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Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination

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RACE, RELIGION, AND RFRA: THE IMPLICATIONS OF *BURWELL V. HOBBY LOBBY STORES, INC.* IN EMPLOYMENT DISCRIMINATION

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TABLE OF CONTENTS

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INTRODUCTION

The recent Supreme Court case, *Burwell v. Hobby Lobby Stores, Inc.*,[1] sparked one of the most controversial legal debates of the 2014 term—whether for-profit, nonreligious corporations could bring a claim under the Religious Freedom Restoration Act (RFRA)[2] that would exempt them from the Affordable Care Act's contraceptive mandate,[3] allowing them to refuse to provide certain forms of contraception to their female employees. When the Supreme Court ruled that these corporations could refuse,[4] advocates for reproductive freedom called it disastrous, while their opponents hailed it as a victory for religious freedom.[5]

The Religious Freedom Restoration Act,[6] passed in 1993 and revised in 2000 alongside passage of the Religious Land Use and

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

2 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

3 45 C.F.R. § 147.131 (2014).

4 *Hobby Lobby*, 134 S. Ct. at 2785.

5 *See* Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155–156 (2014). *See also* Binyamin Appelbaum, *They're Not Like You and Me*, N.Y. TIMES, July 27, 2014, § MM (Magazine), at 14; Eliana Dockterman, *5 Things Women Need to Know About the Hobby Lobby Ruling*, TIME (July 1, 2014), http://time.com/2941323/supreme-court-contraception-ruling-hobby-lobby; Dr. Robert Jeffress, Opinion, *Hobby Lobby Ruling: Why Supreme Court Got it Right*, FOX NEWS (June 30, 2014), http://www.foxnews.com/opinion/2014/06/30/hobby-lobby-ruling-why-supreme-court-got-it-right.

6 42 U.S.C. §§ 2000bb–200bb-4.

Institutionalized Persons Act (RLUIPA),[7] allows parties whose exercise of religion is substantially burdened by federal law to claim exemption from those laws. Congress asserted that RFRA was intended to provide very broad protection of religious liberty.[8] Several states have also passed their own versions of RFRA to provide religious exemptions to state law.[9] However, broad religious freedom can be dangerous when it insulates political dissenters from antidiscrimination laws. When the corporations in *Hobby Lobby* denied certain contraceptives to their female employees based on their religious beliefs,[10] the result was that women would have to pay for contraception out-of-pocket, unless Congress enacted new legislation to cover these costs.[11]

The Supreme Court's interpretation of RFRA as applied to "closely held, for-profit corporations" has the potential to provide similar sweeping exemptions to neutral, generally applicable laws for businesses that object on religious grounds. While the current cultural and political atmosphere is familiar with the conflicts between religion and sexual liberty (including reproductive rights and LGBT rights), the *Hobby Lobby* case also has unsettling implications for anyone who might face discrimination from an employer, even if federal or state laws forbid it. Despite the majority's assertion that race discrimination, disguised as religious belief, would not be permitted under RFRA, the Court's reasoning granting a religious exemption from the contraception mandate may permit such claims. This Note will consider these very real implications.

This Note argues that an employer who wishes to discriminate in hiring based on race—despite contrary federal law[12]—can easily state a claim under the federal or a state RFRA. The plaintiff's prima facie case will be satisfied if its beliefs are sincere, religiously motivated, and substantially burdened by antidiscrimination laws.[13] This Note also argues that even if the government has a compelling interest in preventing discrimination against employees, in light of

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7 § 2000cc–2000cc-5.

8 *Hobby Lobby*, 134 S. Ct. at 2760–61.

9 Marci A. Hamilton, *Here is What is Happening in Your State*, RFRA PERILS, http://www.rfraperils.com (last visited Feb. 23, 2016).

10 *Hobby Lobby*, 134 S. Ct. at 2755.

11 While the majority in *Hobby Lobby* stated that the government could choose to pay for the employee's contraception as an alternative to burdening the corporation's exercise of religion, the Court only held that the contraceptive mandate was unconstitutional as applied to the companies; it did not mandate that the coverage be provided by the government. *Id.* at 2781–82.

12 *See* § 2000e–2000e-17.

13 § 2000bb-1; *accord Hobby Lobby*, 134 S. Ct. at 2774.

the Court's ruling in *Hobby Lobby*, the RFRA claimants will still be granted an exemption.

This Note will proceed in four parts. Part I will discuss the prevalence of white separatist beliefs in the United States and their ties to religious belief, demonstrating the realistic possibility of white separatist business owners as RFRA claimants. Part II will detail the Court's most recent interpretation of RFRA in *Burwell v. Hobby Lobby*, and the framework the Court provided for analyzing future RFRA claims involving discrimination by for-profit corporations. Part III will provide an analysis of the likelihood that white separatists' claims for an exemption to federal antidiscrimination laws would succeed under RFRA and *Hobby Lobby*. In Part IV, this Note will propose an amendment to state RFRAs that would prohibit exemptions that discriminate against employees in violation of state antidiscrimination laws. Such an amendment would be a first step in preventing further harm to employees on the basis of religion, and an important acknowledgment of the damage that limitless religious liberty can do.

I. THE PREVALENCE OF WHITE SEPARATISM AND WHITE NATIONALISM IN THE UNITED STATES

White separatists, also referred to as white nationalists, espouse the belief that nations should be racially homogenous.[14] In the United States, for instance, white separatists assert that America was founded on, and should be guided by, a white racial identity.[15] The essence of white separatism in America is based on the belief that America is a white country, and gains its values, traditions, and culture from its European heritage; therefore, "multiculturalism, immigration and racial diversity fundamentally threaten America's future."[16] There are many organizations currently in existence in the United States that express white supremacist and white

14 Daniel Levitas, *The White Nationalist Movement*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/ideology/white-nationalist/the-white-nationalist-movement [http://web.archive.org/web/20150304103937/https://www.splcenter.org/get-informed/intelligence-files/ideology/white-nationalist/the-white-nationalist-movement].

15 *Id.* It bears noting that there are also black separatist and black supremacist groups, often based on pieces of various religions, who similarly oppose desegregation and association between different races. ARTHUR GOLDWAG, THE NEW HATE: A HISTORY OF FEAR AND LOATHING ON THE POPULIST RIGHT 298–303 (2012).

16 Levitas, *supra* note 14. *See generally* BETTY A. DOBRATZ & STEPHANIE L. SHANKS-MEILE, "WHITE POWER, WHITE PRIDE!" THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES (1997).

nationalist views.[17] These labels are umbrella terms that encompass a wide range of groups[18] that believe not only in the need for national separation of races, but also in white superiority—including the Ku Klux Klan,[19] neo-Confederates,[20] neo-Nazis,[21] racist skinheads,[22] and Christian Identity.[23] Alternatively, many white separatist groups do not openly espouse white supremacist views; rather, they base their rhetoric in claims of love for their own race, as opposed to hatred of others.[24] However, while the methodologies employed by these groups in expressing their views may be different,[25] ranging from militant to academic, they share the belief that America should not be racially diverse, and that association between races is wrong.[26]

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17 Some white separatists and their organizations have tried to rebrand white separatism as something distinct and separate from white supremacism. DOBRATZ & SHANKS-MEILE, *supra* note 16, at 97. However, white separatists who believe in a white nation might believe in it because they believe it is natural for races to be grouped together, or because they believe whites are the superior race. *Id.* at 91. In this Note, when the term "white separatist" is used, it encompasses all variations of these beliefs, which share at their core that government-mandated desegregation and any law that promotes "racial mixing" is wrong.

18 *Id.* at 34 ("Memberships in these groups overlap considerably, and some prominent figures have been involved in some groups and then have moved on to others or created their own groups.").

19 David Chalmers, *The Ku Klux Klan*, S. POVERTY L. CTR. (Jan. 25, 2010), http://www.splcenter.org/get-informed/intelligence-files/ideology/ku-klux-klan/the-ku-klux-klan-0.

20 Euan Hague, *The Neo-Confederate Movement*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-confederate/the-neo-confederate-movement [https://web.archive.org/web/20150731165933/http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-confederate/the-neo-confederate-movement].

21 Frederick J. Simonelli, *The Neo-Nazi Movement*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-nazi/the-neo-nazi-movement [https://web.archive.org/web/20150325070139/http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-nazi/the-neo-nazi-movement].

22 Randy Blazak, *The Racist Skinhead Movement*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/ideology/racist-skinhead/racist-skinheads [https://web.archive.org/web/20150420052717/http://www.splcenter.org/get-informed/intelligence-files/ideology/racist-skinhead/racist-skinheads].

23 *Christian Identity Movement Spreads Race-Hate*, S. POVERTY L. CTR. (Mar. 15, 1998), https://www.splcenter.org/fighting-hate/intelligence-report/1998/christian-identity-movement-spreads-race-hate.

24 MATTIAS GARDELL, GODS OF THE BLOOD: THE PAGAN REVIVAL AND WHITE SEPARATISM 69 (2003) ("[W]hite racists . . . adopt an underdog position. In the mental universe of Aryan revolutionaries, whites are the bottom rung of society . . . . [A]n oppressed minority, systematically reduced to second-rate citizens."); DOBRATZ & SHANKS-MEILE, *supra* note 16, at 156 ("Parts of the movement have tried to redefine their public image so they would be perceived as working for the best interests of white civilization.").

25 *White Nationalist*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist (last visited Feb. 28, 2015) ("These groups range from those that use racial slurs and issue calls for violence to others that present themselves as serious, non-violent organizations and employ the language of academia.").

26 *Id.*

The separatist belief that America was founded as an all-white nation and should be governed as such is inextricably tied to a central belief that America was founded as, and should remain, a Christian country.[27] The Council of Conservative Citizens (CCC), currently the largest and most prominent separatist group in America,[28] puts its Christian faith first in its Statement of Principles.[29] While this first Principle makes no overt reference to race, the separatist claim to a homogenous culture in America is echoed in its second Principle, which asserts European culture as the supreme culture of America.[30] The CCC views an ideal America as one that practices solely Christian traditions, necessarily tied to white racial tradition. These two Principles together shape its ideal view of a homogenous racial and religious country.[31]

The link between religion and white separatism has even been demonstrated in United States jurisprudence. In *Loving v. Virginia*,[32] a black woman and white man were prosecuted under a Virginia law banning interracial marriages. On appeal, the United States Supreme Court held all bans on interracial marriage unconstitutional, as their only purpose was illegitimate—namely "to maintain White Supremacy."[33] As evidence, the Supreme Court quoted the ruling of the trial judge, which stated:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[34]

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27 *Council of Conservative Citizens*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/groups/council-of-conservative-citizens (last visited Feb. 26, 2016) (quoting the organization's website from 2001, stating that "God is the author of racism").

28 *White Nationalist*, *supra* note 25. The Council of Conservative Citizens is a modern version of the White Citizen's Councils that strongly opposed integration. DOBRATZ & SHANKS-MEILE, *supra* note 16, at 42.

29 *Statement of Principles*, COUNCIL OF CONSERVATIVE CITIZENS, http://conservative-headlines.com/introduction/statement-of-principles (last visited Feb. 26, 2016) ("We believe that the United States of America is a Christian country, that its people are a Christian people, and that its government and public leaders at all levels must reflect Christian beliefs and values. We therefore oppose all efforts to deny or weaken the Christian heritage of the United States . . . .").

30 *Id.* ("We believe that the United States derives from and is an integral part of European civilization and the European people and that the American people and government should remain European in their composition and character.").

31 *Id.*

32 388 U.S. 1 (1967).

33 *Id.* at 11.

34 *Id.* at 3.

Additionally, in some branches of white separatism, their justification for the need for racial segregation comes from a revisionist interpretation of Christian texts.[35] Christian Identity, a white separatist group formed in the 1980s, promotes the theory that Christian mythology only referred to the white race.[36] Similarly, the neo-Confederate movement argues that racial hierarchies are ordained by God and that racism is not mentioned as a sinful act in the Bible; therefore, it is unproblematic.[37] More recently, there have been various white separatist groups identifying with non-monotheistic religions, including Wicca and Norse mythology.[38]

White separatism is not merely a fringe theory of the radical far right in current American culture.[39] Participants in these groups do not merely come from certain states, family backgrounds, or economic classes.[40] According to the Southern Poverty Law Center, as of the end of 2015 there were 115 active chapters of identified white separatist groups in the United States.[41] These groups span the entire country, including thirty-three states and the District of Columbia.[42] The CCC, the most widespread group, has twenty-three active chapters.[43]

One of the central beliefs of white separatist groups is that the federal government in the twentieth and twenty-first centuries unfairly imposed, and continues to impose, a forced acceptance of

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35 *See, e.g.*, *Christian Identity Movement Spreads Race-Hate*, *supra* note 23.

36 GARDELL, *supra* note 24, at 119 (stating that God created the races separately, and the story in the book of Genesis about the creation of Adam told only the story of the creation of the white race); *Christian Identity Movement Spreads Race-Hate*, *supra* note 23. These beliefs have been incorporated into many different types of white separatist groups as religious justification for their beliefs; DOBRATZ & SHANKS-MEILE, *supra* note 16, at 73–74 ("[T]he 'novel religious character' of much of the current movement is rooted in the 'Christian Identity' religious position . . . [that is] the 'uniting force among many white supremacist groups.'"). *See also* MICHAEL BARKUN, RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT 103–19 (1994).

37 Hague, *supra* note 20.

38 *See generally* GARDELL, *supra* note 24.

39 Levitas, *supra* note 14. In 2013, the Southern Poverty Law Center counted about 50,000 Christian Identity adherents, 163 chapters of the Ku Klux Klan, and forty-seven chapters of the CCC or the American Freedom Party. Mark Potok, *The Year in Hate and Extremism*, S. POVERTY L. CTR. (Feb. 25, 2014), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2014/spring/The-Year-in-Hate-and-Extremism.

40 GARDELL, *supra* note 24, at 328–34.

41 *Active White Nationalist Groups*, S. POVERTY L. CTR. (March 2, 2015), http://www.splcenter.org/get-informed/intelligence-files/ideology/white-nationalist/active_hate_groups. New York currently has the most chapters of various white nationalist organizations, at nine. *Id.* Mississippi is second with eight. *Id.*

42 *Id.*

43 *Id.* (showing four chapters in Alabama and Mississippi, two in Tennessee, Missouri, and New York, and one in Ohio, North Carolina, Florida, Georgia, Maryland, Pennsylvania, Oregon, South Carolina, and Washington, D.C.).

racial diversity in America that threatens the future of their ideal all-white culture.[44] The movement's revival was largely in response to the advancement of civil rights for racial minorities in the United States, including desegregation and the Civil Rights Act.[45] The CCC is a new incarnation of White Citizens Councils that opposed desegregation and increased civil rights for minorities,[46] with their Second Principle specifically condemning legal doctrines of the civil rights era as a threat to America's white heritage.[47] Suspicion of the federal government and disdain for mid-twentieth-century civil rights legislation is a unifying factor among many different branches of white separatism, including the CCC, Christian Identity branches,[48] and the Survivalist movement.[49]

Affirmative action laws and Title VII, laws created by the 1964 Civil Rights Act,[50] are favorite targets for white separatist groups to demonstrate the federal government's "wrongful" attempts to destroy the superior racial influence of whites.[51] The CCC also

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44 Levitas, *supra* note 14.

45 *Id.* One of the most influential founders of Christian Identity, Wesley Swift, was quoted as saying, "if you believe the Bible, you are going to be a segregationist." DOBRATZ & SHANKS-MEILE, *supra* note 16, at 75. Dobratz and Shanks-Meile also note that "[m]ajor racial concerns of the white separatists include the perceived threats from intermarriage . . . and the loss of jobs to minorities." *Id.* at 114 (footnote omitted).

46 Levitas, *supra* note 14. Dobratz and Shanks-Meile argue that the influence of white separatist organizations "was limited until the civil rights movement grew in strength." DOBRATZ & SHANKS-MEILE, *supra* note 16, at 42. After the Supreme Court ruled to desegregate public schools in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), "White Citizens Councils were formed and the Klans grew as well." DOBRATZ & SHANKS-MEILE, *supra* note 16, at 42. These Councils "[o]rganiz[ed] the 'better element' of 'decent' and 'solid' southern racists, [and] the movement spread rapidly . . . . [A]imed at overturning the Brown decision and defending . . . racial segregation." GARDELL, *supra* note 24, at 46.

47 *Statement of Principles*, *supra* note 29 ("We also oppose all efforts to mix the races of mankind, to promote non-white races over the European-American people through so-called 'affirmative action' and similar measures, to destroy or denigrate the European-American heritage, including the heritage of the Southern people, and to force the integration of the races.").

48 BARKUN, *supra* note 36, at 200 ("Christian Identity . . . campaigns to bring the American legal system into conformity with laws spelled out in the Bible and to garner support for political candidates whose positions are deemed compatible with Identity views . . . [and] develop[s] local political groups as an expression of the radical right's frequently expressed view that only local political institutions are legitimate.").

49 *See generally* JAMES COATES, ARMED AND DANGEROUS: THE RISE OF THE SURVIVALIST RIGHT (3d ed. 1995).

50 Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000h-6 (2012).

51 *See, e.g.*, Lawrence Auster, *Why the 1964 Civil Rights Act Has Been Terrible For America!*, COUNCIL OF CONSERVATIVE CITIZENS (May 26, 2010, 10:11 AM), http://www.conservative-headlines.com/2010/05/why-the-1964-civil-rights-act-has-been-terrible-for-america; *Platform*, THE AM. FREEDOM PARTY, http://american3rdposition.com/?page_id=9184 (last visited Feb. 26, 2016) (advocating to "[r]eturn to Americans their traditional right of freedom of association, including freedom in racial matters, along with the abolishment of all forms of government- and corporate-mandated racial discrimination and racial preferences, such as affirmative action, quotas, and all forms of 'sensitivity

asserts that the federal government has overstepped its constitutional boundaries by passing "hate crime" laws, promoting "sensitivity training" in businesses and schools, and forcing the "radical indoctrination" of children in public schools through "'Afrocentric' curricula."[52] Generally, any legislation that allows or encourages diversity or threatens entrenched white racial privilege is of particular offense to white separatists.[53]

A renewed focus on white separatism occurred in the late 1990s, when numerous politicians were revealed to have ties to influential separatist groups.[54] The CCC's website boasts that they are the "[o]nly group advocating for 'white rights' that attracts elected figures as speakers."[55] Recently, House Majority Whip Steve Scalise[56] acknowledged speaking to the European-American Unity and Rights Organization (EURO),[57] a prominent white separatist group founded by former KKK leader David Duke.[58] The president of the CCC, Earl Holt III, contributed several thousand dollars to early 2016 Republican presidential candidates.[59] In light of the *Hobby Lobby* ruling, politically active groups such as the CCC—with strong religious convictions against civil rights laws—are likely to seek religious exemptions from antidiscrimination laws using the Religious Freedom Restoration Act.

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training'"). *See also* DOBRATZ & SHANKS-MEILE, *supra* note 16, at 232–37 (quoting David Duke, founder of the White Youth Alliance and the National Association for the Advancement of White People (NAAWP), who believed that affirmative action promoted an atmosphere of resentment and hatred toward whites).

52 *Statement of Principles*, *supra* note 29.

53 DOBRATZ & SHANKS-MEILE, *supra* note 16, at 150 ("The movement criticizes the U.S. government for a number of its policies, including affirmative action that denies jobs to white men, gun control legislation that takes away one's ability and right to protect oneself, the allowance of illegal immigrants to enter and stay in the United States, the legalization of abortion for white women, and the placement of federal guards at abortion clinics where white genocide is being practiced . . . .").

54 Levitas, *supra* note 14.

55 *More Info*, COUNCIL OF CONSERVATIVE CITIZENS, http://conservative-headlines.com/more-info (last visited Feb. 26, 2016). However, white separatists generally do not endorse the Republican party. GARDELL, *supra* note 24, at 67 ("[R]evolutionary ideologues typically denounce the conservative right wing as part of the problem, blinded by their patriotism to the 'fact' that the administration of the United States is a primary enemy of the white race.").

56 MAJORITY WHIP STEVE SCALISE, http://www.majoritywhip.gov (last visited Feb. 26, 2016).

57 Robert Costa & Ed O'Keefe, *House Majority Whip Scalise Confirms He Spoke to White Supremacists in 2002*, WASH. POST (Dec. 29, 2014), http://www.washingtonpost.com/politics/house-majority-whip-scalise-confirms-he-spoke-to-white-nationalists-in-2002/2014/12/29/7f80dc14-8fa3-11e4-a900-9960214d4cd7_story.html.

58 *EURO*, S. POVERTY L. CTR., http://www.splcenter.org/get-informed/intelligence-files/groups/euro (last visited Feb. 26, 2016).

59 Michael Wines & Lizette Alvarez, *Council of Conservative Citizens Promotes White Primacy, and G.O.P. Ties*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/2015/06/23/us/politics/views-on-race-and-gop-ties-define-group-council-of-conservative-citizens.html.

II. THE RELIGIOUS FREEDOM RESTORATION ACT AND *HOBBY LOBBY*

A. *The Free Exercise Clause and Passage of the Religious Freedom Restoration Act*

The Religious Freedom Restoration Act was a legislative response to the Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*,[60] which held that the Free Exercise Clause did not permit religious claimants to claim exemptions from neutral, generally applicable laws.[61] In *Smith*, claimants Alfred Smith and Galen Black were fired from their jobs at a drug rehabilitation center because they had used peyote during a ceremony at the Native American Church.[62] They were then denied unemployment benefits because Oregon law stated that employees fired for misconduct were not entitled to benefits.[63]

The U.S. Supreme Court upheld the criminalization of peyote and denial of unemployment benefits.[64] In doing so, it rejected the claimants' argument that neutral, generally applicable laws should be subject to a "compelling interest" test.[65] The Court also distinguished *Sherbert v. Verner*, pointing out that the religious claimant's desired exemption in that case (to not work on Saturday, Seventh-Day Adventists' Sabbath) was not illegal, unlike the use of peyote.[66]

After the *Smith* ruling, backlash from religious groups spurred Congress to pass RFRA—which condemned *Smith* for not applying a compelling interest standard[67]—creating a new path for religious claimants to seek exemption from neutral, generally applicable laws. RFRA requires that claimants make a prima facie case that a

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60 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015).

61 *Smith*, 494 U.S. at 879.

62 *Id.* at 874.

63 *Id.* The Oregon Department of Human Resources argued that because the use of peyote was a crime, the denial of benefits was permissible. *Id.* at 875. The religious claimants, citing the case Sherbert v. Verner, 374 U.S. 398, 403 (1963), argued that the government should have to prove a compelling interest in order to deny them the benefits. *Smith*, 494 U.S. at 882–83.

64 *Smith*, 494 U.S. at 890.

65 *Id.* at 884–85. Such a test would place the burden of proof on the government to prove that the law served a compelling interest in order to enforce a law that placed a burden on religious exercise. *Id.* at 885–86.

66 *Id.* at 884–85.

67 42 U.S.C. § 2000bb(a)(4) (2012) ("in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion").

law substantially burdens their religious exercise;[68] if they are able to do so, the burden shifts to the government to prove that the law serves a compelling governmental interest and is the "least restrictive means" of achieving that interest.[69]

B. *State Religious Freedom Restoration Acts*

In 1997, the Supreme Court held that RFRA was unconstitutional as applied to the states in *City of Boerne v. Flores*.[70] After the decision, states began to pass their own versions, and nineteen states currently have effective RFRA laws.[71] In these states, claimants can make the same type of challenge to state laws that was originally permitted under the federal RFRA.[72]

These state laws range from extreme versions of the federal law to somewhat more tempered versions. Many states have adopted a "standard" RFRA that closely (or exactly) mirrors the language of the federal RFRA.[73] However, some states have expanded their RFRAs to provide even more rigorous protection for religious claimants than the federal RFRA.[74] For example, Alabama's RFRA[75]—unlike the federal law—is not limited to "substantial" burdens and can be used to claim an exemption to a law that burdens religious belief in any way.[76]

Other state RFRAs have limitations that the federal law does not.[77] While the federal RFRA applies to all federal law, some states

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68 § 2000bb(b)(2).

69 § 2000bb-1.

70 City of Boerne v. Flores, 521 U.S. 507 (1997). The Court held that RFRA was unconstitutional because it exceeded Congress's powers under § 5 of the Fourteenth Amendment, which defines Congress's power to enforce the provisions of the amendment. *Id.* at 536. This was because RFRA, rather than being a "remedial" piece of legislation rectifying Fourteenth Amendment violations, changed the "substantive" rights of religious constitutional protections. *Id.* at 532. This analysis draws attention to the gap between measured religious liberty under the Court's free exercise jurisprudence, and the extreme religious liberty of RFRA, which provides much broader protections to religious claimants than they are entitled to under the Constitution. For a more detailed explanation of the importance of *City of Boerne*, see MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 203–37 (2005).

71 MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 29 (2014). In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000cc–2000cc-5. RLUIPA is still applicable to the States. § 2000cc-5.

72 HAMILTON, *supra* note 71, at 29.

73 *See, e.g.*, 775 ILL. COMP. STAT. ANN. 35/15 (West 2015).

74 HAMILTON, *supra* note 71, at 339–42.

75 ALA. CONST. art. I, § 3.01.

76 *Id.* HAMILTON, *supra* note 71, at 342. This expansion of RFRA garners attention because of its ability to empower businesses to discriminate against the LGBT community.

77 *See, e.g.*, MO. ANN. STAT. § 1.307 (West 2015); 71 PA. STAT. AND CONS. STAT. ANN. § 2406(b) (West 2015); TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West 2015).

have exempted certain areas of their law from challenges under their RFRA. Pennsylvania, for instance, has incorporated a list of statutes to which the protections of RFRA do not apply, including drug laws, medical licensing laws, and abuse reporting laws.[78] Texas and Missouri have a specific exception that specifies that their RFRAs create no new rights with respect to civil rights laws.[79]

Recently, there has been some pushback by state citizens against RFRAs. Since 2010, only three states have passed new RFRAs.[80] In 2012, both North Dakota and Colorado rejected versions of the statute.[81] Michigan also declined to pass its own state RFRA in 2014, although the bill was reintroduced for the 2015 session.[82] However, some states are currently pushing to expand their RFRAs. For example, Oklahoma has recently introduced legislation that would specifically allow businesses with religious owners to discriminate on the basis of sex, gender, and sexual orientation in the provision of goods and services.[83] Whether state RFRAs will become the norm, and how closely they will mirror the federal law, is still unknown.

C. *The Contraceptive Mandate and* Hobby Lobby

When Congress passed the Patient Protection and Affordable Care Act of 2010 (ACA or Obamacare),[84] it required employers who provided group health plans to provide "preventive care and screenings" without any cost-sharing requirements.[85] Rather than specifying what types of preventive care and contraception would be provided, Congress left that determination to the Health Resources and Services Administration (HRSA), a branch of the Department of Health and Human Services (HHS).[86] The HRSA ultimately promulgated a regulation that required employers to provide coverage for all FDA approved contraception.[87] The contraceptive mandate created by HHS and HRSA exempted some

78 PA. STAT. AND CONS. STAT. ANN. § 2406(b).

79 MO. ANN. STAT. § 1.307(2); TEX. CIV. PRAC. & REM. CODE ANN. § 110.011.

80 Those states are Kansas, Kentucky, and Mississippi. KAN. STAT. ANN. § 60-5303 (West 2015); KY. REV. STAT. ANN. § 446.350 (West 2015); MISS. CODE ANN. § 11-61-1 (2015).

81 HAMILTON, *supra* note 71, at 29.

82 S.B. 0004, 98th Leg., Reg. Sess. (Mich. 2015).

83 S.B. 440, 55th Leg., 1st Sess. (Okla. 2015).

84 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code).

85 42 U.S.C. § 300gg-13(a)(3)–(4) (2012).

86 *Id.*

87 Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

nonprofit corporations and religious entities, but not for-profit corporations.[88]

In 2012, both the Green family, owners of Hobby Lobby Stores, Inc. and Mardel, Inc., and the Hahn family, owners of Conestoga Wood Specialties, Inc., all for-profit corporations, brought suit claiming the contraceptive mandate violated their rights under the Free Exercise Clause and RFRA.[89] On appeal, Conestoga Wood's claim was rejected by the Third Circuit Court of Appeals, which stated that for-profit corporations were not protected under RFRA.[90] Hobby Lobby and Mardel, however, were successful in the Tenth Circuit Court of Appeals, which stated that for-profit corporations did have a right to RFRA's protection.[91] The U.S. Supreme Court granted certiorari in both cases to resolve the circuit split and ruled in favor of the religious claimants, holding that for-profit corporations were entitled to RFRA's protection, that their exercise of religion was substantially burdened by the contraceptive mandate, and that the government had not met the required showing that the contraceptive mandate met the "least restrictive means" test.[92] This decision broadened the scope of religious exemptions that for-profit businesses can seek. White separatist business owners would rely on this decision to bring a RFRA challenge to Title VII.

D. *Title VII and White Separatist Corporations*

Title VII of the Civil Rights Act of 1964 is a federal antidiscrimination law that prohibits discrimination in hiring based on race, color, religion, sex, or national origin.[93] It also prohibits segregating employees or applicants based on the same classifications if it would negatively affect their employment or employment opportunities.[94] Under Title VII, discrimination has occurred when race or one of the other specified classifications are used as a motivating factor for any employment decisions, even if

88 45 C.F.R. § 147.131 (2013).

89 Complaint at 2, Conestoga Wood Specialties Corp. v. Sebelius, 2012 WL 6192751 (E.D. Pa. 2012) (No. 5:12-CV-06744); Complaint at 3–4, Hobby Lobby Stores, Inc. v. Sebelius, 2012 WL 4009450 (W.D. Okla. 2012) (No. CIV-12-1000-HE).

90 Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013).

91 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013).

92 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). For a full discussion of the Court's analysis, see *infra* Part III. Because the corporations succeeded on their RFRA claim, the Court did not decide the Free Exercise issue. *Hobby Lobby*, 134 S. Ct. at 2785.

93 42 U.S.C. § 2000e–2000e-17 (2012).

94 § 2000e-2(a)(2).

other factors were also considered.[95] It generally applies to employers with more than fifteen employees, with some limited exceptions for religious entities.[96] There is no exception given to for-profit corporations, and if an employer violates Title VII, the party whom it discriminated against may sue the employer.[97] If the employer loses, it faces damages and may be required to hire or re-hire the complaining party.[98]

Given the conflict between Title VII's antidiscrimination mandate and the beliefs of white separatists, it is certainly possible that a corporation owned by white separatists may try to use RFRA to seek a religious exemption from Title VII. This Note contemplates a corporation that, like the corporations in *Hobby Lobby*, is closely held (that is, with the majority of stock owned by members of the same family).[99] The owners of the corporation would identify themselves as white separatists who believe in the basic tenets of white separatism.[100] The corporation would employ more than fifteen employees and would thus be subject to Title VII's requirements.[101]

In dicta, the *Hobby Lobby* majority asserted that religious exemptions allowing race discrimination, brought by people with racist beliefs disguised as religious beliefs, would not be permitted under its analysis of RFRA and the corporation's claims.[102] However, a claim brought by a white separatist corporation seeking exemption from antidiscrimination hiring laws would look very similar to the claim brought by the corporations in the *Hobby Lobby* case. Such a corporation could easily make a prime facie case for such an exemption, and it is even possible that the government would not be able to meet its burden under the "least restrictive means" test.

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95 § 2000e-2(m).

96 § 2000e(a); *accord* § 2000e-1.

97 § 2000e-5(g).

98 *Id.*

99 The definition of a "closely held" corporation is ambiguous. *See infra* Part III.C.1. In the hypothetical presented by this Note, a "closely held" corporation is a business with all of the stock owned by members of the same family, as the businesses in *Hobby Lobby* were. However, the majority opinion in *Hobby Lobby* may allow for claims from corporations that are not closely held. *Id.*

100 *See supra* Part I.

101 § 2000e(b).

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

III. ANALYSIS OF RFRA CLAIMS AND RACE DISCRIMINATION POST-*HOBBY LOBBY*

A. *Race, Religion, and the Burden of Complying with Title VII*

1. For-Profit "Persons" and RFRA

One of the most extensively briefed questions[103] raised by the *Hobby Lobby* case, and one that garnered the most attention in both media and academia,[104] was the question of whether Hobby Lobby, Mardel, and Conestoga Wood were "persons" who could exercise religious beliefs within the meaning of RFRA. HHS argued that for-profit corporations could not exercise religious belief, and therefore were not able to raise a RFRA claim.[105] Hobby Lobby, Mardel, and Conestoga Wood argued instead that RFRA referred to "persons," a term which under the Dictionary Act[106] includes corporations.[107]

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103 Reply Brief for Petitioners at 10, Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 2751 (2014) (No. 13-356) ("There is no principled basis on which to rule that for-profit corporations by nature cannot exercise religion, while non-profits can. The scope of the First Amendment and RFRA (and the Dictionary Act, for that matter) cannot and do not turn on mere distinctions in the tax code."); Brief for Respondents at 8, *Conestoga Wood*, 134 S. Ct. 2751 (No. 13-356) ("Petitioner Conestoga, a for-profit corporation . . . is not itself a person exercising religion within the meaning of RFRA."); Reply Brief for Petitioners at 5, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) ("[T]he reading of RFRA's text that best comports with our laws and traditions is one that does not confer exemptions on for-profit corporations . . . ."); Brief for Respondents at 17, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) ("Congress knows how to limit statutory protections to a subset of artificial entities or "persons," and it chose not do so in RFRA.").

104 Emily J. Barnet, *Hobby Lobby and the Dictionary Act*, 124 YALE L.J. F. 11 (2014); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014); Jeremy M. Christiansen, Note, *"The Word[] 'Person' . . . Includes Corporations": Why the Religious Freedom Restoration Act Protects Both For- and Nonprofit Corporations*, 2013 UTAH L. REV. 623 (2013); Recent Case, *First Amendment—Free Exercise of Religion—Tenth Circuit Holds For-Profit Corporate Plaintiffs Likely to Succeed on the Merits of Substantial Burden on Religious Exercise Claim.—Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)*, 127 HARV. L. REV. 1025 (2014); Adam Winkler, *Yes, Corporations are People: And That's Why Hobby Lobby Should Lose at the Supreme Court*, SLATE (Mar. 17, 2014, 11:52 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/corporations_are_people_and_that_s_why_hobby_lobby_should_lose_at_the_supreme.html; Appelbaum, *supra* note 5.

105 Brief for Respondents, *Conestoga Wood*, *supra* note 103, at 11–13; Reply Brief for Petitioners, *Hobby Lobby*, *supra* note 103, at 6.

106 1 U.S.C. § 1 ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). The Dictionary Act controls the definition of words within the United States Code. *Id.*

107 Reply Brief for Petitioners, *Conestoga Wood*, *supra* note 103, at 10; Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 16–17. *See also* 1 U.S.C. § 1.

The Supreme Court agreed with the Tenth Circuit's reliance on the Dictionary Act, and ruled that a for-profit corporation could bring a RFRA claim.[108] Furthermore, the Court found no textual basis in either RFRA or the Dictionary Act for drawing a distinction between nonprofit and for-profit corporations.[109]

The *Hobby Lobby* decision decisively settled that closely held, for-profit corporations can bring a RFRA claim.[110] White separatist business owners who chose to incorporate their business would not, therefore, be barred from bringing a RFRA claim simply because of the corporate form. Furthermore, since the requirements of the contraceptive mandate at issue in *Hobby Lobby* applied to businesses with fifty or more employees, and the requirements of Title VII apply to businesses with fifteen or more employees, the number of potential claimants for exemptions to Title VII is vastly greater than for the Affordable Care Act.[111]

2. Sincere Religious Beliefs of the Claimants

After the Supreme Court held that Hobby Lobby, Mardel, and Conestoga Wood could "exercise religion" and therefore, claim an exemption under RFRA to the contraceptive mandate, it considered whether the corporations' claim that they opposed the use of certain forms of birth control was an "exercise of religion" that RFRA was meant to protect.[112] The Court found that the owners believed that making the contraception at issue available to their employees offended their religious beliefs, and ruled that their

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108 *Hobby Lobby*, 134 S. Ct. at 2768–69.

109 *Id.* at 2769 ("No known understanding of the term "person" includes *some* but not all corporations . . . . [I]t sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." (emphasis in original)).

110 *Id.*

111 26 U.S.C. § 4980H(a), (c)(2) (an "applicable large employer" with more than fifty employees must provide "minimum essential coverage" for health services). *See also Hobby Lobby*, 134 S. Ct. at 2762; 42 U.S.C. § 2000e(b) (defining "employer" for purposes of Title VII as one who has fifteen or more employees working each day of the twenty previous weeks). Each month in the first quarter of 2014, between nineteen and twenty million people worked for an establishment (business providing goods or services, like Hobby Lobby) that employed between twenty and forty-nine people. *Quarterly Census of Employment and Wages*, U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., http://www.bls.gov/cew/cewind.htm#year=2014&qtr=1&own=5&ind=10&size=4 (Last visited Feb. 26, 2016). These employees would already work for an employer that was exempt from the Affordable Care Act, but would be vulnerable to their employers seeking exemptions from Title VII.

112 *Hobby Lobby*, 134 S. Ct. at 2775.

choice not to provide those forms of contraception was an exercise of those beliefs.[113]

The religious beliefs of the Hahns and the Greens fell squarely within RFRA's definition of "religious exercise." RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[114] This affords broad protection for all kinds of religious exercise, even those that were not directly affiliated with a common or well-known religion.[115] That the owners' beliefs were sincere and religious in nature was conceded by HHS and was not challenged by the Supreme Court.[116]

To succeed on a RFRA claim, a closely held white separatist corporation would initially have to establish the sincerity and religious nature of its belief—that mixing of the races is wrong.[117] Since the sincerity and religious nature of a claimant's beliefs are rarely questioned, this would not be a difficult assertion for it to make.[118] In *Hobby Lobby*, neither the briefs from the parties nor any

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113 *Id.* at 2770 ("[T]he 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990)).).

114 42 U.S.C. § 2000cc-5(7)(A).

115 *Id.* However, the *Hobby Lobby* claimants were all members of the Christian faith. *Hobby Lobby*, 134 S. Ct. at 2764–66. The Hahns were members of the Mennonite Church; the Greens did not specify which Christian denomination with which they affiliated. *Id.*

116 *Hobby Lobby*, 134 S. Ct. at 2774; Brief for Respondents, *Conestoga Wood*, *supra* note 103, at 7 ("The Hahns' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings"); Reply Brief for Petitioners, *Hobby Lobby*, *supra* note 103, at 5 ("We acknowledge that the Greens' religious beliefs are sincerely held"). HHS did raise some practical concerns about determining the sincerity of a corporation's religious belief, but the majority theorized that if Congress was confident in the Court's ability to determine the sincerity of claims brought by prisoners under RLUIPA, there was no reason to believe that they would exclude for-profit corporations from RFRA over the same issue. *Hobby Lobby*, 134 S. Ct. at 2774 ("If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases.").

117 *See Hobby Lobby*, 134 S. Ct. at 2774.

118 Conceding the question of the sincerity and religious nature of a claimant's belief is squarely in line with the Supreme Court's Free Exercise and RFRA jurisprudence. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (government conceding sincerity of claimant's religious belief); City of Boerne v. Flores, 521 U.S. 507 (1997) (claimant's sincerity not analyzed); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (no challenge to claimant's sincere belief in sacrificing animals for religious purposes); Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 919 (1990) (Blackmun, J., dissenting) (no challenge to sincerity of claimant's religious beliefs); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 138 n.2 (1987) (considering a Free Exercise claim where no party disputed that claimant's conversion to Seventh-Day Adventism was genuine); United States v. Lee, 455 U.S. 252, 257 (1982) (considering a Free Exercise claim where claimant's sincerity was undisputed); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981) (declining to review the conclusion of an administrative board that petitioner held sincere religious beliefs);

amicus briefs attempted to challenge either the sincerity or the religious nature of the Hahns' or Greens' beliefs. The absence of such an analysis was echoed in the majority and dissent, with both acknowledging that the parties conceded the legitimacy of the beliefs and declining to proceed further on the question.[119]

However, the corporations did make a minimal assertion regarding the sincerity and religious nature of their beliefs.[120] A white separatist corporation could easily make a similar assertion of sincerity. First, the fulfillment of the sincerity requirement would likely not be questioned, as is the case in most RFRA claims; however, even if the sincerity of its beliefs were disputed, it would likely succeed if the corporation could point to actions it took that aligned with other white separatist beliefs.[121] For example, a member of the CCC might point to regular attendance at a Christian church, volunteering for environmental conservation projects, or choosing to live in a neighborhood that is predominantly white.[122] Since these activities are connected to white separatist beliefs, they would be indicative of the claimant's sincerity. Few federal courts have seriously contemplated the sincerity of a claimant's beliefs, so such actions would likely be sufficient to prove sincerity.[123]

Wisconsin v. Yoder, 406 U.S. 205, 209 (1972) (state stipulated to sincerity of claimant's religious belief); Welsh v. United States, 398 U.S. 333 (1970) (not disputing the sincerity of a conscientious objector's belief); Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) (considering a Free Exercise claim where no party disputed the sincerity or religious nature of the claimant's belief); Murdock v. Commonwealth of Pa., 319 U.S. 105, 109 (1943) (considering a Free Exercise claim where no party disputed the sincerity or religious nature of the claimant's belief). *But see* United States v. Quaintance, 608 F.3d 717, 718 (10th Cir. 2010) (upholding as a matter of law a district court ruling that the claimant's belief that marijuana was "a deity and a sacrament" was not sincere). Courts have been more open to questioning a claimant's sincerity under RLUIPA. *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("[T]he Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity.").

119 *Hobby Lobby*, 134 S. Ct. at 2774.

120 Reply Brief for Petitioners, *Conestoga Wood*, *supra* note 103, at 4 ("The Hahns are a Mennonite family from Lancaster County, Pennsylvania. They hail from a religious tradition known for incorporating faith into every aspect of life, including business."); Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 8 ("The Greens each signed a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs, to 'honor God with all that has been entrusted' to them, and to 'use the Green family assets to create, support, and leverage the efforts of Christian ministries.'"). The brief for Hobby Lobby and Mardel also pointed to the business's refusal to make business decisions that did not comport with the family's religious beliefs at its expense, such as closing on Sundays and refusing to sell shot glasses. *Id.* at 9.

121 Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 8. *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 62–63 (2014).

122 *Statement of Principles*, *supra* note 29.

123 *See, e.g.*, *Gonzales*, 546 U.S. 418 (government conceding sincerity of claimant's religious belief). In claims under RLUIPA, sincerity is more frequently questioned. *See Cutter*, 544 U.S. at 725 n.13 ("[P]rison gangs use religious activity to cloak their illicit and

The religious nature of the business owners' beliefs in *Hobby Lobby* was even less disputed than their sincerity; while the parties conceded, and the Court noted, that sincerity of belief was not disputed, the religious nature of the belief was not even mentioned.[124] This is probably because the owners all asserted that they belonged to the Christian faith, the predominant religion in America.[125] Furthermore, the connection between abortion or contraception, and religion, has been a central issue in the public and political sphere since the Supreme Court's landmark decisions in *Griswold v. Connecticut*[126] and *Roe v. Wade*.[127]

Although the link between religion and white separatists' racist beliefs is not at the forefront of public awareness, a white separatist corporation would still easily be able to prove that its belief was religious in nature. After the initial passage of RFRA, it seemed that some federal courts were prepared to provide guidance, if not an outright definition, of what it meant for a belief to be "religious."[128] However, when RFRA was amended in 2000, Congress added language indicating that a religious belief need not be tied to a system of religion or be mandated by that religion.[129] Federal courts

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often violent conduct . . . . [P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic."). But even in RLUIPA claims, federal courts seem reluctant to require anything more than a minimal assertion that the beliefs are sincere, unless the defendant can directly refute that sincerity. *See, e.g.*, Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 791 (5th Cir. 2012) (noting that "[s]incerity is generally presumed or easily established," looking to "the words and actions of the inmate" to establish sincerity, and holding that a "showing of sincerity does not necessarily require strict doctrinal adherence to standards created by organized religious hierarchies").

124 *Hobby Lobby*, 134 S. Ct. at 2774. *See generally* Reply Brief for Petitioners, *Conestoga Wood*, *supra* note 103; Brief for Respondents, *Hobby Lobby*, *supra* note 103.

125 *Religious Landscape Survey*, PEW RES. CTR., http://religions.pewforum.org/affiliations (last visited Feb. 26, 2016). Various Christian denominations, combined together, total about 70% of the U.S. public. *Id.* While federal courts have allowed religious exemptions for a wide variety of religions, when they have rejected claims for religious exemptions for lack of sincerity, the claims have been for exemptions rooted in religions other than Christianity. *See, e.g.*, United States v. Quaintance, 608 F.3d 717, 718 (10th Cir. 2010).

126 381 U.S. 479 (1965) (holding that the constitutional right to privacy extends to a married couple's decision to use birth control).

127 410 U.S. 113 (1973) (holding that the constitutional right to privacy protects a woman's decision to choose to have an abortion up to a certain point in the pregnancy).

128 *See, e.g.*, United States v. Meyers, 95 F.3d 1475, 1483–84 (10th Cir. 1996) (listing factors that could be indicia of religion, such as the metaphysical nature of and comprehensiveness of the beliefs, and whether there were "[a]ccoutrements of religion," such as prophets, a hierarchy, special clothing, or attempts to convert others).

129 42 U.S.C. § 2000cc-5(7)(A) (2012) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

have yet to articulate a RFRA standard, in light of this amendment, for judging whether a belief is religious or secular.[130]

Therefore, even if a court were to consider whether a white separatist's racist beliefs are religious, the broad definition supplied by the RFRA amendment makes it likely that the court would find the requirement fulfilled. For many white separatist groups, their racist beliefs are directly tied to their religious beliefs through their desire for a culturally homogeneous America.[131] Such groups assert that America should be exclusive, not to the white race entirely, but solely to the Christian faith.[132] Some white separatist groups, such as Christian Identity, even espouse the view that the Christian faith is an exclusively white religion, and that other racial groups are subhuman in God's eyes.[133] The connection between the racist and religious beliefs of white separatists are therefore even more persuasive than the connection between contraceptive use, abortion, and the beliefs of the business owners in *Hobby Lobby*, who did not assert or provide evidence of any direct connection between their beliefs and their religion.[134]

3. The Substantial Burden of the Contraceptive Mandate

Under RFRA, persons exercising their religious beliefs may claim exemptions from laws that substantially burden that exercise, even if the burden results from a neutral, generally applicable law.[135] The claim made by the corporations in *Hobby Lobby* was that the contraceptive mandate placed a substantial burden on their exercise of religion.[136] They argued for an exemption from the contraceptive mandate because facilitating the provision of the objectionable forms of birth control to their female employees violated their religious beliefs, and compelling them to do so substantially burdened the exercise of this belief.[137] Conestoga

130 *See generally* Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 168–175 (2007).

131 *Statement of Principles*, *supra* note 29.

132 *Id.*

133 *Christian Identity Movement Spreads Race-Hate*, *supra* note 23. *See generally* BARKUN, *supra* note 36.

134 *See generally* Brief for Petitioners, *Conestoga Wood*, *supra* note 103; Brief for Respondents, *Hobby Lobby*, *supra* note 103.

135 42 U.S.C. § 2000bb-1 (2012).

136 Brief for Petitioners, *Conestoga Wood*, *supra* note 103, at 32–34; Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 34.

137 Brief for Petitioners, *Conestoga Wood*, *supra* note 103, at 32–34; Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 34.

Wood argued that the Mennonite faith specifically compelled them to incorporate their religious beliefs into their business practices;[138] Hobby Lobby and Mardel argued that they would face severe economic consequences if they did not comply with the mandate.[139]

The Supreme Court agreed that the HHS mandate imposed a substantial burden on the corporations' religious beliefs.[140] The majority focused on the economic consequences that the companies would face if they chose not to comply with the mandate.[141] The Court also asserted that if the companies chose to drop health care entirely for their employees, in order to avoid this tax, then they would also face severe economic penalties, and that dropping all health care for their employees would similarly be a burden on the defendants because skilled workers, seeking jobs with healthcare plans, would chose to work elsewhere.[142]

The majority also rejected the argument advanced by HHS that the link between the companies' beliefs (that the destruction of an embryo is wrong) and the actions they were being asked to take (making the contraceptives available to their employees) was too attenuated to substantially burden their religious exercise.[143] Ultimately, the Court ruled the companies' religious beliefs compelled them to provide health care to their employees that did not comport with the rule of the mandate.[144] Since providing health care—which aligned with their beliefs—would cost them an enormous amount of money, effectively forcing them to choose

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138 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764 (2014) (citing Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013)).

139 Brief for Respondents, *Hobby Lobby*, *supra* note 103, at 36–38.

140 *Hobby Lobby*, 134 S. Ct. at 2775–79.

141 *Id.* at 2775–76.

142 *Id.* at 2776–77. The Court briefly addressed in dicta the argument raised by amicus briefs that dropping all health coverage would not place a substantial burden on the companies' religious exercise because the penalty is less than the average cost of providing insurance. *Id.* This argument was rejected seemingly on the ground that the companies also had religious motivations for providing health insurance to their employees. *Id.*

143 *Id.* at 2777–78. Justice Alito wrote:

> This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable) . . . . This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another . . . . HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Id. at 2778 (emphasis in original) (footnote omitted).

144 *Id.* at 2776.

between doing business or practicing their religion, the mandate was a substantial burden on their religious exercise.[145]

Under this interpretation of "substantial burden," a white separatist corporation would easily be able to satisfy the Court's standard. Title VII, which mandates that any business with more than fifteen employees not discriminate on the basis of race in hiring, would burden a white separatist corporation's religious beliefs by compelling its members to associate with different races. For a white separatist business owner with a sincere religious belief that people of different races should not associate with each other, this statute directly interferes with his religious exercise.

As discussed above, the centrality of a white separatist's belief against association between races, or how strongly compelled it is by his religious beliefs, is irrelevant to the consideration of how substantial the burden is on the claimant.[146] The Court in *Hobby Lobby* made this clear when it rejected HHS's argument that the link between the Hahns' and Greens' religious belief (that abortion is wrong) and what the statute required (providing birth control they believed were "abortifacients") was too attenuated.[147]

This makes an even stronger case for a white separatist corporation to assert a substantial burden, because there is no attenuation at all between their religious beliefs and their racism; in fact, their racism is a direct mandate of their revisionist interpretation of Christian texts. To compare, if forcing the corporations in *Hobby Lobby* to provide a healthcare plan that made certain forms of "objectionable" birth control available was a substantial burden, then forcing them to cover their employees' abortions would certainly be a substantial burden, as there is a more direct tension between the law's requirement and the religious beliefs. That direct tension also exists between Title VII and white separatists' beliefs. For a white separatist business owner, Title VII directly burdens his religious belief—that associating with other races is wrong—by mandating that he

145 *Id.* at 2779. The majority also pointed out that not providing any health coverage would make the corporation less competitive in the hiring process, as many employees might prefer to have employer-sponsored healthcare coverage. *Id.* at 2776–77. This also made it a burden for the companies to drop healthcare entirely. *Id.*

146 42 U.S.C. § 2000cc-5(7)(A) (2012) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

147 *Hobby Lobby*, 134 S. Ct. at 2777–78. "Abortifacient" forms of birth control prevent a fertilized egg from attaching to a woman's womb. *Id.* at 2762–63. To the *Hobby Lobby* claimants, this is tantamount to an abortion. *Id.* at 2759.

choose between running a business with more than fifteen employees or practicing his religion.[148]

The burden on a white separatist business would arguably be even greater than that of the corporations in *Hobby Lobby*, because unlike the contraceptive mandate, private corporations do not have a choice between meeting Title VII requirements or paying a penalty.[149] Furthermore, violating Title VII exposes an employer to a civil suit, which may result in the hiring of the employees initially rejected.[150] Therefore, even direct and willful violation of Title VII would not guarantee that a business owner could conduct his business in accordance with his religious beliefs.

Given the simplicity of asserting and proving a prima facie RFRA claim under *Hobby Lobby* and federal RFRA jurisprudence, broadening the scope of RFRA claims to allow protection of for-profit corporations' religious beliefs makes it substantially more likely that private business owners with racist beliefs will assert such a claim. For the government to continue enforcing antidiscrimination laws against such claimants, it will have to prove that the law serves a compelling interest and is the "least restrictive means" of serving that interest.

B. *The Government's Compelling Interest and the "Least Restrictive Means"*

1. The Federal Government Has a Compelling Interest in Preventing Race Discrimination in Employment

Once religious claimants satisfy their prima facie case under RFRA, the burden then shifts to the government to prove that the challenged statute serves a compelling government interest, and is the "least restrictive means" of achieving that interest.[151] In *Hobby Lobby*, HHS asserted that there were several compelling interests,

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148 In contrast, a statute is *not* a substantial burden if it only affects the subjective spiritual experience of a religious claimant, or if it does not threaten sanctions, or condition benefits, on a claimant violating their religious beliefs. *E.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008) (rejecting the religious claimant's contention that placing fake recreational snow on mountains they believed to be sacred was a substantial burden on their religious practice). This would certainly not be the case for a white separatist business owner, who must comply with Title VII's mandate that he take action in direct violation of his beliefs or face civil suits. § 2000e-5.

149 § 2000e-2(a). The statute mandates that employers may not refuse to hire an applicant on the basis of race, without providing any exceptions for for-profit corporations. *Id.*

150 § 2000e-5(f)–(g).

151 § 2000bb-1(b).

such as public health and gender equality.[152] The Department also asserted an "interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing."[153] The Court expressed some skepticism over the arguments, suggesting that the interests cited may be too broad or unpersuasive given that other healthcare plans could exclude the contraceptive mandate.[154] Ultimately, however, there is little analysis of the "compelling interest" standard in *Hobby Lobby* because the Court assumed, without expressly deciding, that the government had a compelling interest.[155] However, if a white separatist business owner were to bring a RFRA claim, a court would almost certainly find a compelling government interest in preventing race discrimination in employment.[156]

Federal courts have upheld the validity of Title VII numerous times as a valid exercise of Congress's powers under Section Five of the Fourteenth Amendment.[157] Furthermore, the Supreme Court has held that the government has a compelling interest in preventing race discrimination, even in light of religious objections. In *Bob Jones University v. United States*,[158] the Court faced a challenge to portions of the tax code—interpreted by the IRS—that denied the University tax-exempt status because of its racially discriminatory admissions policy.[159] The Court directly stated that

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152 *Hobby Lobby*, 134 S. Ct. at 2779.

153 *Id.*

154 *Id.* at 2779–80. ("[M]any employees—those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.").

155 *Id.* at 2780.

156 The Court's skepticism of the Government's articulated interests in *Hobby Lobby* may call the government's interest in Title VII into question. A similar argument might be made for Title VII: since it allows some organizations to discriminate in some ways, an asserted interest in racial equality might be too broad. However, because the Court has recognized the government's interest in Title VII in many cases, it is far more likely that, similar to *Hobby Lobby*, the Court will assume a compelling interest in adjudicating a RFRA claim against Title VII.

157 For instance, in Okruhlik v. Univ. of Ark. ex rel. May, 255 F.3d 615 (8th Cir. 2001), the court ruled that because Congress had enacted Title VII to remedy an identified wrong of race and gender discrimination in employment, and Title VII is proportional and congruent to the wrong identified by Congress, the statute's abrogation of State sovereign immunity was valid. *Id.* at 626–28. Federal courts have also held the section of Title VII proscribing discrimination in hiring valid against Establishment Clause challenges. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 618 (1987) ("[F]ew would contend that Title VII of the Civil Rights Act of 1964, which both forbids religious discrimination by private-sector employers . . . and requires them reasonably to accommodate the religious practices of their employees . . . violates the Establishment Clause.") (citations omitted); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (rejecting the argument that Title VII violates the Establishment Clause).

158 461 U.S. 574 (1983).

159 *Id.* at 581.

the government had a compelling interest in "eradicating racial discrimination in education."[160] Moreover, it ruled that the government's compelling interest "substantially outweigh[ed]" the burden placed on its religious beliefs.[161] Thus, the IRS's refusal to grant tax-exempt status was not a violation of the Free Exercise Clause.[162]

In light of the government's compelling interest in preventing and eradicating racial discrimination, it would seem that a claim from a white separatist business owner might fail despite the claimant's prima facie case. However, RFRA also demands that the government prove the statute is the "least restrictive means" of achieving that interest.[163]

2. Despite the Government's Compelling Interest, Title VII May Not be the Least Restrictive Means to Achieve its Goal

RFRA first introduced the "least restrictive means" test into Free Exercise doctrine.[164] The Act states that to burden the exercise of religion, the government must prove that the method employed by the challenged statute is the least restrictive method.[165] This means that when the Court is considering whether the statute is the least restrictive means of accomplishing the government's interest, the law must be tailored to fit the specific religious beliefs and needs of the believer bringing the claim.[166] The government or agency enforcing the statute has the burden of proving that the statute passes this test.[167] It is a test that—when applied to statutes that are challenged as imposing a burden on the claimant's religion—is "exceptionally demanding" and requires the governmental entity being challenged to demonstrate that it has no other way to accomplish its interest that does not burden the religious exercise of the claimants.[168] The standard imposed by

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160 *Id.* at 604. When RFRA applied to the states, the Supreme Court of California also acknowledged that the government had a compelling interest in preventing race discrimination. *See* Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 952 (1996).

161 *Bob Jones Univ.*, 461 U.S. at 604.

162 *Id.* at 602–04.

163 42 U.S.C § 2000bb-1(b) (2012).

164 HAMILTON, *supra* note 71, at 21.

165 § 2000bb-1(b)(2) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the *least restrictive means* of furthering [a] *compelling governmental interest*.") (emphasis added).

166 HAMILTON, *supra* note 71, at 21.

167 § 2000bb-1(b).

168 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) (articulating the test as requiring the government to show "it lacks other means of achieving its desired goal

RFRA, a heightened form of strict scrutiny, is a departure from the Court's typical "rationality review" that it uses to examine neutral, generally applicable laws.[169]

In *Hobby Lobby*, HHS claimed that the preventive services coverage provision satisfied the "least restrictive means" test because both Hobby Lobby and Conestoga Wood had the option to either provide the required coverage, or, to not offer a health plan, allow its employees to obtain coverage through the healthcare exchanges, and pay a tax.[170] The Department also argued that Hobby Lobby's suggestion of a less restrictive means—namely that the government pay for the forms of contraception that they objected to providing for their employees—was not a valid alternative.[171]

The Court disagreed with the HHS analysis. The majority found that the mandate did not satisfy the "least restrictive means" test because the government could take on the cost of providing the contraception to Hobby Lobby and Conestoga Wood employees.[172]

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without imposing a substantial burden on the exercise of religion by the objecting parties"). *See also* City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997).

169 HAMILTON, *supra* note 71, at 21 ("As Justice Powell stated in 1980, and it still remains true, 'this "means" test has been virtually impossible to satisfy.'"). While rationality review defers to the legislature and presumes the law is constitutional, the "compelling interest" and "least restrictive means" tests presume the law is unconstitutional, and puts the burden of proof on the government to demonstrate the law is constitutional. *Id.* at 20–21. The "least restrictive means" test places a heightened burden on the government, even above strict scrutiny, which is so famously referred to as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

170 Brief for Petitioners, *Hobby Lobby*, *supra* note 103, at 57; Brief for Respondents, *Conestoga Wood*, *supra* note 103, at 57.

171 Brief for Respondents, *Conestoga Wood*, *supra* note 103, at 55 ("RFRA's less-restrictive means test does not require *Congress* to create or expand federal programs."). HHS argued that the Greens' theory was irreconcilable with the Court's decision in United States v Lee, 455 U.S. 252 (1982), where the Court held that a government-funded scheme was not a less-restrictive alternative to an Amish employer paying Social Security taxes. Brief for Respondents, *Conestoga Wood*, *supra* note 103, at 57.

172 *Hobby Lobby*, 134 S. Ct. at 2781 (quoting RLUIPA, 42 U.S.C. § 2000cc-3(c): "[this statute] may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise"). Justice Alito, writing for the majority, stated:

> It seems likely . . . that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. . . . If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this important goal. . . . RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs.

Id. (emphasis in original).

The majority opinion also stated that even if the creation of a new program, or the modification of an already existing program, were not appropriate alternatives under the "least restrictive means" test, HHS had still failed to show that the mandate fulfilled the test's requirements because there was already a method used by HHS to provide the contraception to women employed by those employers exempt from the mandate.[173] Therefore, *Hobby Lobby* ruled, in part, that under the "least restrictive means" test, it may be an appropriate alternative for the government to take on additional economic and administrative burdens that would have been the responsibility of the RFRA claimant had the claimant not asserted a religious exemption.[174]

In reaching this conclusion, the Court pointed out that HHS could not refute that the Court's solution was a less restrictive means because HHS had already created an exception for religious organizations and nonprofits.[175] Similarly, a white separatist business owner bringing a RFRA claim could argue that Title VII has an exception that allows for race discrimination in hiring for religious organizations.[176] The exception states that the requirements of Title VII do not apply to several types of religious organizations, including religious corporations, in the context of employing individuals of a particular religion.[177] Furthermore, although the EEOC and federal courts have held that the exception does not apply to for-profit businesses, the *Hobby Lobby* ruling calls that holding into question, since the majority ruled the exception to the contraceptive mandate could be extended to for-profit corporations.[178] The exemption is a religious accommodation that for-profit corporations could use to argue that, because Title VII already has exceptions for religious organizations, it fails the "least restrictive means" test.[179]

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173 *Id.* at 2782 ("HHS has already established an accommodation for nonprofit organizations with religious objections.").

174 *Id.* at 2780–82. The majority also stated, "[w]e do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief . . . and it serves HHS's stated interests equally well." *Id.* at 2782 (footnote omitted).

175 *Id.*

176 42 U.S.C. § 2000e-1(a).

177 *Id.* ("This subchapter shall not apply . . . to a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . .").

178 *See* Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, GEO. WASH. L. FAC. PUBLICATIONS & OTHER WORKS 1, 31 (2015), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2347&context=faculty_publications.

179 *Id.* The majority in *Hobby Lobby* also expressed some doubt as to whether the government had a compelling interest because the contraceptive mandate did not apply uniformly. *Hobby Lobby*, 134 S. Ct. at 2780. Although Title VII would almost certainly pass

Furthermore, federal courts deciding RFRA cases tend to hold that a federal law is the least restrictive means when creating an exception to the statute would lead to a large number of potential claims, especially if the claims would diminish the practicality of enforcing the statute. For example, in *Adams v. C.I.R.*, the Third Circuit rejected a RFRA claim, finding that the federal tax system was the "least restrictive means" of furthering the government's compelling interest in a uniform system of taxation.[180] In doing so, the court pointed out that such an exemption would be impracticable, considering the wide variety of religious claimants that might demand a similar exemption and the administrative difficulties that would result.[181] However, allowing white separatists an exemption would not present the same administrative difficulties because while white separatists are politically active, they do not constitute a significant majority in the United States. Unlike the wide variety of religious claimants the Third Circuit foresaw asking for exemptions in *Adams*, the potential claimants under *Hobby Lobby*'s reasoning would constitute only white separatist business owners with racist religious beliefs, a far smaller minority than the new group contemplated in *Adams*, which might have included every American taxpayer.[182]

Title VII might also fail the "least restrictive means" test because a similar exception already exists for other religious organizations.[183] While the Court in *Hobby Lobby* stated that there

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the "compelling interest" test, the existence of an exception similar to the contraceptive mandate might call that into question.

180 170 F.3d 173 (3d Cir. 1999).

181 *Id.* at 179 (citing a "practical need of the government for uniform administration of taxation, given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts . . . . [W]e can easily imagine a plethora of other sects that would also have an equally legitimate concern with the usage of tax dollars to fund activities antithetical to their religion"). Similarly, in United States v. Wilgus, 638 F.3d 1274, 1277 (10th Cir. 2011), the Tenth Circuit addressed a claim against the Bald and Golden Eagle Protection Act (Eagle Act), where a claimant who was not affiliated with any Native American tribe but was an adherent of a Native American religion used RFRA as a defense against prosecution for illegally acquiring eagle feathers. The District Court proposed a less restrictive alternative that would allow all sincere adherents of the Native American religion to apply for a permit to obtain eagle feathers. *Id.* at 1292. Although the Tenth Circuit agreed that would be less burdensome on Wilgus's practice of religion, the court stated that the government's interest would be "drastically impacted" by the alternative, due in large part to the number of claims that would result and the problems presented in enforcing the alternative. *Id.* at 1292–93.

182 *Adams*, 170 F.3d at 179.

183 42 U.S.C. § 2000e-1(a) (2012). There is also an exception to Title VII for certain religious organizations known as the ministerial exception. Hosanna-Tabor Evangelical Church and Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 710 (2012) ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will . . . carry out their mission. When a minister who has been fired sues her church alleging

would be no less restrictive alternative to the "categorical requirement to pay taxes," the contraceptive mandate was not a "categorical requirement" because HHS had created exceptions to the mandate.[184] Similarly, the requirements of Title VII are not categorical because there is already an exception to that rule.[185] The exception would undermine the argument that the government has no less restrictive alternative for enforcing antidiscrimination laws.[186]

In *Hobby Lobby*, the Court allowed the corporations seeking religious exemptions to discriminate against their employees on the basis of gender, by allowing them to cover full healthcare for their male employees but only part of the required coverage for women.[187] In doing so, the majority did not foresee a flood of religious objections, nor did they imagine that allowing some for-profit corporations to decline that coverage would have a substantial impact on women and discrimination in the workplace.[188] A white separatist business owner seeking to discriminate on the basis of race could argue that allowing a limited exemption to those with sincere, religious, and racist beliefs would have a similarly limited impact.

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that her termination was discriminatory, the First Amendment has struck the balance for us."). But the ministerial exception differs from the exception at issue in *Hobby Lobby* in that it is not part of the statute, but rather an exception mandated by the Constitution. Therefore, since the ministerial exception does not indicate that the legislature intended for additional exceptions, it does not suggest that Title VII would fail the "least restrictive means" test.

184 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2758, 2784 (2014).

185 § 2000e-1(a).

186 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) (holding that the government's compelling interest in applying the Controlled Substances Act uniformly did not preclude granting an exemption "given the longstanding exemption from the Controlled Substances Act for religious use of peyote").

187 HAMILTON, *supra* note 71, at 2.

188 *Hobby Lobby*, 134 S. Ct. at 2783–85.

C. *The Dicta Limits of the* Hobby Lobby *Ruling Would Not be Sufficient to Prevent Racial Discrimination by Employers*

1. "Closely Held" Corporations[189] are not the Minority of Companies

Many commentators seeking to contradict claims that the *Hobby Lobby* decision was too broad pointed to the majority opinion's contention that the ruling would apply only to "closely held" corporations.[190] The implication of this argument is that if *Hobby Lobby* only allows closely held corporations to seek RFRA exemptions, the case will not enable many other employers to seek similar exemptions, and thus the ruling is limited in scope. However, this argument fails for two reasons: first, closely held corporations account for around ninety percent of American businesses[191] and employ approximately 60.4 million Americans;[192] second, the rationales behind the majority opinion's justification of expanding RFRA protections to closely held corporations could easily apply to other corporations as well.[193]

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189 What the majority in *Hobby Lobby* meant by a "closely held" corporation is somewhat ambiguous. The IRS defines a closely held corporation as a corporation with "more than 50% of the value of its outstanding stock [which] is, directly or indirectly, owned by or for five or fewer individuals" and "is not a personal service corporation." *Publication 542*, *Corporations*, INTERNAL REVENUE SERV. 3 (Mar. 26, 2012), https://www.irs.gov/pub/irs-pdf/p542.pdf. Personal service corporations include the fields of law, accounting, performing arts, and others. *Id.* However, Hobby Lobby was organized as an "S" corporation, which can have up to 100 shareholders. Drew Desilver, *What is a 'Closely Held Corporation,' Anyway, and How Many are There?*, PEW RES. CTR. (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there. This suggests that the definition of "closely held" for the purposes of a *Hobby Lobby* analysis is broader than the IRS definition.

190 *See, e.g.*, Emma Green, *The Supreme Court Isn't Waging a War on Women in Hobby Lobby*, THE ATLANTIC (June 30, 2014), http://www.theatlantic.com/national/archive/2014/06/hobby-lobby-isnt-waging-a-war-on-women/373717/2 ("Love it or loathe it, the Hobby Lobby decision is limited in scope"); Kate Pickert, *4 Reasons the Supreme Court Contraception Ruling Means Less Than You Think*, TIME (June 30, 2014), http://time.com/2940952/supreme-court-hobby-lobby-obamacare-ruling; Pete Williams, *Hobby Lobby Ruling: Employers Don't Have to Cover Birth Control*, NBC NEWS (June 30, 2014, 10:19 AM), http://www.nbcnews.com/news/us-news/hobby-lobby-ruling-employers-dont-have-cover-birth-control-n144321 (referring to the *Hobby Lobby* decision as "limited" to closely held, for-profit companies).

191 *See* Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does 'Closely Held' Mean?*, WALL ST. J. (June 30, 2014, 2:56 PM), http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577.

192 Alison Griswold, *How Many People Could the Hobby Lobby Ruling Affect?*, SLATE (June 30, 2014, 2:32 PM), http://www.slate.com/blogs/moneybox/2014/06/30/hobby_lobby_supreme_court_ruling_how_many_people_work_at_closely_held_corporations.html.

193 *Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting). *See also* Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations*, N.Y. TIMES (June 30,

It might be argued that such numbers are misleading because many closely held corporations are small businesses, likely to have fewer than fifty employees, and therefore not covered by the Affordable Care Act and the contraceptive mandate.[194] However, it should be noted that there are many large corporations that could be defined as closely held, including Dell, and Koch Industries.[195] The ruling thus has the potential to apply to tens of millions of Americans.[196] More importantly, if a white separatist business owner argued for an exemption to Title VII, there would be a substantially greater number of companies subject to the requirements potentially seeking an exemption. The requirements of Title VII apply to any business that has more than fifteen employees, bringing many more closely held corporations into the sphere of potential RFRA claimants challenging Title VII.[197] Therefore, even if the *Hobby Lobby* ruling only applies to closely held corporations, the potential impact is far reaching.

But the majority's logic extending RFRA to closely held, for-profit corporations does not necessarily preclude a for-profit that is not closely held from bringing a similar claim. The Court pointed out that under the Dictionary Act, the definition of "person" made no distinction between nonprofit and for-profit corporations; therefore, if nonprofits could assert religious beliefs to avoid complying with the contraceptive mandate, as the statute allowed, then for-profits could as well.[198] However, the Dictionary Act also does not distinguish between corporations that are closely held and those that are not.[199] Therefore, the same logic under this interpretation of the Dictionary Act could just as easily extend exemptions to corporations that are not closely held.

2014), http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html.

194 26 U.S.C. § 4980H(a), (c)(2) (2012) (an "applicable large employer" with more than fifty employees must provide "minimum essential coverage" for health services). *See Hobby Lobby*, 134 S. Ct. at 2762.

195 *Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting). *See also* Armour & Feintzeig, *supra* note 191; Miriam Berg, *Myths v. Facts on the Supreme Court's Hobby Lobby Ruling*, PLANNED PARENTHOOD (July 8, 2014, 6:00 PM), http://www.plannedparenthoodaction.org/elections-politics/blog/myths-v-facts-hobby-lobby-birth-control; Kent Greenfield, *Hobby Lobby Symposium: Hobby Lobby, "Unconstitutional Conditions," and Corporate Law Mistakes*, SCOTUSBLOG (June 30, 2014, 9:07 PM), http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes.

196 Griswold, *supra* note 192; Berg, *supra* note 195.

197 42 U.S.C. § 2000e(b).

198 *Hobby Lobby*, 134 S. Ct. at 2769 ("HHS concedes that a nonprofit corporation can be a 'person' within the meaning of RFRA. . . . This concession effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations involved in these cases." (citation omitted)).

199 1 U.S.C. § 1.

The majority relied more on practical concerns that would limit the ruling to closely held corporations, rather than any legal rationale.[200] Justice Alito stated that it seemed unlikely that corporate giants or publicly traded companies would be able to demonstrate a unified religious belief that could be attributed to the corporation. [201] However, there are corporations that are not closely held, but have the majority of stock owned by one family, who could impose their religious beliefs on the company.[202] The *Hobby Lobby* decision, therefore, did not forbid or foreclose the possibility of a company not closely held asserting a similar RFRA claim.[203] The holding merely tabled the discussion for a later date and, by relying on the Dictionary Act, provided strong precedent suggesting that publicly traded corporations could assert nearly identical claims.[204]

2. The Alternative Means Proposed by the Court for Achieving the Government's Interest is Not Limited to Healthcare[205]

The majority in *Hobby Lobby* also limited the ruling in dicta by stating that it was deciding the case based solely on the contraceptive mandate, and that other healthcare mandates or federal laws would require a fresh analysis.[206] Specifically, the Court stated that discrimination on the basis of race, disguised as religious belief, would not be possible under the majority's analysis because the government had a compelling interest in preventing race discrimination, and that antidiscrimination laws were precisely tailored.[207] The majority did not discuss how it reached these conclusions.[208]

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200 CYNTHIA BROUGHER, CONG. RES. SERV., R43654, FREE EXERCISE OF RELIGION BY CLOSELY-HELD CORPORATIONS: IMPLICATIONS OF BURWELL V. HOBBY LOBBY STORES, INC. 3 (2014).

201 *Hobby Lobby*, 134 S. Ct. at 2774.

202 Greenfield, *supra* note 195 ("Walmart, for example, is publicly traded. But a majority of its stock is owned by the Walton family, and they could impose their religious beliefs on the company with ease.").

203 BROUGHER, *supra* note 200, at 3.

204 *Id.*

205 The *Hobby Lobby* decision only challenged four contraceptives that the plaintiffs believed were "abortifacients." *Hobby Lobby*, 134 S. Ct. at 2759. There has been much debate about the term, but because this Note addresses the potential of a racially discriminatory RFRA claim, this debate is beyond this Note's scope. However, it is important to note that whether or not the contraceptives in question were "abortifacients" is irrelevant for the purposes of a RFRA analysis; the Court does not analyze whether the beliefs are reasonable or scientifically sound. *Id.* at 2778.

206 *Id.* at 2783.

207 *Id.*

208 One factor the majority pointed to as a limitation on the ruling is that under the alternative scheme they proposed for providing contraception, there would be no third-

This passage fails to limit the scope of the *Hobby Lobby* ruling for two reasons. First, the majority provided no guidance for the conclusion that antidiscrimination laws would satisfy the "narrow tailoring" test.[209] The federal RFRA and its subsequent interpretations, including *Hobby Lobby*, have shown that satisfying the prima facie case for the claimant is simple.[210] Therefore, if a RFRA claim to discriminate on the basis of race was barred, it would be because the government met its burden of showing the least restrictive means of achieving a compelling interest. But the majority in *Hobby Lobby* assumed, for the purposes of its analysis, that the government had a compelling interest in providing the contested forms of contraception. The Hobby Lobby decision is therefore limited to healthcare only if one presumes that the contraceptive mandate uniquely failed the least restrictive means test. However, as already discussed, it is possible that some antidiscrimination laws, such as Title VII, do not satisfy the least restrictive means test.[211]

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party impact. *Id.* at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."). Allowing racial discrimination in hiring, in contrast, would have an obvious detriment to third parties that is not as easily absorbed into pre-existing government schemes. Justice Ginsburg's dissent argued that the Court's decision denied women rights that they were entitled to by law. *Id.* at 2787 (Ginsburg, J., dissenting) ("In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith . . . ."). It is important to note that the Court's ruling in *Hobby Lobby* did not trigger coverage of the corporations' employees under their proposed alternatives. Such accommodations would have to be provided through statute or regulation. *See* HAMILTON, *supra* note 71, at 354. Although the government has solicited comments on proposed regulation that would allow employees of these corporations to be covered by the HHS accommodation, no new ruling or regulation has been adopted or put into effect. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118, (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. 54, 29 C.F.R. 2590, 45 C.F.R. 147). It therefore seems that the Supreme Court, while suggesting alternatives that would theoretically have no third-party impact, is not opposed to creating religious exemptions that have true third-party impact in practice. The negative impact of granting exemptions to white separatist employers would therefore not prevent such exemptions from being granted.

209 That the majority stated that antidiscrimination laws were "precisely tailored," not "the least restrictive means," is interesting and perhaps telling. *Hobby Lobby*, 134 S. Ct. at 2783. "Narrow tailoring," which is usually part of the strict scrutiny standard, is less rigorous than the "least restrictive means" test, which requires that laws be tailored to the specific needs of each claimant. HAMILTON, *supra* note 71, at 21. Therefore, even if the Court had explained why such laws are "precisely tailored," it doesn't necessarily follow that they would also satisfy the "least restrictive means" test.

210 *See supra* Part III.A.

211 *See supra* Part III.B. *See also* Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2534 n. 115 (1996) ("While it might seem unusual to override Title VII's presumption of legality, the result is mandated by RFRA."). *But see* Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006) ("[T]here is a compelling interest in

Second, the majority purported to limit only racial discrimination "cloaked" as religious practice.[212] Many potential RFRA claimants, including employers with white separatist views or affiliations, do not "cloak" their discrimination as religious practice.[213] Rather, their racist views are deeply tied to their religious views, even mandated by them.[214] These potential claimants would easily make out a prima facie case for a RFRA claim, not because they are disguising their racism as religion, but because their racism is a sincerely held religious belief.[215] As Justice Ginsburg's dissent demonstrates, such discriminatory claims have been brought on the basis of religious belief numerous times and are not merely a theoretical occurrence.[216]

A court inquiring into what beliefs can be deemed religious is exactly the Establishment Clause "minefield" that Justice Ginsburg feared.[217] How a court would determine what beliefs are genuinely religious and which are merely "cloaked" in religious practice, while accepting RFRA's mandate that it applies to *all* exercises of religion, is a difficult question. But even if that question could be answered, once it is found that a claimant holds a sincere, religious, and racist belief, the majority's dicta limiting only claims of racist beliefs "cloaked" as religious practice would no longer apply. Unless the Court wished to assert that discrimination against women or sexual minorities was a legitimate and sincere exercise of religion, while race discrimination was not, it would seem the *Hobby Lobby*

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ensuring that Title VII remains enforceable as to employment relationships that do not implicate concerns under the Free Exercise and Establishment Clauses. . . . [T]he Title VII framework is the least restrictive means of furthering this compelling interest.").

212 *Hobby Lobby*, 134 S. Ct. at 2783.

213 DOBRATZ & SHANKS-MEILE, *supra* note 16, at 78–80.

214 *Id. See also supra* Part I.

215 *See supra* Part III.A.

216 *Hobby Lobby*, 134 S. Ct. at 2804–05. Justice Ginsburg cited, among others, the recent case of Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), where a photography company refused to photograph a same-sex wedding. Although her claim for an exemption from New Mexico's antidiscrimination laws failed, the religious nature of her objection to homosexuality was not questioned or discussed. *Willock*, 309 P.3d at 60. The Court seemed to accept at face value that it was religious. Justice Ginsburg also cited to Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966), where a business owner alleged that he had a religious opposition to racial integration. Like so many cases that address religious exemptions, the religious nature of his discriminatory belief was not questioned. *Id.* at 945. For a comparison of religious accommodation of discrimination against LGBT and racial minorities, see Nathan A. Berkeley, *Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism*, 50 GONZ. L. REV. 1, 3 (2015).

217 *Hobby Lobby*, 134 S. Ct. at 2804–06 (Ginsburg, J., dissenting).

decision provided few logical barriers against race discrimination to affirm the dicta of the opinion.[218]

In the aftermath of the *Hobby Lobby* decision, a wide variety of different organizations began to pursue RFRA exemptions.[219] Going forward, the Court's holdings may not be logically limited in ways the majority asserted in dicta.

IV. PROPOSAL

The Constitution enshrines the right of American citizens to practice their religion freely and to be governed by a Congress that does not establish or prefer any single religion to another.[220] However, prior to RFRA's enactment and the *Hobby Lobby* decision, these rights were never presumed to be limitless.[221] Therefore, ideally, RFRA should be repealed, and the law returned to the Supreme Court's First Amendment jurisprudence prior to the law's enactment.[222] Failing that, an amendment to the federal RFRA that protects Title VII and, ideally, other civil rights laws, would be the most effective way of preventing the potential consequences of the *Hobby Lobby* ruling in employment discrimination.[223]

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218 Although that may be what the Court is asserting. There is some evidence to suggest that the Supreme Court views religious objections to abortions as a "special case," where religious objections should receive even stronger protections. This is in part demonstrated by its insistence that the *Hobby Lobby* case is applicable only to the contraception mandate, despite the applicability of its reasoning in the opinion to many different religious exemptions. Whether the Court will use this type of analysis in future cases, however, is beyond the scope of this Note.

219 Michael Hiltzick, *Danger Sign: the Supreme Court Has Already Expanded the Hobby Lobby Decision*, L.A. TIMES (July 2, 2014, 12:37 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-expanded-hobby-lobby-20140702-column.html#page=1; Dahlia Lithwick & Sonja West, *Quick Change Justice*, SLATE (July 4, 2014, 2:59 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/wheaton_college_injunction_the_supreme_court_just_sneakily_reversed_itself.html. *See also* Welch v. Brown, 58 F. Supp. 3d 1079, 1087 n.4 (E.D. Cal. 2014) (analyzing a First Amendment claim for a religious exemption to a California law banning sexual orientation change therapy for minors). Interestingly enough, several religious organizations are pursuing exemptions from abortion *restrictions,* citing their sincere belief in women's autonomy. *See, e.g.*, Press Release, The Satanic Temple, *Satanists Leverage Hobby Lobby Ruling in Support of Pro-Choice Initiative* (July 28, 2014), http://thesatanictemple.com/wp-content/uploads/2015/05/TSTPRWomensHealth-HobbyLobbyPressRelease.pdf; Irin Carmon, *Satanists Aren't the Only Ones Following Hobby Lobby's Lead*, MSNBC (July 29, 2014, 9:32 PM), http://www.msnbc.com/msnbc/satanists-hobby-lobby-when-religious-exemptions-are-prochoice.

220 U.S. CONST. amend. I.

221 *See generally* Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: the Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2010) (discussing the Supreme Court's Free Exercise jurisprudence prior to the passage of RFRA).

222 For a complete analysis of this proposal, see generally HAMILTON, *supra* note 71.

223 The Center for American Progress (CAP), a progressive organization, proposed an amendment to the federal RFRA in the aftermath of the *Hobby Lobby* decision that would

However, while these solutions would prevent many of the undesirable consequences of RFRA, they are less practical. Such solutions seem unlikely to succeed in a legislature that has demonstrated its continuing commitment to providing broad religious exemptions.[224] While it would be ideal for substantive changes to be made to the federal RFRA in order to counteract the potential negative effects of the *Hobby Lobby* ruling, it seems unlikely that in the current political atmosphere, the federal legislature is capable of providing such changes.[225]

Instead, states should amend their own RFRAs to protect their citizens from employment discrimination. Such amendments would mandate that employment discrimination laws be immune from challenges under the state RFRA. This would prevent courts from granting exemptions to those laws under RFRA's extreme standard because most states have their own versions of Title VII prohibiting race discrimination in employment.[226] Since the federal RFRA is no

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restrict allowable religious exemptions under RFRA exclusively to those exemptions that do not harm others. DONNA BARRY ET. AL., CTR. FOR AM. PROGRESS, A BLUEPRINT FOR RECLAIMING RELIGIOUS LIBERTY POST-HOBBY LOBBY 14 (2014), http://cdn.americanprogress.org/wp-content/uploads/2014/07/ReligiousLibertyReport.pdf (proposing the following language as an amendment to RFRA: "[t]his section [referring to the existing statute] does not authorize exemptions that discriminate against, impose costs on, or otherwise harm others, including those who may belong to other religions and/or adhere to other beliefs").

224 Various federal legislators have expressed disapproval with the *Hobby Lobby* decision; however, the objections and proposed amendments put forward by legislators after the decision mainly addressed the contention that for-profit companies should not be able to assert religious beliefs, not broad religious liberty specifically. For example, Senator Charles Schumer suggested that the legislature should clarify that RFRA was not intended to extend to for-profit corporations. Kevin Daley, *After Hobby Lobby Ruling, Democrats Move to Amend RFRA*, WASH. EXAM'R (July 2, 2014, 2:37 PM), http://www.washingtonexaminer.com/after-hobby-lobby-ruling-democrats-move-to-amend-rfra/article/2550444 ("RFRA 'was not intended to extend the same protection to for-profit corporations, whose very purpose is to profit from the open market' . . . ."). Senator Dick Durbin proposed a RFRA amendment to that effect. *Id.* The White House also issued a statement after the ruling, explaining that while a company should not be able to impose its beliefs on their employees, President Obama wished to emphasize that he "believes strongly" in religious liberty. Press Briefing by Josh Earnest, Press Sec'y, in Wash., D.C. (June 30, 2014), http://www.whitehouse.gov/the-press-office/2014/06/30/press-briefing-press-secretary-josh-earnest-6302014.

225 The 113th Congress, which ended on January 3, 2015, was one of the least productive in history, enacting only 296 laws. *See Statistics and Historical Comparison*, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics# (last visited Feb. 27, 2016). On average, each Congress since 1973 (the 93rd Congress) has enacted approximately 551 laws. *Id.* However, even if the federal legislature was actively passing laws, it is unlikely that amending RFRA would be a priority. Religious exemptions remain a contentious topic, evoking strong opinions on either side of the debate from legislators and their constituents. *See, e.g.*, Kristina Peterson, *Supreme Court's Hobby Lobby Ruling Ignites Debate Over Religious-Freedom Law*, WALL ST. J. (June 30, 2014, 3:11 PM), http://www.wsj.com/articles/supreme-courts-hobby-lobby-ruling-ignites-debate-over-religious-freedom-law-1404155510.

226 *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1463 (2014); 775 ILL. COMP. STAT. ANN. 5/2-102 (West 2015); TEX. LAB. CODE ANN. § 21.051 (West 2013).

longer applicable to the states, businesses that want a religious exemption to state antidiscrimination laws would have to bring a challenge under the state RFRA.[227] But if amendments were introduced into state RFRAs that blocked state antidiscrimination employment laws from RFRA challenges, then state law would protect citizens of these states, even if the employers received an exemption from Title VII under the federal RFRA.[228]

An ideal amendment to state RFRAs would be similar to the language adopted in some states that removes certain laws from RFRA's scope. Pennsylvania, for instance, has incorporated a list of statutes to which the protections of RFRA do not apply, such as abuse reporting laws.[229] If similar language were incorporated into state RFRAs, mandating that employment discrimination laws were immune from RFRA challenges, a white separatist corporation would not be able to receive an exemption to those laws. For example, an amendment to the state RFRA could declare that notwithstanding the substantive RFRA statute—stating that a law may substantially burden religion only if it serves a compelling interest and is the "least restrictive means"—the state RFRA will not apply to state antidiscrimination employment statutes. Incorporating this language into state RFRAs would prevent the type of claims that allowed *Hobby Lobby* to skirt the contraceptive mandate, but would still allow religious exemptions outlined in the antidiscrimination statute. This strikes the ideal balance between preventing widespread discrimination and allowing religious organizations a measure of freedom granted to them by state constitutions and antidiscrimination laws.

Because each state with a RFRA has adopted its own version, amendments preventing employment discrimination would be accomplished by each state individually. The general language of the amendment, however, could be similar in each state regardless of its individual RFRA, because it would only remove antidiscrimination employment laws from challenges under the state RFRA without changing the burden on any parties, or the procedure for bringing claims.

One counterargument to this proposal is that a widespread campaign to amend state RFRAs would be just as impractical as

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227 *See* City of Boerne v. Flores, 521 U.S. 507 (1997); HAMILTON, *supra* note 70, at 235–37 (detailing the implications of *Boerne* for religious exemptions).

228 Since businesses in states without RFRAs are bound by state antidiscrimination laws, employees in these states are safe from RFRA exemptions to discriminatory employment practices. Since the federal RFRA is unconstitutional as applied to the states, there is no way for businesses to bring a RFRA challenge to the antidiscrimination laws in these states. *Boerne*, 521 U.S. at 536.

229 71 PA. STAT. AND CONS. STAT. ANN. § 2406(b) (West 2014).

amending the federal law. However, the federal legislature has demonstrated an inability to make progress on contentious issues.[230] In contrast, some states have already demonstrated that they are prepared to take legislative action to prevent the undesirable consequences of RFRAs.[231] As discussed above, both North Dakota and Colorado declined to pass their own state RFRAs in 2012,[232] while Michigan prevented the passage of a RFRA in 2014.[233] The greatest public pushback against a state RFRA occurred in Arizona, where Governor Jan Brewer vetoed an amendment to the Arizona RFRA that would allow religious claimants to assert RFRA as a defense in disputes between private parties.[234]

It is true that while some states are limiting their RFRAs, others are pushing to expand them.[235] Furthermore, some states that currently do not have RFRAs are considering proposed versions of the law that provide even broader religious liberty than previously contemplated by state and federal RFRAs.[236] These are indications that some states may have a difficult time passing the suggested amendments to their state RFRAs. But the recent pushbacks against RFRAs in other states, especially in the wake of the *Hobby Lobby* decision, is an encouraging sign that other state legislators and their constituents are beginning to realize the widespread impact of RFRAs and are willing to take legislative action to amend them.

Similarly, Michigan, a state that rejected passing a state RFRA, recently implored Congress to pass pending legislation that would prevent for-profit employers from denying women federally

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230 *See supra* note 225.

231 *See supra* Part II.B.

232 HAMILTON, *supra* note 71, at 29.

233 *See* H.B. 5958, 97th Leg., Reg. Sess. (Mich. 2014).

234 *See* S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014); Press conference by Jan Brewer, Governor of Ariz., (Feb. 26, 2014), http://archive.azcentral.com/ic/pdf/brewer-1062-prepared-remarks.pdf (discussing the veto of S.B. 1062). This amendment received attention mainly because civil rights groups feared it would be used to deny service to LGBT citizens. *See, e.g.*, Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014, 11:13 PM), http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill. However, the amendment was not specific to LGBT citizens and could be used to deny service to anyone based on discriminatory religious beliefs. Thus, such an amendment could be used by a white separatist business owner to deny service based on race as well. Governor Brewer's veto is an encouraging sign that the potential detriment to third-parties due to religious exemptions is gaining attention from state citizens and legislatures.

235 *See supra* Part II.B.

236 Indiana and Georgia, for instance, have proposed RFRAs that would allow claims for injunctive relief when a religious believer's exercise of religion is merely "likely" to be substantially burdened, and would allow the state RFRA to be asserted as a defense in a suit between private parties. *See* H.B. 29, 153d Gen. Assemb., Reg. Sess. (Ga. 2014); S.B. 568, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

mandated contraceptive coverage.[237] While the potential dangers of the *Hobby Lobby* ruling extend past employee healthcare,[238] such legislation indicates that state citizens and legislatures support statutes that prevent undesirable religious exemptions. It is also an encouraging sign that states without RFRAs are willing to act to protect their constituents from the federal RFRA.[239]

In light of the potential consequences of the *Hobby Lobby* decision, it is more important than ever that states take action to protect their citizens from employment discrimination. To protect their constituents from harmful religious exemptions, before the courts grant them, states should adopt amendments to their RFRAs that explicitly prohibit granting religious exemptions to antidiscrimination employment laws.

CONCLUSION

The notion that any law should be subject to the whims of particular religious believers is problematic. The rule of law cannot continue in American society if religious claimants have the capability to carve out particularized exemptions to any law they disagree with. This is especially true in a field such as discrimination, whether it is against women, the LGBT community, or racial minorities. With widely varying beliefs as to the utility of federal law in remedying discrimination, allowing religious claimants exemptions at will to such laws would, in practice, render them useless. However, after the passage of RFRA and its subsequent interpretations, including *Hobby Lobby*, such religious claims are indeed possible, to the detriment of all Americans. With Congress in an ideological gridlock, legislators at the state level should adopt amendments to their RFRAs to ensure that unrestrained religious liberty does not encroach on the employment rights of their constituents.

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237 *See* H. Res. 400, 97th Leg., Reg. Sess. (Mich. 2014) (urging Congress to pass The Protect Women's Health From Corporate Interference Act of 2014, S. 2578, 113th Cong. (2014)).

238 *See supra* Part III.

239 While Michigan's legislative efforts to undo the effects of the *Hobby Lobby* decision are admirable, amendments to state RFRAs should ideally do more than simply target current and popular religious exemptions. As discussed above, the federal RFRA and its state counterparts allow for the possibility of many different religious exemptions that could harm a state legislature's constituents. *See supra* Part III.