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).

The passage of the Patient Protection and Affordable Care Act[1] (ACA) has brought to the fore a question that the Supreme Court has yet to address[2]: can for-profit corporations exercise religious beliefs within the meaning of the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act[3] (RFRA)?[4] Recently, in *Hobby Lobby Stores, Inc. v. Sebelius*,[5] the Tenth Circuit held that a for-profit chain of arts-and-crafts stores and a for-profit chain of Christian bookstores were entitled to claim that a law substantially burdened their religious exercise under RFRA, and that the stores would be likely to succeed on the merits of those claims.[6] In so holding, the court conflated the full breadth of the private religious beliefs of a corporation's shareholders with the far more limited range of publicly articulated corporate beliefs. The court thus elided a well-settled distinction under corporate law between the beliefs of a corporation and those of its owners; this approach risks improperly enlarging the burdens that free exercise protections place upon third parties. If for-profit corporations do indeed merit RFRA protection, that protection should be limited to the corporations' public expressions of religious belief.

David and Barbara Green, along with their three children, collectively own and operate Hobby Lobby Stores, Inc.[7] and Mardel,

---

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[2] *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations . . . .").

[3] 42 U.S.C. §§ 2000bb–2000bb-4 (2006), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997). In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "the Constitution permits burdening Free Exercise [rights] if that burden results from a neutral law of general application." Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013) (citing *Smith*, 494 U.S. at 878–80). Congress responded by passing RFRA, intending to restore the "pre-*Smith* test," which exempted a religiously burdened person from the neutral law "unless the government could show a compelling need to apply the law to the person." *Id.*

[4] *See* Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 27, 2013, at A1 ("In recent months, federal courts have seen dozens of lawsuits brought . . . by private employers ranging from a pizza mogul to produce transporters who say the government is forcing them to violate core tenets of their faith.").

[5] 723 F.3d 1114.

[6] *See id.* at 1121.

[7] Hobby Lobby Stores, Inc. is a for-profit chain of arts-and-crafts stores "with over 500 [locations] and about 13,000 full-time employees." *Id.* at 1122.

Inc.,[8] two privately held corporations run with at least some attention to the Greens' religious principles.[9] For example, Hobby Lobby closes on Sundays, refuses to promote alcohol consumption, funds full-page ads "inviting people to 'know Jesus as Lord and Savior,'" and has a statement of purpose endorsing biblical principles.[10] The Greens' personal religious beliefs do not allow them to "provide or pay for drugs that risk harming newly conceived human life."[11] Guidelines promulgated under the ACA require that employer-provided health plans cover certain forms of contraception for female employees,[12] including four methods that the Greens believe serve as abortifacients.[13]

The plaintiffs filed suit in the Western District of Oklahoma against the Secretary of Health and Human Services, disputing the validity of the contraceptive-coverage requirement. They sought a preliminary injunction under RFRA and the Free Exercise Clause to excuse Hobby Lobby and Mardel from paying for four methods of contraception that violate the Greens' beliefs.[14] Judge Heaton denied the motion,[15] concluding that the plaintiffs had failed to show a likelihood of success on the merits of their claims[16] as required under the preliminary injunction test.[17] The court found that corporations do not have free exercise rights[18] and that for-profit corporations should not be considered "persons" under RFRA.[19] Judge Heaton also held that the Greens as indi-

---

[8] Mardel, Inc. is a for-profit chain of Christian bookstores affiliated with Hobby Lobby, "with just under 400 employees." *Id.*

[9] The Greens "each sign trust commitments obliging them to run Hobby Lobby according to their faith and to use all assets to 'create, support, and leverage the efforts of Christian ministries.'" Supplemental Brief of Appellants at 1, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294) (quoting Joint Appendix at 21a).

[10] *Hobby Lobby*, 723 F.3d at 1122 (quoting Joint Appendix at 24a).

[11] Supplemental Brief of Appellants, *supra* note 9, at 2. The Greens are "committed evangelical Christians," Verified Complaint at 1, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE), who believe "that human life begins when sperm fertilizes an egg," *Hobby Lobby*, 723 F.3d at 1122.

[12] *See* 42 U.S.C. § 300gg-13(a)(4) (2006 & Supp. V 2011); *Hobby Lobby*, 723 F.3d at 1122–23. The ACA partially or fully exempts many entities from this mandate, including qualified religious employers and businesses with grandfathered plans. *Hobby Lobby*, 723 F.3d at 1123–24. According to the plaintiffs, these exemptions could affect coverage for 50–100 million people. *Id.* at 1124.

[13] *Hobby Lobby*, 723 F.3d at 1125. Those methods are Plan B, Ella, and two intrauterine devices. *Id.*

[14] *See id.*

[15] *Hobby Lobby*, 870 F. Supp. 2d at 1296–97.

[16] *Id.* at 1296.

[17] *See Hobby Lobby*, 723 F.3d at 1128. The moving party must also establish that, absent an injunction, it will suffer "a likely threat of irreparable harm" that "outweighs any harm to the non-moving party," and that the injunction would serve the public interest. *Id.*

[18] *Hobby Lobby*, 870 F. Supp. 2d at 1287–88.

[19] *Id.* at 1292 (internal quotation marks omitted). Judge Heaton found that, though RFRA provided no specific definition of "person," the Dictionary Act's definition did not apply. *See id.* at 1291 (citing 1 U.S.C. § 1 (2012)). That Act specifies that "persons" should be defined to include

viduals would be unlikely to succeed on the merits because the mandate regulated the corporations, not their owners.[20]

The Tenth Circuit, sitting en banc, reversed and remanded. Writing for the court, Judge Tymkovich[21] identified three central issues: "(1) whether Hobby Lobby and Mardel are 'persons' exercising religion for purposes of RFRA; (2) if so, whether the corporations' religious exercise is substantially burdened; and (3) if there is a substantial burden, whether the government can demonstrate a narrowly tailored compelling government interest."[22]

After resolving preliminary jurisdictional issues,[23] Judge Tymkovich determined that Hobby Lobby and Mardel "qualify as 'persons' under RFRA."[24] The court dismissed the government's argument that Congress enacted RFRA with the understanding that the Free Exercise Clause distinguished between for-profit and nonprofit corporations.[25] Because RFRA was intended to restore a free exercise test that had protected the religious rights of nonprofit corporations and of individuals operating for-profit businesses,[26] the court could not find a reason why such protection would not extend to "closely held family businesses with an explicit Christian mission as defined in their governing principles" and run by individuals "unanimous in their belief" who manage those businesses according to that belief.[27]

The court turned next to the questions of whether the contraceptive coverage requirement constituted a "substantial burden on Hobby Lobby and Mardel's exercise of religion" and, if so, whether the government could show a narrowly tailored compelling interest justifying

---

corporations "unless the context indicates otherwise." 1 U.S.C. § 1. Here, Judge Heaton found that context indicated that "persons" excluded corporations. *Hobby Lobby*, 870 F. Supp. 2d at 1291.

[20] *Hobby Lobby*, 870 F. Supp. 2d at 1294. The plaintiffs appealed the district court's denial and moved for injunctive relief pending appeal. *Hobby Lobby*, 723 F.3d at 1125. The latter motion was denied, and the plaintiffs sought emergency relief from the Supreme Court, which was also denied. *Id.* The Tenth Circuit granted the plaintiffs' subsequent motions for initial en banc consideration and expedited consideration of the appeal. *Id.*

[21] Judge Tymkovich was joined by Judges Kelly, Hartz, Gorsuch, and Bacharach on the merits, except that Judge Bacharach did not join in resolving the final two prongs of the preliminary injunction standard. *Hobby Lobby*, 723 F.3d at 1121.

[22] *Id.* at 1126. The court reviewed the district court's decision for abuse of discretion. *Id.* at 1128.

[23] The court unanimously held that Hobby Lobby and Mardel had Article III standing and that the Anti-Injunction Act did not bar the plaintiffs' claims. *Id.* at 1121, 1126–28.

[24] *Id.* at 1137. Because RFRA does not define "person," the court looked to the Dictionary Act. *Id.* The court held that the Act's plain language dictated that Hobby Lobby and Mardel were persons. *Id.* at 1129.

[25] *Id.* at 1133.

[26] *Id.* at 1133–34.

[27] *Id.* at 1137. The court declined to determine which, if any, of those factors distinguishing businesses eligible for RFRA protection were necessary, finding "that their collective presence . . . is sufficient for Hobby Lobby and Mardel to qualify as 'persons' under RFRA." *Id.*

that burden.[28] Analogizing the facts to Supreme Court and Tenth Circuit precedent,[29] Judge Tymkovich found that, as the plaintiffs' religious objections were concededly sincere and violating the contraceptive-coverage mandate could cost the plaintiffs as much as $475 million per year, Hobby Lobby and Mardel's beliefs were substantially burdened.[30] Judge Tymkovich further found that the government's interest in "public health and gender equality"[31] could not be sufficiently compelling to justify this substantial burden, since the ACA's provisions already exempted coverage for "tens of millions of people."[32]

Judge Hartz concurred, arguing that all corporations enjoy free exercise protection[33] and that compelling corporations to act contrary to their beliefs is per se substantially burdensome.[34] Judge Gorsuch concurred separately,[35] arguing that the Greens as individuals should also be entitled to relief because, as controlling officers, the Greens must direct the corporations to comply with the mandate.[36] Judge Bacharach also concurred but disagreed with Judge Gorsuch; he explained that the shareholder-standing rule required dismissing the Greens' individual complaints because their injury was "purely derivative of the corporations' injury."[37]

Chief Judge Briscoe concurred in part and dissented in part.[38] She argued that the majority opinion ignored that the burden of persuasion lay with the plaintiffs,[39] that there was very little evidence on the record to support the plaintiffs' claims,[40] and that its holding was not grounded

---

[28] *Id.* A party's religious exercise is substantially burdened under RFRA where the court finds that the party holds a sincere religious belief and that a government mandate "places substantial pressure" on that party to violate that belief. *Id.* at 1137–38.

[29] *See id.* at 1138–41 (discussing United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); and Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010)).

[30] *Id.* at 1140–41. The court dismissed the government's argument that the coverage "is just another form of non-wage compensation," emphasizing that it was not the court's role to judge the reasonableness of the beliefs. *Id.* at 1141.

[31] *Id.* at 1143 (quoting Brief for the Appellees at 34, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294)) (internal quotation mark omitted).

[32] *Id.* After deciding that the plaintiffs had established a likelihood of success on the merits, the court addressed the three remaining preliminary injunction factors. *See id.* at 1145. The court held "that establishing a likely RFRA violation satisfies the irreparable harm factor," *id.* at 1146, and a plurality would have held that the balance of equities and public interest factors also clearly weighed in favor of the plaintiffs, *see id.* at 1146–47.

[33] *Id.* at 1147 (Hartz, J., concurring).

[34] *See id.* at 1151–52. Judge Hartz argued that the magnitude of harm was irrelevant. *Id.*

[35] Judge Gorsuch was joined in his concurrence by Judges Kelly and Tymkovich.

[36] *See Hobby Lobby*, 723 F.3d at 1153–54 (Gorsuch, J., concurring).

[37] *Id.* at 1163 (Bacharach, J., concurring).

[38] Chief Judge Briscoe was joined by Judge Lucero.

[39] *Hobby Lobby*, 723 F.3d at 1163 (Briscoe, C.J., concurring in part and dissenting in part).

[40] Chief Judge Briscoe pointed out that the majority treated the allegations in the plaintiffs' complaint as fact, although the district court proceedings were stayed pending appeal before the government had the opportunity to respond to these allegations. *Id.* at 1164.

in precedent.[41] She was troubled that the majority limited its holding to "faith-based companies," which had never before been recognized as "a distinct legal category of for-profit corporations" in federal court precedent or Oklahoma law, under which Hobby Lobby and Mardel were incorporated.[42] She also argued that, in this case, the "context" in which to define "person" under the Dictionary Act was the free exercise jurisprudence that RFRA was intended to restore.[43] Because this jurisprudence had conferred free exercise rights only on individuals and nonprofit religious corporations, Chief Judge Briscoe would not have read "person" as used in RFRA to include for-profit corporations.[44]

Judge Matheson also concurred in part and dissented in part, arguing that the corporations did not show that RFRA was substantially likely to apply to them,[45] but that the Greens as individuals should have standing to challenge the contraceptive-coverage mandate.[46]

The majority elided the legal distinction between the corporate plaintiffs and their shareholders in determining the ACA's burden on Hobby Lobby and Mardel's free exercise of religion. In conflating the individual shareholders' beliefs with the corporations', the Tenth Circuit risked improperly extending the burdens that free exercise protections impose on third parties. If for-profit corporations do merit religious exercise protection under RFRA,[47] those protections should properly be limited to the corporations' own expressions of religion.

The majority treated the evidence of the Greens' beliefs as evidence of their corporations' religious exercise, thereby overlooking the distinction between the Greens and the corporations. For example, the court supported its assertion that the corporations' beliefs were clearly sincere with the fact that the shareholders "associated through Hobby

---

[41] *See id.* at 1166.

[42] *Id.* (internal quotation marks omitted). Chief Judge Briscoe worried that the definitional ambiguity as to what suffices to make a company "faith-based" meant that the scope of the majority's holding would be unclear. *Id.* at 1174.

[43] *Id.* at 1166–67.

[44] *Id.* at 1167–68. Chief Judge Briscoe also argued that the majority's extension of free exercise rights to at least some for-profit corporations was "a radical revision of First Amendment law, as well as the law of corporations." *Id.* at 1172. Chief Judge Briscoe was troubled by the majority's conflation of the individual plaintiffs' and the corporate plaintiffs' beliefs for the purposes of the substantial burden test. *See id.* at 1173–74.

[45] *Id.* at 1179 (Matheson, J., concurring in part and dissenting in part). Judge Matheson departed from Chief Judge Briscoe's opinion in that he was not prepared to rule that all for-profit corporations were foreclosed from having RFRA or free exercise rights. *Id.*

[46] *Id.* at 1184.

[47] That this is a close question is evidenced by the breadth of opinions in this case and among other circuit and district courts. *Compare, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 389 (3d Cir. 2013) (denying RFRA and free exercise rights to for-profit corporations), *and* Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1117–18 (D. Colo. 2013) (same), *with* Grote v. Sebelius, 708 F.3d 850, 854 (7th Cir. 2013) (allowing RFRA claim by for-profit corporation).

Lobby and Mardel with the intent to provide goods and services while adhering to Christian standards *as they see them*."[48] However, Hobby Lobby's statement of principles says only that the Board of Directors "is committed to . . . operating the company in a manner consistent with Biblical principles."[49] This statement does not say anything about the Greens' interpretation of those biblical principles. Thus, the court's assertion that providing employees with certain contraceptives would violate the corporations' sincere beliefs requires an inferential step equating the companies' beliefs with the Greens'.[50]

That a corporation and its shareholders, no matter how few, are distinct legal entities is well settled.[51] This distinction routinely insulates shareholders — even those of closely held corporations — from the contract and tort liability that arises from the corporation's activities.[52] The exception to this legal separation is the equitable doctrine of piercing the corporate veil.[53] This exception, however, is rare[54] and, by making the shareholders liable to third parties beyond the level of their investment in the corporation, protects the third parties when the shareholders have "abused the privilege of limited liability."[55]

---

[48] *Hobby Lobby*, 723 F.3d at 1137 (emphasis added).

[49] *Id.* at 1165 (Briscoe, C.J., concurring in part and dissenting in part) (quoting Joint Appendix at 22a) (internal quotation marks omitted).

[50] The court supported this inference by stressing that the corporations "are closely held family businesses" and that "the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel." *Id.* at 1137 (majority opinion). *But cf. Conestoga Wood*, 724 F.3d at 389 ("We accept that the Hahns sincerely believe . . . that it would be a sin to pay for or contribute to the use of contraceptives which may [result in the termination of a fertilized embryo]. We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself.").

[51] *See* Cargill, Inc. v. JWH Special Circumstance, Inc., 959 A.2d 1096, 1109 (Del. Ch. 2008) ("Even though every stockholder of a corporation may change, the corporation maintains its own identity in perpetuity, because it is a separate and distinct legal entity from its shareholders." (footnote omitted)); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) ("As a general principle, corporations are recognized as legal entities separate from their shareholders . . . .").

[52] *See* Walkovszky v. Carlton, 223 N.E.2d 6, 7 (N.Y. 1966) ("The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability . . . ."); Meredith Dearborn, Comment, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195, 198–99 (2009) ("One of the critical features of corporate law is the principle of . . . limited liability, which insulates a corporation's owners (its shareholders) from the debts of the corporation . . . .").

[53] *See* Thompson, *supra* note 51, at 1036 (explaining that courts pierce the corporate veil when they "disregard the separateness of the corporation and hold a shareholder responsible for the corporation's action as if it were the shareholder's own").

[54] *See Hobby Lobby*, 723 F.3d at 1182 (Matheson, J., concurring in part and dissenting in part) (explaining that veil piercing is "a 'rare exception'" (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003))).

[55] Thompson, *supra* note 51, at 1072.

Contrary to the traditional purpose of piercing the corporate veil, the *Hobby Lobby* court used veil piercing to allow two corporations to *impose* costs on third parties.[56] Using veil piercing to protect the free exercise rights of shareholders through the corporate vehicle is problematic because there is a cost to protecting free exercise rights.[57] Ignoring the difference between a corporation and its shareholders spreads that cost to the third parties that veil piercing is meant to protect, while still permitting the shareholders to keep the significant benefits of an intact veil between them and corporate liability[58] — allowing the shareholders to "have their corporate veil and pierce it too."[59]

If for-profit corporations do enjoy RFRA protection, that protection should properly be limited to the corporations' own religious expression.[60] As the Supreme Court has noted, corporations as commercial actors are bound by different responsibilities than are individuals exercising religion.[61] Thus, to the extent that corporate belief is protected,

---

[56] While allowing the Greens standing as individuals would have created essentially the same problem that conflating the corporate and individual beliefs did, doing so would not have been appropriate because the Greens' injury was purely derivative of the corporations' — the ACA mandates action only by Hobby Lobby and Mardel. *See Hobby Lobby*, 723 F.3d at 1163 (Bacharach, J., concurring). Though the Greens would be forced to comply with the ACA in their capacities as corporate officers, *id.*, by incorporating, they took on the duty to act as fiduciaries for the corporations. *Cf.* Grote v. Sebelius, 708 F.3d 850, 859 (7th Cir. 2013) (Rovner, J., dissenting) ("The Grotes have voluntarily elected to engage in a large-scale, secular, for-profit enterprise.").

[57] *See, e.g.*, Brief for the ACLU et al. as *Amici Curiae* in Support of Defendants-Appellees and Urging Affirmance at 19, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294) ("This case . . . implicate[s] the rights of third parties, such as providing employees with fair pay or ensuring that health insurance benefits of others are not diminished." (citations omitted)); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1502 (1999) ("[A]ny religious exemption regime must reconcile religious objectors' claims with the countervailing private rights and interests of others.").

[58] *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1173 (Briscoe, C.J., concurring in part and dissenting in part) ("[I]t is simply unreasonable to allow the individual plaintiffs in this case to benefit . . . from the corporate/individual distinction, but to ignore that distinction when it comes to asserting claims under RFRA."); Thompson, *supra* note 51, at 1040 ("[L]imited liability shifts some costs of doing business away from the corporation to other parts of society.").

[59] *Hobby Lobby*, 723 F.3d at 1179 (Matheson, J., concurring in part and dissenting in part).

[60] In this case, for example, that notion might mean protecting Hobby Lobby from a statute requiring employers to provide employees with alcoholism treatment in which moderate quantities of alcohol are available, because of the corporation's evidenced "refus[al] to engage in business activities that facilitate . . . alcohol use." *Id.* at 1122 (majority opinion).

[61] United States v. Lee, 455 U.S. 252, 261 (1982) ("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."); *see also Grote*, 708 F.3d at 859–60 (Rovner, J., dissenting) (listing ways business owners "must, in compliance with a variety of statutory mandates, take actions that may be inconsistent with their individual religious convictions," *id.* at 859); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 853 (Minn. 1985) ("Sports and Health . . . is not a religious corporation — it is a Minnesota business corporation engaged in business for profit. By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs.").

it should be limited to what can be evidenced by prior practice. This approach would simplify the sincerity test for corporate plaintiffs, as well as better enforce their responsibilities as market actors — potential employees, customers, and investors, for example, would be better put on notice about the range of statutorily mandated behaviors from which the corporation might be exempt, which would allow the market to better value the costs of the religious exercise protection.[62]

The Tenth Circuit in *Hobby Lobby* pierced the veil between the corporate plaintiffs and their shareholders, not to protect third parties, as veil piercing is meant to, but to protect the corporations' expression of the Greens' religious beliefs, even while the Greens maintained the benefits of limited liability. If for-profit corporations do merit RFRA protection, such protection should be limited to the corporations' own religious expressions. In this case, failing to limit the protection imposed the costs of the Greens' freedom of religious exercise on any of their more than 13,000 full-time employees who choose forms of contraception that violate the Greens' religious beliefs; those employees must now pay out of pocket,[63] despite having had only a statement of commitment to biblical principles to warn them that they might bear those costs.

---

[62] A general statement about commitment to biblical principles, as Hobby Lobby had made, *Hobby Lobby*, 723 F.3d at 1122, would not be enough to satisfy this requirement, as it would not meaningfully put the market on notice: employees and investors would have to research the shareholders' specific religious views to know that such a commitment in this case meant not providing four of the mandated contraceptives.

[63] *Id.* at 1144 ("[E]mployees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would face an economic burden not shared by employees of companies that cover all twenty methods."); *see also* Brief for the ACLU et al. as *Amici Curiae* in Support of Defendants-Appellees and Urging Affirmance, *supra* note 57, at 19 ("Appellants here . . . invoke RFRA to deny their female employees, who may have different beliefs — religious or otherwise — about contraception use from their employer, equal health benefits."). This burden may not be trivial for those women, and it is not difficult to imagine a scenario where the burden would be substantial. *See generally* Brief of the National Women's Law Center et al. as *Amici Curiae* in Support of Defendants-Appellees and Affirmance at 17, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294) ("Studies show that high costs lead women to forego contraception altogether, to choose less effective contraception methods, or to use contraception inconsistently or incorrectly. These responses to contraception's costs pose significant risks of unintended pregnancy . . . ." (citation omitted)).