

Written Testimony for  
“Oversight of the Religious Freedom Restoration Act and the Religious Land Use and  
Institutionalized Persons Act”  
February 13, 2015  
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For the  
House of Representatives  
Committee on the Judiciary  
Subcommittee on the Constitution and Civil Justice

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\* Institutional affiliation is given for identification purposes only. The views expressed here are those of the author, not Brooklyn Law School.

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Testimony of Nelson Tebbe \*

Thank you for giving me this opportunity to testify on these important questions of religious freedom and equality law.

Since the Court's recent decisions in *Burwell v. Hobby Lobby Stores, Inc.*<sup>1</sup> and *Holt v. Hobbs*,<sup>2</sup> debate has intensified concerning the Religious Freedom Restoration Act of 1993 (RFRA)<sup>3</sup> and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),<sup>4</sup> two statutes that accommodate religious actors in similar ways. In this testimony, I highlight one core problem with the Court's application of RFRA in *Hobby Lobby*, namely that it shifted the costs of accommodating a religious employer onto its employees, who may not share the company's beliefs. While ordinarily the costs of accommodating religious freedom are born by the government, or by the public, here those costs were placed on the shoulders of other private citizens. Imposing meaningful costs on identifiable third parties not only should be avoided as a policy matter, but it also violates the Constitution.<sup>5</sup>

Below, I offer three ways that Congress could ameliorate that problem. In short, Congress could: 1) amend the statutes to make them inapplicable where accommodating religious actors would shift meaningful harm to identifiable third parties, 2) amend the statutes to make them inapplicable to commercial actors, or 3) amend the statutes to clarify that Congress did not intend to effect a clean break with judicial precedent under the Free Exercise Clause. Each of these possibilities would improve the statutes by avoiding harm to third parties.

## Background

RFRA provides that substantial burdens imposed by the federal government on religious practices are presumptively invalid, unless the government can show that it was pursuing a compelling interest and that it was doing so using the least restrictive means. That is the essence of the statute, putting to one side for the moment certain details. RLUIPA imposes a

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<sup>1</sup> 134 S.Ct. 2751 (2014).

<sup>2</sup> 135 S.Ct. 853 (2015).

<sup>3</sup> 42 U.S.C. § 2000bb et seq.

<sup>4</sup> 42 U.S.C. § 2000cc- et seq.

<sup>5</sup> A similar risk of harm to third parties exists for RLUIPA, though no such harm resulted in *Holt v. Hobbs*, as I will explain.

similar standard, but it applies only in the specific contexts of land use and institutionalized persons, who usually are inmates.

RFRA was passed in reaction to the Supreme Court's 1990 decision in the case *Employment Division v. Smith*.<sup>6</sup> There, the Court announced that it would generally uphold laws that applied in the same way to everyone, instead of closely scrutinizing all laws that happened to burden religion.<sup>7</sup> Only laws that targeted religious actors would continue to trigger a presumption of unconstitutionality under the compelling interest test, with certain exceptions not relevant at the moment.<sup>8</sup> After that decision was criticized, Congress passed RFRA in order to "restore" the compelling interest test as set forth in the Court's previous decisions. Congress spelled this out in its statement of purposes in the text of the law, and it put the word "restore" in the title of the statute.<sup>9</sup> RFRA passed with strong bipartisan support and it was signed by President Clinton.

After RFRA was declared invalid as applied to the states,<sup>10</sup> it remained in force against the federal government.<sup>11</sup> Yet the Supreme Court did little with the statute until its decision in *Hobby Lobby*. The details of the facts and procedural history are complicated and mainly not relevant here -- they are set out in the majority opinion by Justice Alito and the main dissenting opinion by Justice Ginsburg. In essence, the Obama Administration used authority granted by Congress under the Affordable Care Act to implement regulations that required all employers that provided health insurance to their employees to include coverage of all approved forms of female contraception without cost sharing.<sup>12</sup> Acting on the advice of medical experts, the government concluded that providing full contraception coverage was crucial for protecting women's health.<sup>13</sup> Exceptions were made for houses of worship and for religiously-affiliated nonprofits, but not for business corporations.<sup>14</sup> Presumably, the Administration exempted houses of worship on the assumption that employees were likely to share the organization's beliefs about contraception. With respect to religiously affiliated nonprofits, however, the administration provided a mechanism for providing coverage to employees; namely, it required

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<sup>6</sup> 494 U.S. 872 (1990).

<sup>7</sup> In more technical terms, the Court said that it would no longer apply the compelling interest test to laws that incidentally burden religion, and that going forward it would treat such laws as presumptively constitutional and would only apply rational basis review. *Id.* at 888-89.

<sup>8</sup> *Id.* at 881 (discussing an exception where the Free Exercise Clause is implicated "in conjunction with" another constitutional provision), 884 (discussing an exception for individualized government assessments); *see also* *Church of the Lukumi Babalu Aye, V. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (noting that laws targeting religion continue to draw the compelling interest test).

<sup>9</sup> 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are-- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . .").

<sup>10</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>11</sup> The only important exception was *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

<sup>12</sup> *Hobby Lobby*, 134 S.Ct. at 2762.

<sup>13</sup> *Id.* (noting that the Administration consulted with "Institute of Medicine, a nonprofit group of volunteer advisers").

<sup>14</sup> *Id.* at 2763.

health insurers or administrators to provide the coverage without cost sharing to employees of religiously affiliated nonprofits.<sup>15</sup>

Hobby Lobby brought a RFRA challenge to the requirement, arguing that it had a religious objection to providing the coverage, which it believed made it complicit in the use of forms of contraception that it believed could work as abortifacients.<sup>16</sup> The Supreme Court sided with Hobby Lobby in a five-to-four decision. Without denying that the government had a compelling interest in requiring coverage for contraception,<sup>17</sup> the Court held that a means for pursuing that interest was available to the government that would be less restrictive on Hobby Lobby's beliefs.<sup>18</sup> In particular, the government could adopt the same kind of arrangement for business corporations that it had constructed for religiously affiliated nonprofit employers, so that health insurers and administrators would provide the coverage to employees without cost sharing. The Court implied that the impact of its ruling on employees would be "precisely zero."<sup>19</sup>

Justice Kennedy, who provided a crucial fifth vote, signed the majority opinion but also wrote separately, emphasizing that the government did have a compelling interest in protecting women's health and stressing the importance of avoiding harm to Hobby Lobby's employees.<sup>20</sup>

### The Constitutional Difficulty

The principal difficulty with the Court's decision in *Hobby Lobby* is that it did not sufficiently protect the company's employees. While reaffirming the principle that religious freedom cannot be protected when that means harming other private citizens, the Court in practice did protect Hobby Lobby only by shifting costs to its employees.

A longstanding constitutional principle holds that the government may not accommodate religious belief by lifting burdens on religious actors if that means shifting meaningful burdens to identifiable third parties. Grounded in both the Free Exercise Clause and in the Establishment Clause, this principle protects against the possibility that the government could impose the beliefs of some citizens on other citizens, thereby advantaging religious people over people of

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<sup>15</sup> *Id.* & n.8.

<sup>16</sup> *Id.* at 2722.

<sup>17</sup> *Id.* at 2780.

<sup>18</sup> *Id.* at 2782.

<sup>19</sup> *Id.* at 2760 ("[W]e certainly do not hold or suggest that 'RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on ... thousands of women employed by Hobby Lobby.'" [Quoting the dissent, 134 S.Ct. at 2787.] 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.").

<sup>20</sup> *Id.* at 1786 (Kennedy, J., concurring) ("[A] premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees."); *id.* at 2786-87 ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.").

other faiths or no faith at all. Avoiding that kind of official inequality on questions of religion, as highly charged as they are, is a core principle of the First Amendment.

Establishment Clause precedents have emphasized this principle. In *Estate of Thornton v. Caldor*,<sup>21</sup> the Court invalidated a Connecticut statute that required all employers to accommodate every employee who did not wish to work on the day he or she regarded as the Sabbath. The Court held that the law accommodated religious belief only by shifting serious costs to employers and to other employees.<sup>22</sup> The Court held that the state law “contravenes a fundamental principle of the Religion Clauses,” namely that “The First Amendment . . . gives no one the right to insist that, in pursuit of their own interests others must conform their conduct to his own religious necessities.”<sup>23</sup> In other words, the Constitution allows special exemptions for religious actors, but not when they work to impose meaningful costs on others.

Later, the Court handed down *Cutter v. Wilkinson*, which turned away an Establishment Clause challenge to RLUIPA itself, one of the subjects of this hearing. There, the Court said in a unanimous opinion that in applying RLUIPA, courts must take “adequate account” of the burdens that could be imposed on third parties and it cited *Estate of Thornton v. Caldor*.<sup>24</sup> Thus, this principle against third party harms is grounded in the Establishment Clause.<sup>25</sup> Costs incurred by protecting religious liberty should be paid by the government or the public, not by other private citizens.

Free exercise cases likewise emphasize the constitutional importance of avoiding burden-shifting to third parties when considering accommodations for religion. In *United States v. Lee*, the Court refused to grant an exemption to an Amish employer who was theologically opposed to paying Social Security taxes on behalf of his employees. The Court held that granting the exemption would impose unacceptable costs on the third-party employees:

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.<sup>26</sup>

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<sup>21</sup> 472 U.S. 703 (1985).

<sup>22</sup> *Id.* at 709 (holding that under the Connecticut statute, “religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who not observe a Sabbath”).

<sup>23</sup> *Id.* at 710 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

<sup>24</sup> 544 U.S. 709, 720 (2004) (“Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) . . .”).

<sup>25</sup> See Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 1 (2014); see also Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>.

<sup>26</sup> 455 U.S. 252, 261 (1982).

So here too, writing in the free exercise context, the Court found an important principle against “impos[ing] the employers religious faith on the employees.”<sup>27</sup>

Tellingly, Congress endorsed this principle, too. When it enacted a religion accommodation to the payment of Social Security taxes after *Lee*, it limited the accommodation to situations where the employees would not be harmed.<sup>28</sup>

Importantly, not every accommodation of religion imposes harm on third parties. A good example is the Court’s recent decision in *Holt v. Hobbs*. There, a unanimous Court held that RLUIPA required a prison to accommodate an inmate who wished to grow a short beard for religious reasons. Allowing him to do that, despite the prison’s grooming policies, shifted no security risks or other harms to fellow inmates. As the Court explained, the government failed to show that a short beard posed any disproportionate safety risks, and it also failed to show that any common safety risks would not be addressed through existing procedures.

Justice Ginsburg, joined by Justice Sotomayor, wrote separately in *Holt* to emphasize *both* that third parties were harmed by the *Hobby Lobby* decision *and* that no one would be harmed by the decision in *Holt*:

Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.<sup>29</sup>

Let me now explain why Justices Ginsburg and Sotomayor are correct that Court’s decision in *Hobby Lobby* did in fact violate the constitutional principle against shifting burdens to third parties. Instead of requiring the absence of harm to third parties as part of its holding, it held only that a solution was available that *could* avoid such harm.

And in fact, Hobby Lobby’s employees have been harmed, and continue to be harmed, by the Court’s decision. Although the Obama Administration is working on implementing the solution that the Court suggested in its opinion,<sup>30</sup> that solution has not yet been put in place. Because the mandate in the Court’s decision has issued, and because we have to assume that Hobby Lobby has acted on the religious belief that it has been stressing in the litigation by ceasing to cover contraception as soon as possible, employees must currently be without coverage.<sup>31</sup> What is more, any rule the administration implements cannot be retroactive.<sup>32</sup> Therefore,

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<sup>27</sup> *Id.*

<sup>28</sup> 26 U.S.C.A. § 3127.

<sup>29</sup> *Holt*, 135 S.Ct. at 867 (Ginsburg, J., joined by Sotomayor, J., concurring).

<sup>30</sup> See *Notice of Proposed Rulemaking Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 FR 51118-01 (Aug. 27, 2014).

<sup>31</sup> See Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014), <http://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html>.

<sup>32</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Hobby Lobby’s employees have suffered harm that may well be irreparable, including heightened risk of unwanted pregnancies and other health problems. Moreover, they are paying for the religious views of their employers.

As a matter of legal doctrine, the decision in *Hobby Lobby* reaffirmed the principle against shifting costs from religious actors to third parties. If the majority opinion leaves any doubt,<sup>33</sup> Justice Kennedy endorsed the principle when he wrote that religion exemptions may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”<sup>34</sup> Because Justice Kennedy cast the crucial fifth vote in *Hobby Lobby*, and because the four dissenters also endorsed the principle against shifting the costs of accommodating religious freedom to other private citizens, his opinion is law on this point.

Nevertheless, the decision contains troubling language concerning the relationship of RFRA to prior case law on free exercise. The Court attempted to avoid its precedent in *United States v. Lee* partly by saying that *Lee* concerned the Free Exercise Clause, not RFRA.<sup>35</sup> The Court argued that RFRA and RLUIPA marked a “complete separation from First Amendment case law.”<sup>36</sup> That is, the Court seemed to be saying that its decisions prior to 1990 were not even *relevant* to interpretation of RFRA. Neither the text of RFRA, as amended, nor any legislative history supports that reading.<sup>37</sup> Although it is not clear at this time how far the Court will take this sweeping argument, it represents a danger to people in the position of Hobby Lobby’s employees—citizens who stand to be harmed by government accommodation of religious beliefs and practices.

### Three Solutions

There are at least three ways that Congress could address the deficiencies—statutory and constitutional—with how the courts have been interpreting RFRA. Of these, the first is the most promising, but each of them would do something to address the risk of harm to third parties.

First, Congress could amend the statutes to clarify that religion accommodations are not available where extending them would result in meaningful harm to identifiable third parties. Ideally, the religious actor would bear the burden of showing that granting relief would not result in such burden-shifting. That change would both implement the Establishment Clause

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<sup>33</sup> A footnote appears to question the principle before pulling back and declining to address the issue. *Hobby Lobby*, 134 S.Ct. at 2781 n.37. That footnote is dicta, as the Court indicates in the footnote itself. *Id.* (“In any event, our decision in these cases need not result in any detrimental effect on any third party.”). Moreover, it is meaningless in light of Justice Kennedy’s concurring opinion.

<sup>34</sup> *Id.* at 2786-87 (Kennedy, J., concurring).

<sup>35</sup> *Id.* at 2784 (“*Lee* was a free-exercise, not a RFRA, case”).

<sup>36</sup> *Id.* at 2761-62.

<sup>37</sup> See Micah Schwartzman, *What Did RFRA Restore?*, CORNERSTONE (Sept. 11, 2014), <http://berkeleycenter.georgetown.edu/responses/what-did-rfra-restore> (“Over multiple Congresses, drafters of the legislation never—not once—suggested that RFRA marked a ‘complete separation’ with the Court’s free exercise jurisprudence prior to *Employment Division v. Smith*. On the contrary, the House and Senate Committee reports contain extensive statements supporting more moderate interpretations of the law.”).

principle described above and it would bring the statutes into conformity with the way Free Exercise Clause doctrine works today and the way it worked before 1990.

Second, Congress could pass an amendment that makes RFRA inapplicable to commercial actors. This change would help to ameliorate harm to third parties because large commercial operations tend to have an outsized impact on other citizens, including employees, customers, investors, and others. Partly for that reason, the Supreme Court had never extended a religious freedom exemption from a general law to a business corporation before *Hobby Lobby*. That decision was entirely unprecedented. Of course, any such amendment to RFRA would have to make clear that it did not apply to religious nonprofit corporations, which should continue to be able to bring claims. In sum, amending RFRA and RLUIPA to exclude commercial actors would go a long way toward protecting private citizens from bearing the costs of accommodating other citizens' religious beliefs.

Third, Congress could amend RFRA and RLUIPA to clarify that these laws did not break with court precedents prior to 1990. Even though that ought to be clear already from the title of RFRA and from the legislative history, the Court in *Hobby Lobby* could be read to have mistakenly said that RFRA has been unmoored from case law like *United States v. Lee*. Nothing in such an amendment would cement those decisions in place for all time. Rather, it would require them to be treated like any other precedent of the Supreme Court—as binding unless distinguished or overruled. The “Restoration Act” itself now needs restoration. This amendment would return its meaning to something that can claim much wider support than the interpretation that the Supreme Court may have given it in *Hobby Lobby*.

## Conclusion

RFRA and RLUIPA have drawn intense controversy since the Supreme Court's decision in *Hobby Lobby*. They should be amended to address the main constitutional difficulty with that ruling, namely the way it shifted real costs from religious citizens to other private citizens. Not only would amending the statute give needed guidance to federal courts, but it would also set a beneficial example for state courts, which are now increasingly implementing their own, state-level RFRA (and state free exercise clauses) in the context of anti-discrimination law and reproductive freedom guarantees. Without such guidance from Congress, courts on all levels could be encouraged to carve out religious freedom exemptions that could involve the government in shifting real costs from religious citizens to other private citizens.