation cases.

## II. BACKGROUND: THE AFFORDABLE CARE ACT AND *BURWELL V. HOBBY LOBBY STORES, INC.*

The *Hobby Lobby* decision fits within the long tradition of religious liberty cases that considered to what extent the federal government must accommodate someone's religious beliefs and whether the cost of the accommodation overly burdens society.[5] After *Hobby Lobby*, religious employers do not have to pay for contraceptives under the ACA's religious accommodation provision so long as employees have other means of obtaining contraceptive funding.[6] Before diving into the mechanics and implications of the *Hobby Lobby* decision, it is important to first understand the ACA's employer mandate and the Supreme Court's findings in *Burwell v. Hobby Lobby Stores, Inc.*

### *A. The Affordable Care Act and The Employer Mandate*

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (ACA) into law.[7] The law sought to guarantee affordable health insurance for all Americans regardless of their pre-existing conditions.[8] The benefits each individual receives under the ACA include, but are not limited to, preventive care without cost sharing, premium cost caps, and access to wellness programs.[9] The ACA combined state and federal resources in order to facilitate a sustainable marketplace to offer health insurance to individuals and employers.[10] Under the ACA, the states set up (or the Federal Government sets up for

5. *Id.*

6. *Hobby Lobby*, 134 S. Ct. 2751.

7. *Key Features of the Affordable Care Act*, HHS.GOV/HEALTHCARE, http://www.hhs.gov/healthcare/facts/timeline/ (last updated Nov. 18, 2014).

8. *Health Insurance Marketplace*, HHS.GOV/HEALTHCARE, http://www.hhs.gov/healthcare/insurance/index.html (last updated Nov. 18, 2014).

9. *Id.*

10. *Id.*

the states) a health insurance exchange that allows individuals to buy health insurance from the open marketplace.[11] However, individuals do not need to purchase health insurance from the exchange if their employer offers ACA compliant health insurance coverage.[12]

All large employers, both for- and nonprofit, must comply with the Employer Shared Responsibility Provisions (hereinafter "employer mandate") within the ACA on or before January 1, 2015.[13] The Internal Revenue Service (IRS), the ACA enforcement agency, splits employers into two categories: small and large.[14] Only large employers shall comply with the employer mandate and must provide coverage for all of their full-time employees.[15] The ACA defines a large employer as an employer that employs fifty full-time employees or a combination of full-time and part-time employees that is the equivalent of fifty full-time employees.[16] Generally, full-time employees are employees that work at least thirty hours per week unless they are seasonal workers.[17]

If an employer qualifies as a large employer, then the employer must offer affordable health insurance to its full-time employees.[18] In order to provide sufficient health coverage under the ACA employer mandate, large employers must offer some type of group plan including a health maintenance organization (HMO), a preferred provider organization (PPO), or a self-insured group plan.[19] Whichever type of group plan(s) the employer decides to offer employees, the plan must cover basic mandated services and follow the ACA's affordability guidelines.[20]

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11. *Id.*; *see* King v. Burwell, 135 S. Ct. 475 (2014) (challenging whether the IRS can issue tax credits to individuals who buy health insurance from a federally created exchange).

12. *Health Insurance Marketplace, supra* note 8.

13. Rules Relating to Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans, 26 C.F.R. § 301.6056-1(m) (West 2016); *see Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, IRS, http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act (last updated Dec. 15, 2014) [hereinafter *IRS Q&A*], for a quick guide to the Employer Shared Responsibility Provisions.

14. Shared Responsibility for Employers Regarding Health Coverage, 26 U.S.C.A. § 4980H(c)(2)(B)(i) (West 2015); *see IRS Q&A*, *supra* note 13.

15. *Id.*

16. *Id.*

17. 26 U.S.C. § 4980H(c)(4)(A).

18. *Id.* § 4980H(a)(1).

19. 26 U.S.C.A. § 5000A(f)(1)(A)-(E) (West 2015); *see Application of Market Reform and Other Provisions of the Affordable Care Act to HRAS, Health FSAS, and Certain Other Employer Healthcare Arrangements*, 2013-40 I.R.B. 287 (published Sept. 30, 2013), http://www.irs.gov/pub/irs-drop/n-13-54.pdf.

20. 26 U.S.C. § 4980H(a)(1); *see IRS Q&A*, *supra* note 13.

A large employer will receive fines in the form of higher taxes if at least one of its employees qualifies for a premium tax credit to purchase health insurance on his or her state's health exchange.[21] A state's health exchange offers a premium tax credit to employees when their employer does not offer adequate health insurance coverage.[22] Inadequate health insurance coverage occurs when an employer does not offer health insurance coverage to the employee at all, the health insurance coverage offered is unaffordable, or the health insurance coverage does not provide the minimum value of services.[23] The minimum value of services affords an employee primary care, emergency services, and preventive care coverage.[24] If an exchange offers an employee a premium tax credit, then the employer incurs a $100 to $2,000 fine per employee from the IRS.[25]

Indeed, the IRS, in 2012, threatened large, for-profit employers with fines for noncompliance with the ACA's employer mandate.[26] One category of large employers that received fine notices is employers seeking religious accommodations from the ACA's contraceptive mandate. Contraceptives are a minimum value service that must be included in all employer health insurance plans.[27] Before *Hobby Lobby*, a corporation qualified for a religious accommodation if (1) the employer opposed contraceptive coverage, (2) it was a nonprofit, (3) it held itself out as a religious employer, and (4) it completed the self-certification form within the requisite timeframe.[28] In 2014, *Hobby Lobby* changed the ACA's religious accommodation to add closely held, for-profit corporations to the list of possible accommodated religious employers.[29] Thus, both religious nonprofit and closely held employers can now qualify for a religious accommodation from the contraceptive mandate.[30] *Wheaton College*, a case decided days after *Hobby Lobby*, further modified the religion accommodation insofar as it allowed religious

21. 26 U.S.C. § 4980H(b)(1)(B); *see* 26 C.F.R. § 1.36B-2(c)(3) (West 2016), for more information regarding eligibility requirements for premium tax credits; *see also IRS Q&A*, *supra* note 13.

22. *IRS Q&A*, *supra* note 13.

23. 26 C.F.R. § 1.36B-2(c)(3); *see IRS Q&A*, *supra* note 13.

24. 42 U.S.C.A. § 300gg-13 (West 2015).

25. 26 U.S.C. § 4980H(c)(1); 26 U.S.C.A. § 4980D (West 2015); *see IRS Q&A*, *supra* note 13.

26. *Application of Market Reform*, *supra* note 19.

27. *See, e.g.*, Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2759 (2014).

28. *Id.*; *see* 79 Fed. Reg. 51118-01 (proposed Aug. 27, 2014) (adding closely held entities to the list of entities that can receive a religious accommodation) (citing *Hobby Lobby*, 134 S. Ct. at 2751).

29. *Hobby Lobby*, 134 S. Ct. at 2782-83.

30. *Id.*

employers to notify HHS of its religious status to qualify for the religious accommodation instead of completing the self-certification form.[31]

### *B.* Burwell v. Hobby Lobby Stores, Inc.*: The Supreme Court's First ACA Religious Accommodation Decision*

The Supreme Court in *Hobby Lobby* held that three corporations qualified for a religious accommodation from the ACA's contraceptive mandate because the contraceptive mandate violated the owners' religious beliefs.[32] The Court reasoned that a for-profit corporation could receive a religious accommodation under RFRA if its owners could show that the Government substantially burdened his or her sincerely held religious belief without a compelling governmental interest.[33] In *Hobby Lobby*, the Supreme Court found that the ACA's contraceptive mandate substantially burdened the religious beliefs of the corporations' owners since they were required to either provide health insurance for the four types of contraceptives that the owners considered abortifacients[34] or face hefty fines.[35] The Court decided that although HHS had a compelling governmental interest in ensuring that all women could access contraceptives, the Government did not enforce its interest through the least restrictive means.[36] HHS already implemented a program to allow religious nonprofit corporations an exemption from the contraceptive mandate, and the Court determined that HHS must apply the same framework to religious for-profit corporations as the least restrictive means of enforcing the contraceptive mandate.[37]

#### *1. Facts of the Case*

*Hobby Lobby* combined facts from three plaintiffs, Hobby Lobby, Mardel, and Conestoga.[38] Norman and Elizabeth Hahn and their three sons fully own Conestoga Wood Specialties, a closely held wood

31. Wheaton College v. Burwell, 134 S. Ct. 2806 (2014).

32. *Hobby Lobby*, 134 S. Ct. at 2759.

33. *Id.*

34. The Supreme Court never discussed the difference between "abortifacients" and other forms of contraception. Rather, the Court accepted at face value the Hahns and Greens' contention that the four contraceptives labeled abortifacients were fundamentally different from the other types of contraceptives and violated the Hanhs and Greens' beliefs. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 2764-65.

working business started in the Hahns' garage over fifty years ago.[39] The Hahn family belongs to the Mennonite Church, wherein one of their beliefs is that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it."[40] The Hahns weave their religious beliefs into Conestoga's corporate operations insofar as Conestoga adopted Christian principles in Conestoga's "Vision and Values Statements" and "Statement on the Sanctity of Human Life."[41]

Likewise, David and Barbara Green and their three children own and operate two businesses: Hobby Lobby and Mardel.[42] Started forty-five years ago, Hobby Lobby is a nationwide arts-and-crafts store.[43] Mardel is a regional Christian bookstore.[44] The Greens closely hold both businesses.[45] Similar to the Hahns, the Greens operate Hobby Lobby and Mardel according to Christian and Biblical principles.[46] In order to follow their religion and spread their Christian values, the Greens vow to adhere to Biblical precepts in all aspects of their businesses. For example, the Greens close Hobby Lobby and Mardel on Sundays and purchase hundreds of full-length newspaper ads to invite people to share in the "Word of God."[47]

In line with the Hahns and Greens' beliefs, Hobby Lobby, Mardel, and Conestoga excluded four contraceptive methods from their employer-employee offered health insurance plans.[48] The corporations excluded two brands of the "morning after" pill and two brands of intrauterine devices (IUD) because the Hahns and the Greens believe that these contraceptive methods are abortifacients or fetus killing agents.[49]

The Greens and Hahns violated the ACA contraceptive mandate when (1) their corporations refused to provide coverage for the four aforementioned types of contraceptives, and (2) as a for-profit employers, they did not qualify for the ACA's religious accommodation.[50] The corporations violated the mandate without an applicable exemption available, so the corporations were forced to pay

39. *Id.* at 2764.
40. *Id.*
41. *Id.* at 2764-65.
42. *Id.* at 2765.
43. *Id.*
44. *Id.*
45. *Id.* at 2766.
46. *Id.*
47. *Id.*
48. *Id.* at 2765-66.
49. *Id.* at 2765.
50. *Id.* at 2766.

fines in the form of extra taxes.[51] Hobby Lobby, for example, would have had to pay $475 million in extra taxes every year.[52]

In the alternative, the Hahns and Greens' corporations could have dropped health care coverage for all of their employees.[53] The Hahns and Greens would have faced a fine for failing to provide any health care coverage to their employees. The fine for completely dropping all employees' health care coverage would have cost less than providing health care coverage - this includes health care coverage with or without contraceptives.[54] Nevertheless, the Hahns and Greens believe, as part of their religion, that they should provide their employees with affordable health insurance coverage.[55] Thus, the Hahns and Greens alleged that HHS forced them to decide between violating their religion (either by providing full contraceptive health coverage or supplying no coverage at all) and paying a heavy fine.[56]

The Hahns and Greens challenged the HHS mandate under RFRA in the Third and Tenth Circuits, respectively.[57] Both the Hahns and Greens claimed that the contraceptive mandate substantially burdened their religion since HHS forced them to choose between violating their religious beliefs and paying outrageous fines.[58] Both families also claimed that HHS failed to show a compelling governmental interest for substantially burdening their religion and, in the alternative, failed to use the least restrictive means in enforcing the contraception mandate.[59]

The Third and Tenth Circuits split on the question of whether the Hahns and Greens could bring a RFRA claim on the behalf of a corporation.[60] The Third Circuit denied the Hahns' claim while the Tenth Circuit affirmed the Greens' claim.[61] The Supreme Court granted certiorari and combined both cases in one suit - *Burwell v. Hobby Lobby Stores, Inc.*[62]

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51. *Id.*
52. *Id.*
53. *Id.* at 2776.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 2765-66.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 2767.

*2. The RFRA Standard*

In *Hobby Lobby*, the Supreme Court applied the RFRA balancing test: "[The] Government shall not substantially burden a person's exercise of religion " except "[if it] is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[63]

Congress enacted RFRA in response to *Employment Division v. Smith* where the Supreme Court found that the respondents, using peyote as part of a religious ceremony, could not receive a religious exemption from a general applicability law (i.e., a law that applies to everyone equally without *any* exceptions).[64] The Court held that a valid and neutral law of general applicability allows the Government to burden an individual's free exercise of religion.[65] After *Smith*, the Government no longer needed to show a compelling governmental interest to substantially burden an individual's religious exercise.[66] Acting to protect free religious exercise, Congress reestablished the compelling governmental interest test set out in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[67] Now, in order for the Government to substantially burden an individual or organization's religious exercise with a general applicability law, the Government must show a compelling governmental interest to justify the burden and use the least restrictive means in enforcing the law.[68]

However, *City of Boerne v. Flores*, limited RFRA's applicability to only certain federal laws.[69] In response, Congress amended RFRA with the Religious Land Use and Institutionalized Persons Act (RLUIPA).[70] RLUIPA amended, among other things, the definition of "exercise of religion" in RFRA.[71] Before RLUIPA, RFRA referred to the free exercise of religion under the First Amendment.[72] RLUIPA redefined

63. *Id.* at 2760 (citing Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb(1)(b) (West 2015)).

64. *Id.* at 2761 (citing Employment Div. v. Smith, 494 U.S. 872 (1989)).

65. *Id.* at 2761 (citing City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

66. *Id.* at 2761 (citing 42 U.S.C.A. § 2000bb(a)(4) (West 2015)).

67. *Id.* at 260 (citing Sherbert v. Verner, 374 U.S. 398 (1963) and Wisc. v. Yoder, 406 U.S. 205 (1972)).

68. *Id.* at 2761 (citing 42 U.S.C.A. § 2000bb-1(b)).

69. *Id.* at 2761 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)).

70. *Id.*at 2761-62 (citing Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. § 2000cc (West 2015)).

71. *Id.*

72. *Id.*

"exercise of religion": "[A]ny exercise of religion, whether or not compelled by, or central to, a system of religious belief."[73]

In *Hobby Lobby*, the Supreme Court applied RFRA to the Hahns and Greens' claims and used the RLUIPA definition of "exercise of religion."[74] The Supreme Court held that HHS substantially burdened the Hahns and Greens' exercise of religion when HHS mandated that Hobby Lobby, Mardel, and Conestoga either face punitive fines or provide contraceptive coverage for prescriptions the Hahns and Greens considered abortifacients.[75] The Court reasoned that although HHS could show that free contraceptives for all women served a compelling governmental interest, HHS could not show that it enforced the contraception mandate through the least restrictive means.[76] HHS implemented a program to allow religious, nonprofit employers to sign a waiver and request that their insurance plans cover only approved forms of contraceptives.[77] The Supreme Court reasoned that the HHS should apply the nonprofit accommodation program to Hobby Lobby, Mardel, Conestoga, and other for-profits, so that HHS could both supply all women with contraceptives without burdening the corporations' owners' religious beliefs.[78] Therefore, the Supreme Court held that HHS could protect its compelling governmental interest – providing all women access to contraceptives – and enforce its interest through the least restrictive means.[79]

*3. Religious Exercise*

The Supreme Court held that the Hahns and Greens' corporations qualified under RFRA for a religious accommodation from the ACA contraceptive mandate.[80] The Court reasoned that the corporations qualified as "persons" under RFRA since corporations are "persons" under the Court's plain meaning test.[81] To find the plain meaning of the word "person," the Court looked at RFRA's definitions, but RFRA did not define "person."[82] Next, the Court turned to the Dictionary Act for the definition of "person" because Congress intended the Court to

73. *Id.* at 2762 (quoting 42 U.S.C.A. § 2000cc-5(7)(A) (West 2015)).
74. *Id.* at 2762.
75. *Id.* at 2759.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 2759-60.
80. *Id.*
81. *Id.* at 2768.
82. *Id.*

employ the Dictionary Act to determine the meaning of any undefined terms in a Congressional Act unless the context indicated otherwise.[83] Under the Dictionary Act, a "person" is defined, among other things, as a corporation.[84] Finally, the Court reasoned that context did not imply that, when writing RFRA, Congress intended to exclude corporations from the list of RFRA protected persons.[85] Rather, the Court's interpretation in past rulings was that Congress intended RFRA to apply to corporations, albeit nonprofit ones.[86] The Supreme Court reasoned that sometimes the context suggests that "persons" should be limited to natural persons; however, in this context, since "persons" refers to natural persons and artificial persons (e.g., nonprofit corporations), it would be unfair and inappropriate to exclude for-profit corporations.[87] Thus, for-profit corporations are RFRA persons.[88]

The Court justified its decision that for-profit corporations could bring religious claims under RFRA in three ways. First, in *Baunfeld v. Brown*, the Court allowed retailers to bring an action against Pennsylvania.[89] The retailers argued that Pennsylvania's Sunday Closing laws threatened their stores' economic viability since their religious beliefs compelled them to also close their stores on Saturday.[90] While the Court ultimately ruled in favor of Pennsylvania, the Court permitted the *Braunfeld* retailers to bring a Free Exercise claim.[91] The Court found it counterintuitive to allow the retailers to bring their claim qua natural person and deny their ability to bring their claim qua corporation.[92]

Second, the Court decided that separating corporations from its owners created a false dichotomy.[93] The Third Circuit decided that corporations, apart from their owners, could "not pray, worship, observe sacraments or take other religiously-motivated actions" without their owners or employees.[94] Hence, corporations are separate from their

83. *Id.* (citing Dictionary Act, 1 U.S.C.A. § 1 (West 2015)).
84. *Id.*
85. *Id.* at 2768-69.
86. *Id.* at 2769.
87. *Id.*
88. *Id.*
89. *Id.* at 2767 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).
90. *Id.*
91. *Id.* at 2767
92. *Id.*
93. *Id.* at 2768.
94. *Id.* (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir.), *cert. granted sub nom.* Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013), *and rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014)).

owners and cannot exercise religious beliefs.[95] Nevertheless, the Supreme Court reasoned that corporations could not take any actions at all without help from their owners and employees.[96] Therefore, corporations can reflect the religious beliefs of their owners.[97]

Finally, the Court found that little distinction existed between some nonprofit and for-profit corporations.[98] Individuals choose to form as a nonprofit or for-profit corporation based on the types of activities each organization will conduct and the potential benefits it will receive.[99] For example, if an organization wishes to engage in lobbying efforts, then it needs to form as a for-profit corporation, not as a nonprofit corporation.[100] In some cases, for- and nonprofit corporate operations are almost indistinguishable.[101] Thus, it should be the owners, not the courts, to decide whether a for-profit corporation exercises religious beliefs.[102]

*4. Substantial Burden*

The Supreme Court determined that the ACA's contraceptive mandate substantially burdened the Hahns and Greens' religious exercise when both family corporations would have to either fully comply with the contraceptive mandate or pay a heavy fine.[103] The standard of review for measuring a substantial burden on the free exercise of religion is whether a law makes a religious belief more burdensome for religious corporations to practice.[104] In *Hobby Lobby*, the Supreme Court found that HHS compelled the Hahns and Greens to choose between a heavy fine and following their religious beliefs.[105] For example, if an employer does not comply with the contraceptive mandate, then the employer will be taxed $100 per day for each affected employee.[106] Since Hobby Lobby employs approximately 13,000 workers, it could pay up to $1.3 million a day or $475 million per year in taxes for failing to comply with the contraceptive mandate.[107] The Supreme Court held that the punitive taxes

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 2769.
99. *Id.* at 2771.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 2777.
104. *Id.* at 2757, 2775.
105. *Id.* at 2775-77.
106. *Id.* at 2775.
107. *Id.* at 2765, 2775-76.

the Hahns and Greens faced substantially burdened their religious beliefs.[108]

HHS argued in the alternative that the Hahns and Greens could drop employee healthcare coverage altogether and save more money than they would have spent on ACA compliant healthcare coverage.[109] The Supreme Court rejected this argument and determined that if the Hahns and Greens did not offer health care coverage, their religious beliefs would still be violated because they believe that offering health care coverage to their employees serves God.[110] Even without considering the Hahns and Greens' religious beliefs, the Supreme Court found that alleged reduction in cost might not actually manifest.[111] Companies that do not provide health insurance could find that they are unable to retain or compete for the best employees.[112] The Supreme Court noted that corporations could try to raise wages in order to offset the employees' cost of purchasing health insurance elsewhere.[113] The Supreme Court held that, at any rate, the Hahns and Greens should be able to supply their employees with affordable health insurance without having to pay for an employee's contraceptives.[114]

HHS also argued that the Hahns and Greens would not directly cause an employee to use one of the four abortifacients types of contraception; rather, each employee decides whether they take an abortifacient form of contraception.[115] Nevertheless, the majority found that the Hahns and Greens should decide what violates their religious beliefs, not the Court.[116]

*5. Compelling Governmental Interest by the Least Restrictive Means*

The Supreme Court then decided whether HHS justified the substantial burden on the Hahns and Greens' religion through the "furtherance of a compelling governmental interest" and used "the least restrictive means of furthering that compelling governmental interest."[117] The standard of review established in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* is that the Court must look at the

108. *Id.* at 2776.
109. *Id.*
110. *Id.* at 2776.
111. *Id.* at 2776-77.
112. *Id.* at 2777.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 2778.
117. *Id.* at 2779 (citing 42 U.S.C.A. § 2000bb–1(b) (West 2015)).

claimant's particularized harm in order to assess whether the Government's compelling governmental interest outweighs the substantial burden on the claimant's religious beliefs.[118]

The Supreme Court assumed that, for the purposes of the argument, HHS demonstrated that the contraceptive mandate satisfied the compelling governmental interest test insofar as HHS could show significant health and gender equality benefits individuals received from contraceptive care.[119] The Supreme Court then turned to the least restrictive means test wherein HHS needed to show that there were no other means of satisfying its goal without imposing a substantial burden on the Hahns and Greens' religious beliefs.[120] The Supreme Court held that since HHS already established a program to accommodate nonprofit corporations, then HHS could extend the same program to for-profit corporations.[121] The HHS religious accommodation program allows employers to pay for general health insurance; third party administrators pay for contraceptive coverage separately with no cost sharing with the employer or employee.[122] The Supreme Court reasoned that the HHS religious accommodation schema is cost-neutral for the employer/employee and the third party administrator based on how health insurance actuarially adjusts to match its members' risks.[123] Thus, the Supreme Court decided that extending the ACA's religious accommodation to for-profit corporations would be the least restrictive means of protecting the Government's compelling governmental interest.[124]

*6. Conclusion*

The Supreme Court held that religious for-profit corporate employers could forgo paying for contraceptives that substantially burdened their religious beliefs.[125] The Court determined that since HHS could show a compelling governmental interest in supplying all women with contraceptives, the ACA's religious accommodation allowed women to receive contraceptives without requiring religious employers to pay for

118. *Id.* at 2779 (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006)).
119. *Id.* at 2780.
120. *Id.*
121. *Id.* at 2781.
122. *Id.* at 2781-82.
123. *Id.* at 2782; *see Id.* at 2786-87 (Kennedy, J., concurring).
124. *Id.* at 2782.
125. *Id.*

the contraceptives.[126] Rather, third party administrators would pay for the contraceptives.[127]

The *Hobby Lobby* case changed the status of many other similarly situated corporations. All closely held for-profit corporations, as defined by the ACA, are permitted to self-certify for a religious accommodation from the contraceptive mandate.[128] The ACA recently defined a closely held for-profit corporation as a corporation that:

> (i) Is not a nonprofit entity;
>
> (ii) Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and
>
> (iii) Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto.[129]

If a closely held corporation meets the ACA's definition, then it can receive an accommodation from the contraceptive mandate.

HHS defined who qualifies for a religious accommodation but that does not end the ACA religious accommodation debate. HHS and the courts will next have to set the ACA religious accommodation limits and further explore its costs. Court battles continue over whether religious employers can totally preclude their employees from receiving free contraceptives.[130] *Hobby Lobby* most likely indicates that religious

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126. *Id.*

127. *Id.*

128. *HHS Mandate Information Central*, BECKET FUND, http://www.becketfund.org/hhsinformationcentral/ (last updated Feb. 12, 2015); *see also* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118-01 (proposed Aug. 27, 2014) (reporting that *Hobby Lobby* will impact 71 for-profit corporations); *see* Timothy Jost, *Implementing Health Reform: New Accommodations for Employers on Contraceptive Coverage*, HEALTH AFF. BLOG (Aug. 22, 2014), http://healthaffairs.org/blog/2014/08/22/implementing-health-reform-new-accommodations-for-employers-on-contraceptive-coverage/. For a summary of the proposed rule, see Mary Anne Pazanowski, *For-Profit, Closely Held Corporations Can Opt Out of Contraceptive Mandate*, BLOOMBERG (July 1, 2014), www.bna.com/forprofit-closely-held-n17179891700/.

129. Exemption and accommodations in connection with coverage of preventive health services, 45 C.F.R. § 147.131(b)(4)(i)-(iii) (West 2015).

130. *HHS Mandate Information Central*, *supra* note 128.

employers ought to receive an accommodation from the contraceptive mandate.[131] However, religious employers' accommodation cannot interfere with their employees' right to receive free contraceptives. In addition, the accommodation is not cost-neutral insofar as the Government pays for the contraceptives for self-insured employers. It is unclear whether the ACA's religious accommodation, with its costs, are limited to only contraceptives, and how much it would cost taxpayers to pay for religious self-insured employers that qualify for a religious accommodation for other medical services, such as vaccinations.

## III. BEYOND *HOBBY LOBBY* ANALYSIS: THE BREADTH OF THE ACA'S RELIGIOUS ACCOMMODATION AND AT WHAT COST?

*Burwell v. Hobby Lobby Stores, Inc.* held that religious for-profit corporations qualified for a religious accommodation under the ACA wherein third party administrators pay fully for employees' contraceptives. In Part III, this Note will demonstrate to what extent the Government must accommodate religious employers' objections to the contraceptive mandate and how much the Government might inadvertently spend to accommodate religious employers.

First, the Supreme Court in *Hobby Lobby* indicated that it is willing to accommodate religious employers whose religious beliefs forbid them from providing their employees with the means of accessing contraceptives. The Court in *Hobby Lobby* decided that religious employers should not have to pay for their employees' contraceptives as long as their employees can still access free contraceptives.[132] The Supreme Court will decide in *Zublk v. Burwell* whether the ACA's religious accommodation both protects the Government's interest in providing all women access to free contraceptives while protecting religious employers from participating in conduct that violates their religion.

Second, the ACA's religious accommodation requires that taxpayers pay for religious self-insured employers' employees' contraceptives, and thus, the religious accommodation is not cost-neutral. The religious accommodation, while intended to cover only contraceptives, can extend to other services. If religious self-insured employers seek an accommodation for other services under the ACA, the taxpayers will again be left paying the tab. The *Hobby Lobby* decision addressed neither how much the contraceptive mandate cost taxpayers nor how much other medical services could cost taxpayers. Without a discussion about the

131. Wheaton College v. Burwell, 134 S. Ct. 2806, 2806 (2014).
132. *Hobby Lobby*, 134 S. Ct. at 2782-83.

contraceptive mandate's costs, it is difficult to determine how much of a role cost will play in future ACA religious accommodation cases.

### *A.* Hobby Lobby's *Limits: Accommodations for Religious Employers as Long as they do not Interfere with a Woman's Right to Receive Free Contraceptives*

One of the large questions after the *Hobby Lobby* decision was whether *Hobby Lobby* ended the debate about the ACA's religious accommodation and, if not, whether the Court would extend the accommodation in future cases. The Court indicated in *Hobby Lobby* that it would accommodate religious employer's religious beliefs as long as the corporations' employees could still receive free contraceptives.[133] Nevertheless, the Court's attempts to accommodate religious employers under RFRA do not go far enough. As the Supreme Court was deciding *Hobby Lobby*, other religious employers filed suit against HHS and argued that the ACA's religious accommodation under the contraceptive mandate violated their religious beliefs.

Only days after *Hobby Lobby*, the Court in *Wheaton College v. Burwell* upheld a preliminary injunction that allowed religious employers to forgo filling out the required self-certification form, Employee Benefits Securities Administration Form 700 (hereinafter "Form 700"), to receive the ACA religious accommodation.[134] Wheaton College argued that Form 700 confers a legal obligation on the third party administrator to provide contraceptive coverage for the religious employer's employees, and therefore, makes the employer complicit in providing contraceptive coverage to their employees.[135] The Supreme Court decided that the Federal Government knows which employers qualify as religious, so religious employers do not have to fill out Form 700.[136] The Supreme Court did not grant injunctive relief based on the merits but simply waived the Form 700 requirements while various lawsuits against Form 700 worked their way through the lower courts.[137] In the meantime, HHS issued an interim final rule that permits religious employers to forgo filling out Form 700 so long as the religious

133. *Id.*

134. Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014).

135. *Id.* ("[T]he obligations of its health insurance issuer and third-party administrator are dependent on their receipt of notice that the applicant objects to the contraceptive coverage requirement."). *Contra id.* at 2812, (Sotomayor, J., dissenting) ("[T]he obligation is created by the contraceptive coverage mandate imposed by law, not by the religious nonprofit's choice to opt out of it.").

136. *Id.*

137. *Id.*

employers provide HHS with notice (hereinafter "HHS Notice") of their religious status.[138] The rule's permanence hinges on future court decisions on whether Form 700 substantially burdens religious employers' free exercise of religion.[139]

Now, religious employers claim that both filling out Form 700 and giving HHS Notice substantially burdens their religious beliefs under RFRA.[140] Religious employers argue that the act of filling out Form 700 or providing HHS Notice triggers a third party administrator's legal obligation to provide contraceptives for its employees "making them complicit in conduct that violates their religious beliefs."[141] HHS argues that the Government and third party administrators have a distinct legal obligation under the ACA to provide contraceptive coverage to all employees that is independent from a religious employer's decision to fill out Form 700 or give HHS Notice.[142]

The circuits have split on whether Form 700 or HHS Notice substantially burdens the religious employers' religious beliefs. The Eighth Circuit Court of Appeals in *Sharpe Holdings, Inc. v. Burwell* held that Form 700 and HHS Notice burdened the religious employer's beliefs.[143] The court reasoned that religious employers must decide what type of conduct violates their religious beliefs.[144] Since the religious employers believe that Form 700 or HHS Notice violates their religious beliefs, then it does, so HHS's regulations must be struck down.[145] The court decided that HHS has not shown that Form 700 or HHS Notice are the least restrictive means of promoting its compelling governmental interest in providing all women with access to free contraceptives.[146]

On the other hand, the D.C., Third, Fifth, and Tenth Circuit Courts of Appeals held that Form 700 or HHS Notice do not substantially burden a

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138. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092-01 (Aug. 27, 2014) (a guidance document on the rationale behind issuing the interim final rule following *Hobby Lobby* and *Wheaton College*).

139. *Id.*

140. Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Services, 801 F.3d 927, 936 (8th Cir. 2015).

141. *Id.* at 939.

142. *Id.* at 941.

143. *Id.* at 944.

144. *Id.* at 941-42.

145. *Id.* ("The question here is not whether [the plaintiffs] have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacients coverage.").

146. *Id.* at 943-44 ("[The Government] simply suggested that the accommodation process would be an acceptable alternative for organizations that did not assert a religious objection to the accommodation process itself.").

religious employer's religious beliefs. For example, the Third Circuit reasoned in *Geneva College v. Burwell* that Form 700 or HHS Notice do not shift a legal obligation from the religious employer to a third party administrator.[147] Rather, the HHS regulations require that the Government and third party administrators provide free access to contraceptive coverage for women.[148] The Government and third party administrators already have a legal obligation to provide contraceptives, so Form 700 or HHS Notice do not transfer a legal obligation from the religious employer to the third party administrator.[149]

The Supreme Court has granted the cases from the D.C., Third, Fifth, and Tenth Circuits certiorari and consolidated the cases into one – *Zubik v. Burwell*.[150] Justice Kennedy's concurrence in *Hobby Lobby* suggests that the Court will likely grant, in *Zubik*, the religious employers' requested accommodation to forgo filling out Form 700 or HHS Notice if the accommodation does not interfere with woman employees' access to free contraceptives.[151] Religious employers have proposed that the Government offer women subsidies, tax deductions, tax credits, or free contraceptives at public clinics in order to promote its interest in providing all women with free contraceptives and relieving the burden on religion.[152] The Supreme Court will likely consider the proposed alternative accommodations. However, the Court might not consider the alternatives viable if HHS can show that the alternative accommodations will restrict women's access to free contraceptives. The Supreme Court will need to decide how much accommodation is too much when it starts affecting third parties' access to important resources.

147. Geneva Coll. v. Sec. U.S. Dept. of Health & Human Services, 778 F.3d 422, 437 (3d Cir. 2015).

148. *Id.*

149. *Id.*

150. Zubik v. Burwell et. al., 778 F. 3d 422 (3d Cir. 2015), *cert. granted,* 136 S. Ct. 444 (Nov. 6, 2015) (No. 14-1418).

151. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2786 (2014). (Kennedy, J., concurring) ("It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

152. *See, e.g.*, Sharpe Holdings, Inc. v. U.S. Dept. of Health & Human Services, 801 F.3d 927, 945 (8th Cir. 2015).

### *B.* Hobby Lobby's *"Cost-Neutral" Solution: Religious Self-Insured Employers Benefit to the Detriment of the Federal Government*

Many believe that the ACA's religious accommodation is cost-neutral for the Government,[153] and the Supreme Court in *Hobby Lobby* never considered how much extending the religious accommodation would actually cost the taxpayers but inferred that it would cost less than the whole ACA.[154] In reality, the ACA's religious accommodation requires that taxpayers pay for religious self-insured employers' accommodation. Therefore, the ACA's religious accommodation is not cost-neutral. One of the fears in the wake of *Hobby Lobby* is whether taxpayer support could extend to other medical services.[155] Indeed, other preventive medical services could fall under the ACA's religious accommodation, and thus, receive taxpayer funding. This section will first explain why the religious accommodation to contraceptives is not cost-neutral. Next, this section will demonstrate that the ACA's religious accommodation is not cost-neutral with regard to religious self-insured employers since taxpayers have to pay for religious corporations' employees' contraceptives. Finally, this section will show that other medical services could qualify under the ACA's religious accommodation and could also require taxpayers to pay for those services.

#### *1.* Hobby Lobby's *Cost-Neutral Solution*

Many consider there to be no cost to employers, employees, or third party administrators when third party administrators pay for religious employers' employees' contraceptives. Health insurance is designed so that third party administrators can fully cover the promised services and still make a profit. Third party administrators make a profit when the amount it charges per person within a group offsets the amount of health

153. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-01, 39889 (July 2, 2013) ("The Departments continue to believe, and have evidence to support, that, with respect to the accommodation for insured coverage established under these final regulations, providing payments for contraceptive services is cost neutral for issuers.").

154. *Hobby Lobby*, 134 S. Ct. at 2781 ("It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases . . . would be minor when compared with the overall cost of ACA.").

155. *See* David Kroll, *Will the Supreme Court's Contraceptive Decision Affect Coverage of Other Drugs?*, FORBES (June 30, 2014), http://www.forbes.com/sites/davidkroll/2014/06/30/will-the-supreme-courts-contraceptive-decision-affect-coverage-of-other-drugs/.

care services it must pay for that group.[156] For instance, a third party administrator profits when a group of ten individuals paying $1,000 in premiums[157] only requires an aggregate of $2,000 for health care services. A third party administrator loses money if it charges the same group of ten individuals $1,000 each in premiums and the third party administrator is required to spend $10,001 in health care services.

Third party administrators project how much money they will spend on health care costs based on the risk factors of their members.[158] General risk factors include, but are not limited to, health status, health history, age, sex, industry, occupation, duration of coverage, and wellness.[159] As of 2014, all third party administrators combine individuals and business employees into risk pools to include as many members as possible.[160] Third party administrators calculate a risk score for each individual.[161] Then, the third party administrators combine all of the scores into an aggregate risk-assessment score using actuarial methodology.[162] If more members in a risk group have high risk factors, then each individual in the group will have to pay higher premiums.[163] On the other hand, if fewer people have high risk factors, then each individual in the whole group will have lower premiums.[164] Every individual's premiums will increase or decrease slightly from the group's average premium to account for his or her own risk factors.[165]

Corporations, like Hobby Lobby, demonstrate how actuarial adjusted risk factors lead to lower premiums. In general, women of childbearing age tend to have higher risk factors because maternal care and childcare cost more to fund.[166] Contraceptives save money since contraceptives are

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156. *Risk Adjustment in Health Insurance*, HEALTH AFF. (Aug. 30, 2012), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=74.

157. *Premium*, HEALTHCARE.GOV (Nov. 8, 2014 9:35 PM), https://www.healthcare.gov/glossary/premium/ ("The amount that must be paid for your health insurance or plan. You and/or your employer usually pay it monthly, quarterly or yearly.").

158. *Risk Adjustment in Health Insurance*, *supra* note 156.

159. *Id.*

160. *Id.* Previously, only Medicare, Medicare Advantage, and Medicaid plans aggregated its members' risk factors and charged one flat rate to everyone in the plan. *Id.* Before 2014, private health insurance plans charged different rates to individuals based on their health history and "preexisting" conditions. *Id.* However, the ACA outlawed this type of insurance practice. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Adam Sonfield, *Contraceptive Coverage at the U.S. Supreme Court: Countering the Rhetoric with Evidence*, 17 GUTTMACHER POL'Y REV. 1, 6 (2014),

much cheaper than paying for pregnancies or child-related care.[167] When women use contraceptives, their chances of pregnancy decrease,[168] so their actuarial risk factors also decrease.[169] Lower risk factors mean lower overall premiums for employers and employees.[170]

Arguably, third party administrators do not lose any money after they apply their actuarial methodology to employers that qualify for the religious accommodation.[171] According to IRS regulations, third party administrators must pay for contraceptives from separate funds if an employer qualifies for an accommodation.[172] Although a third party administrator technically uses separate funds, the third party administrator's net balance remains the same regardless of whether an employer receives an accommodation or not.

*2. Religious Self-Insured Employers*

Self-insured employer plans that qualify for a religious accommodation receive a windfall from the Federal Government. Self-insured plans or employer health insurance plans are plans in which the employer directly pays for its employees' health insurance claims through a facet of the Department of Labor's Employee Retirement Income Security Act (ERISA).[173] Unlike the insured plans, when a religious self-insured employer qualifies for the ACA's religious

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https://www.guttmacher.org/pubs/gpr/17/1/gpr170102.pdf ("By helping women avoid unintended pregnancies, public funding for contraceptive services in 2010 resulted in net public savings of $10.5 billion, or $5.68 for every dollar spent.") (summarizing findings from Jennifer J. Frost, Mia R. Zoina & Lori Frohwirth, *Contraceptive Needs and Services, 2010*, GUTTMACHER INST. (July 2013), http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf).

167. Sonfield, *supra* note 166, at 6.

168. *Id.*

169. *Risk Adjustment in Health Insurance, supra* note 156.

170. *Id.*

171. It is unclear from the information available if third party administrators profit from the lower adjusted risk and how much of the profits they must share under law with employers and employees through lower premiums. More than likely, everyone benefits from lower overall costs. What is clear, however, is that each woman employee's own risk decreases, so her personal premiums decrease, and likewise, so does the amount that the employer pays for her.

172. Exemptions and Accommodations in Connection with Coverage of Preventive Health Services, 45 C.F.R. §§ 147.131(c)(2) (West 2015); Accommodations in connection with coverage of preventative health services, 26 C.F.R. §§ 54.9815-2713A(c)(2) (West 2015).

173. Accommodations in Connection with Coverage of Preventive Health Services, 29 C.F.R. §2590.715–2713A(b) (West 2015).

accommodation, the burden falls on an outside third party administrator and the Federal Government to pay for the employees' contraceptives.[174]

In this schema, the self-insured employer must file the self-certification form, EBSA Form 700, with a third party administrator or give HHS notice that it qualifies for a religious accommodation.[175] Once the Federal Government receives notice of the employer's religious objection to contraceptives, the Federal Government then contracts with a third party administrator to provide contraceptive coverage for the religious employer's employees.[176] The third party administrator does not pay for any other medical services nor does the third party administrator receive the actuarial benefits from providing contraceptive coverage to the religious employer's employees.[177] Instead, the third party administrator provides the religious self-insured employer's employee with contraceptives -- coverage the third party administrator would not normally supply -- in order to accommodate the religious self-insured employer.[178] The third party administrator bears the upfront costs for the contraceptives, but the Federal Government reimburses the third party administrator the next year with readjusted user fees or Federally-facilitated Exchange Fees (FFE).[179] Thus, in large part, the Federal Government pays for accommodating religious self-insured employers.[180]

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174. *Id.*

175. *Id.*; *see* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (Aug. 27, 2014) (amending 29 C.F.R. §2590.715-2713A as an interim final rule to bypass filing the EBSA 700 form and instead allows a self-insured employer to directly submit notice of religious accommodation eligibility to HHS pursuant to the Supreme Court's directive in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014)).

176. *See* Marty Lederman, *Unpacking the Forthcoming RFRA Challenge*, BALKANIZATION (July 18, 2014), http://balkin.blogspot.com/2014/07/unpacking-forthcoming-rfra-challenges.html.

177. *Id.* ("For one thing, the TPA, unlike the issuer of an insured plan, will be doing something it would *not* have done but for the employer's opt-out—namely, make reimbursements for claims with its own funds, something that would *not* have occurred if the employer did not opt out.").

178. *Id.*

179. Financial Support, 45 C.F.R. 156.50(d)(2)(i)(West 2016). Since there is up to a yearlong waiting period before the Government reimburses the third party administrator, the third party administrator loses money. Over time, money becomes less valuable *noted in A Primer on the Time Value of Money*, N.Y.U. STERN SCH. BUS., http://pages.stern.nyu.edu/~adamodar/New_Home_Page/PVPrimer/pvprimer.htm (last visited Dec. 19, 2014). The Government does not reimburse the third party administrator with interest so the reimbursement the third party administrator receives is not interest adjusted, and thus, third party administrators lose money. *See* Financial Support, 45 C.F.R. 156.50(d)(2)(i)(West 2016).

180. Lederman, *supra* note 176.

Religious self-insured employers and employees benefit monetarily when the Federal Government pays for an employee's contraceptives.[181] While religious employers' self-insured plans do not have to pay for the employees' contraceptives, the self-insured plan and employees receive the actuarial benefits including fewer pregnancies and increased utilization of preventive services.[182] The employee should see lower premiums and the religious employer's self-insured plan will likely experience increased profits with the decrease in actuarial risk. Thus, employers and employees profit from the religious accommodation at the expense of the Federal Government.[183]

*3. Other Medical Services May Cost Taxpayers*

The dissent in *Hobby Lobby* raises the concern that, as a result of *Hobby Lobby*, employers could start seeking religious accommodations for a variety of different services, such as blood transfusions and vaccines.[184] The worry is that if employers opt out of providing contraceptives, religious employers could seek accommodations for other services and leave the tab with the Federal Government.[185] However, it is unclear what the likely effect of *Hobby Lobby* will be on other services given the alleged narrowness of the opinion.[186] For most medical services, courts will likely find that the high costs of the medical services will be too burdensome for third party administrators or the Federal Government to fund without an employer contribution. Nevertheless, it is ultimately unclear how much money is too much for third party administrators and the Federal Government to spend since *Hobby Lobby* failed to consider contraceptive costs that religious self-insured employers impose on the Federal Government.[187] The largest area of concern will likely be other preventive services that can fit perfectly into the ACA's religious accommodation framework. While this is most likely not a problem for a majority of the ACA's preventive services, it

181. *Id.*

182. Sonfield, *supra* note 166, at 5.

183. When employers self-insure, they do not pay premiums insofar as they are the ones paying for the insurance and operate as a third party administrator. Employees should also see reduced premium rates since their premiums should reflect the actuarial risk adjustment. Whether employees actually benefit through lower premiums depends on the insurance schema.

184. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2802, 2805 (2014). (Ginsburgh, J., dissenting).

185. *Id.* at 2802 ("And where is the stopping point to the "let the government pay" alternative?").

186. *Id.* at 2782-83 (majority opinion).

187. *Id.*

could lead to some strange results -- religious accommodations for vaccinations.

*a. Non-Preventive Medical Services*

Like in *Hobby Lobby*, in order for a religious employer to qualify for the religious accommodation, they must demonstrate that their free exercise of religion is substantially burdened.[188] HHS must then show that the burden on the employer's religion serves a compelling governmental interest and is enforced by the least restrictive means.[189] Even if religious employers could show that paying for a medical service substantially burdens their religious exercise, they probably could not show that the burden on their religion outweighs a compelling governmental interest by the least restrictive means. However, the *Hobby Lobby* decision makes it unclear whether cost plays a central role in the Court's analysis.

First, in almost all medical cases, even if religious employers could show that a medical service substantially burdened their religious beliefs, the Government would be able to show a compelling governmental interest in order to require the religious employer to fund the employee's medical care.[190] In *Hobby Lobby*, contraceptive care represented HHS's promotion of preventive services and gender equality.[191] Preventive care services are important because it reduces health care costs and creates a healthier society.[192] The current healthcare paradigm shifted in the past few decades from treating individuals after they became ill to preventing illness and malady before it occurs.[193] Contraceptive care plays an integral role in promoting women's health so that women can mitigate menstrual related problems as well as plan pregnancies.[194] Women's health closely connects with the ongoing dialogue about women's rights

188. *Id.* at 2760-61.

189. *Id.* (citing Religious Freedom Restoration Act, 42 U.S.C.A. §2000bb-1(a), (b) (West 2015)).

190. *Id.*

191. *Id.* at 2779-80.

192. *National Prevention Strategy: America's Plan for Better Health and Wellness,* CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/features/preventionstrategy/ (last visited Oct. 17, 2015).

193. Steven H. Woolf & David Atkins, *The Evolving Role of Prevention in Health Care*, AM. J. PREVENTIVE MED., http://archive.ahrq.gov/clinic/ajpmsuppl/woolf1.htm (last visited Dec. 25, 2015).

194. Mayo Clinic Staff, *Birth Control Pill FAQ: Benefits, Risks and Choices: Get the Facts about Common Concerns and Questions about Birth Control Pills*, MAYO CLINIC (May 21, 2013), http://www.mayoclinic.org/healthy-living/birth-control/in-depth/birth-control-pill/art-20045136.

and equality in the workforce and the doctor's office.[195] HHS decided that contraceptives promote women's preventive health and gender equality, and thus, should receive high priority.[196] Although the ACA accommodates religious employers that object to contraceptives, it ensures that all employees, aside from those working for churches, receive contraceptive care without paying anything out of pocket to protect both the employer's religious liberty and HHS's promotional objectives.[197]

Although *Hobby Lobby* was a unique case insofar as it promoted preventive care and gender equality, there are other compelling governmental interests that the courts will likely try to protect.[198] In many cases, the Government can claim that medical necessity is the primary interest. Blood transfusions, open-heart surgery, etc., could mean life or death for many patients, and thus, the courts would likely consider medical necessity a compelling governmental interest strong enough to outweigh the substantial burden on an employer's religion.

Second, the religious employer, in most circumstances, will not be able to show that there are least restrictive ways for HHS to accommodate their religion. Religious employers will likely request that they, like the Hahns and Greens in *Hobby Lobby*, should have third party administrators cover the full costs of a certain medical service without cost sharing with them.[199] However, without religious employers paying their fair share of their employee's medical bills for the objected-to service, a heavy burden falls on third party administrators and the Federal Government (for self-insured plans) who then have to pay for most, if not all of, the employee's medical costs.[200] The Court would

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195. Sarah Lipton-Lubet, *Promoting Equality: An Analysis of the Federal Contraceptive Coverage Rule*, ACLU (Oct. 2012), https://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf ("With contraception, women have greater opportunities to finish school, pursue higher education, advance in the workplace, have healthier pregnancies and infants, and create and nurture families in sizes that work for them.").

196. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2779 (2014).

197. *Id.* at 2782-83; *compare* Exemption and accommodations in connection with coverage of preventive health services, 45 C.F.R. §§ 147.131(b)(4), (c)(1) (West 2016) *and* Accommodations in connection with coverage of preventive health services, 26 C.F.R. §§ 54.9815–2713A(a)(4), (b) (West 2016) *with* Coverage, 29 U.S.C.A. § 1003(b)(2) (West 2015). Church plans are exempt from complying with the contraceptive mandate or religious accommodation.

198. *Hobby Lobby*, 134 S. Ct. at 2782-83.

199. *Id.*

200. In many health insurance plans, employees must pay a co-pay or a deductible with the third party administrator and employer sharing the costs of the rest of the bill. *See 6 Things to know about deductibles in the Health Insurance Marketplace*,

likely distinguish *Hobby Lobby* from other medical services since the contraceptive costs in *Hobby Lobby* could be offset through actuarial risk adjustment.[201]

In the alternative, religious employers could argue that third party administrators or the Federal Government need not pay for the employee's objectionable medical service at all; the employee can pay for the total cost of the procedure or prescription out of his/her pocketbook. Nevertheless, the underlying purpose of the ACA was originally to make affordable healthcare available to all individuals and alleviate the burden the health system places on individuals.[202] Depending on the case, the Court will likely find that, for policy reasons, it is unconscionable not to provide medical services, especially those that are medically necessary.[203] However, the Court in *Hobby Lobby* did not seriously consider the costs, so who knows?

*b. Preventive Medical Services: Vaccinations*

Preventive medical services most likely fit into the ACA's religious accommodation framework, and so, the courts will probably have to accommodate the religious employer's accommodation request.[204] The ACA requires that all health insurance plans provide preventive services at no cost to individuals.[205] Most of the services include screenings and requirements for pediatric/prenatal care.[206] The majority of services offered will never cause any religious controversy. However, one of the services offered might develop into a lawsuit -- vaccinations.[207] Starting almost from the inception of vaccinations, various religious groups have objected to compulsory vaccination laws.[208] Currently, HHS does not

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HEALTHCARE.GOV BLOG (Jan. 28, 2014), https://www.healthcare.gov/blog/6-things-to-know-about-deductibles-in-the-health-insurance-marketplace/.

201. *Hobby Lobby*, 134 S. Ct. at 2782-83.

202. *Health Care that Works for Americans*, WHITEHOUSE.GOV, http://www.whitehouse.gov/healthreform/healthcare-overview (last visited Dec. 20, 2014).

203. *Hobby Lobby*, 134 S. Ct. at 2782-83.

204. *Preventive Health Services for Adults*, HEALTHCARE.GOV, https://www.healthcare.gov/preventive-care-adults/ (last visited Oct. 17, 2015).

205. *Id.*

206. *Id.*

207. *The Affordable Care Act and Immunization*, HHS.GOV/HEALTHCARE (Sept. 14, 2010), http://www.hhs.gov/healthcare/facts/factsheets/2010/09/The-Affordable-Care-Act-and-Immunization.html.

208. John D. Grabenstein, *What the World's Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011, 2013-17 (2013), http://childrenshealthcare.org/wp-content/uploads/2012/01/Vaccine-Grabenstein-

exempt or accommodate religious employers who object to funding vaccines for their employees.[209]

While no vaccination lawsuits are currently pending or even threatened, the issue could arise in the future. The analysis for an employer potentially raising a religious objection to mandatory vaccination requirements under the ACA closely matches the Supreme Court's analysis of why Hobby Lobby qualified for a religious accommodation from the contraceptive mandate. Assuming that a religious employer can show that vaccinations substantially burden a sincerely held religious belief, then the religious employer can most likely meet RFRA's least restrictive means test in order to defeat HHS's compelling governmental interest for supplying free vaccinations to all individuals.

First, HHS will most likely be able to show a compelling governmental interest in offering vaccinations without cost sharing.[210] HHS argued in *Hobby Lobby* that it had a compelling governmental interest in promoting preventive health services that encouraged gender equality.[211] Likewise, vaccinations eradicated some of the world's most deadly and easily transferrable diseases from the nineteenth and twentieth centuries.[212] Because of the great benefits vaccinations conferred, HHS added vaccinations to the list of services health insurance plans must provide without cost sharing to individuals.[213] Therefore, HHS can show a compelling governmental interest in providing vaccines without cost sharing to a religious employer's employees.

Second, HHS could adopt a religious accommodation program for vaccinations similar in design to the ACA's religious accommodation

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article.pdf (discussing various religious groups' objections to vaccinations since the first smallpox vaccination created 1796).

209. Exemptions and Accommodations in Connection with Coverage of Preventive Health Services, 45 C.F.R. §§ 147.131(b)(4), (c)(1) (West 2016); Accommodations in connection with coverage of preventive health services, 26 C.F.R. §§ 54.9815-2713A(a)(4), (b) (West 2016).

210. *The Affordable Care Act and Immunization*, *supra* note 207; *see generally* Steve P. Calandrillo, *Vanishing Vaccinations: Why are so Many Americans Opting Out of Vaccinating their Children?*, 37 U. MICH. J.L. REFORM 353 (2004) (analyzing the effect of religious and other exemptions on public health); *see also* Hope Lu, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869 (2013) (discussing whether states must provide religious exemptions for vaccinations and the Government's interest in protecting public health).

211. *Hobby Lobby*, 134 S. Ct. at 2779-80.

212. *What Would Happen If We Stopped Vaccinations?*, CDC, http://www.cdc.gov/vaccines/vac-gen/whatifstop.htm (last visited Dec. 24, 2015).

213. *The Affordable Care Act and Immunization*, *supra* note 207.

program for contraceptives to allow employers to exercise their religion by the least restrictive means. The ACA requires that employers and third party administrators offer vaccination options with no employee cost sharing.[214] Third party administrators, similar to contraceptives, could offer vaccination services without any costs to the religious employer since third party administrators can offset the vaccination costs through their actuarial calculus.[215] Vaccinations, which cost relatively little, prevent members from contracting serious, costly illnesses, and hence, save third party administrators from paying for more expensive medical treatments down the road.[216] This is analogous to how contraceptives prevent women from becoming pregnant, which costs third party administrators more in prenatal and childcare.[217] Therefore, similar to contraceptives, third party administrators could accommodate religious employers without incurring any additional costs. Nevertheless, like contraceptives, the Federal Government will have to pay for religious self-insured employer's employee's vaccinations. Because the Court never addressed the costs of religious self-insured employers on the Government, it is unclear how the courts would decide this question if it were brought up in a vaccination accommodation case.

Since vaccinations fit into the *Hobby Lobby* framework, it begs the question if *Hobby Lobby* was truly as narrow of a ruling as Justice Kennedy claims.[218] Preventive services, such as vaccines, reduce the risk of serious future illnesses.[219] Thus, the reasoning of *Hobby Lobby* can apply for each preventive service. However, it is highly unlikely any employer will object on religious grounds to their employees receiving colorectal cancer screenings and the like. In addition, the Court will likely find that high cost services (e.g., open-heart surgery) cannot be analyzed with the *Hobby Lobby* framework since the health care burden on society would far outweigh any religious burden. Yet, for religious

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214. *Id.*

215. *Risk Adjustment in Health Insurance*, *supra* note 156.

216. Calandrillo, *supra* note 210, at 369 ("The benefits have been remarkable: millions of deaths have been prevented, millions more lives markedly improved, and billions of dollars of societal resources have been saved for use in countless other valuable endeavors.").

217. Sonfield *supra* note 166, at 5; James Trussell et. al. *Cost Effectiveness of Contraceptives in the United States*, 79(1) CONTRACEPTION 5 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3638200/.

218. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) ("At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.").

219. *Vaccines and Preventable Diseases*, CTR. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vaccines/vpd-vac/default.htm (last visited Feb. 23, 2014).

self-insured employers receiving a religious accommodation with Federal Government funds, it is unclear when a service is too expensive to warrant an accommodation.

*4. Concluding Remarks on Whether* Hobby Lobby *Offers a Cost-Neutral Solution*

The *Hobby Lobby* Court assumed that the ACA's religious accommodation was cost-neutral since it never analyzed the costs of the program.[220] Under the ACA's religious accommodation, religious self-insured employers do not have to pay for contraceptives, so the burden falls on the Federal Government to pay for it. The ACA's religious accommodation's framework could extend to other medical services and potentially cost the Federal Government more in taxpayer dollars.

HHS found that when it issued the final rule to accommodate religious self-insured employers from the contraceptive mandate that the accommodation would not incur over $100 million in costs, so it does not have a significant economic impact on the Federal Government.[221] Yet, the *New York Times* reported in 2012 that over sixty percent of all workers nationwide belong to a self-insured employer, and that number is even higher for large employers.[222] The percentage of religious self-insured employers likely mirrors the national average, so taxpayers could end up paying for many employers' religious exercise.[223] HHS also acknowledged in its final rule that third party administrators would incur costs as a result of providing contraceptive coverage to religious self-insured employers.[224] In order to solve the problem, HHS placed the burden on third party administrators to collect the FFE from the Government or else find other means of making up the difference.[225] In future ACA religious accommodation cases, the costs of accommodating religious self-insured employers should be discussed pursuant to RFRA's compelling governmental interest test. Weighing the dollar amounts will be especially important if additional services become part of the ACA's

220. *See Hobby Lobby*, 134 S. Ct. at 2781.

221. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-01, 39889 (July 2, 2013) (citing Exec. Order 12866).

222. Katie Thomas, *Self-Insured Complicate Health Deal*, N.Y. TIMES (Feb. 15, 2012), http://www.nytimes.com/2012/02/16/business/self-insured-complicate-health-deal.html?_r=0 (citing the Kaiser Family Foundation's annual survey of employer health benefits).

223. *Id.*

224. 78 Fed. Reg. 39870-01, 39878.

225. *Id.*

religious accommodation because it might become difficult to draw the line and determine how much money is too much.

## IV. CONCLUSION

The *Hobby Lobby* decision redefined who qualifies as a religious person when it allowed religious for-profit employers to participate in the ACA's religious accommodation.[226] *Hobby Lobby* fits squarely with prior religious liberty court decisions that determine: 1) to what extent is the Government required to relieve a substantial burden on a religious entities free exercise of religion, and 2) how much money should the Federal Government allocate for religious accommodations?[227] *Hobby Lobby* likely answers the first question that the Federal Government should accommodate religious employers who do not want to pay for their employees' contraceptives. The Court paid lip service to the second consideration of how much the accommodation costs. The Court considered whether the ACA's religious accommodation is cost-neutral but does not discuss the burden on taxpayers with regards to religious self-insured employers or the possible costs that could arise with adding additional medical services to the ACA's religious accommodation.

In failing to address the ACA's religious accommodation head on, the Supreme Court lost an important aspect in its RFRA analysis -- cost. Without addressing the cost of religious self-insured employers, determining the reach and predictability of the ACA's religious accommodation may prove difficult especially if religious employers seek an accommodation for medical services other than contraceptives. Perhaps the Supreme Court will address how far the religious accommodation should extend and at what cost in its *Zubik v. Burwell* decision.

226. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2782-83 (2014).

227. *See generally* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (Aspen Publishers, 3d ed. 2011).