



# Restoring the Balance

A Progressive Vision of Religious Liberty Preserves  
the Rights and Freedoms of All Americans

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By Carolyn J. Davis, Laura E. Durso, and Carmel Martin with Donna Barry, Billy Corriher,  
Sharita Gruberg, Jeff Krehely, Sarah McBride, Ian Millhiser, Anisha Singh, and Sally Steenland

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# Contents

- 1 Introduction and summary**
- 4 Reinterpreting RFRA: The impact of *Hobby Lobby***
- 17 Beyond 2015: Recommendations for addressing harm and restoring balance**
- 20 Conclusion**
- 21 About the authors**
- 22 Endnotes**

# Introduction and summary

Religious freedom is a core American value. In fact, 88 percent of Americans agree that religious liberty is a founding principle afforded to everyone in this country, even those who hold unpopular religious beliefs.<sup>1</sup> Throughout U.S. history, both courts and legislatures have worked to balance the twin components of religious liberty: the right to worship and practice one's faith and the right not to be coerced into following beliefs that are not one's own. Nearly two-thirds of Americans also believe that a strict separation between church and state must be maintained.<sup>2</sup> This balance is a careful one and requires attention to, and respect for, the vibrant and dynamic plurality of beliefs and practices in the United States. However, the U.S. Supreme Court's 2014 *Hobby Lobby* decision has unfortunately put these values and the very real protections they represent at risk.

Many right-wing groups and individuals—including coalitions of Catholics and evangelicals that built strategic partnerships during the rise of the New Right in the 1970s and 1980s—have increasingly appealed to religious liberty as a tactic to advance conservative political and legal goals across the country. These efforts have grown both in number and scope over the past several years, with increasing calls for exemptions from a host of laws. Such groups also often cite religious beliefs as justification for discriminatory behavior.<sup>3</sup>

The 2009 passage of the Affordable Care Act, or ACA, and its subsequent inclusion of mandated contraceptive coverage in employer-sponsored insurance plans created a lightning rod that united anti-government sentiment with dangerously expanded views of what constitutes religious liberty. More than 100 nonprofit and for-profit groups filed lawsuits against the Obama administration, seeking to avoid the ACA's mandate on religious grounds. Many refused to relent even when the administration extended accommodations to religiously affiliated nonprofits.<sup>4</sup> A number of these groups were represented by right-leaning legal defense organizations that are explicitly interested in resisting broader expansions of reproductive and lesbian, gay, bisexual, and transgender, or LGBT, rights.<sup>5</sup> Two of those suits,

*Burwell v. Hobby Lobby Stores Inc.* and *Conestoga Wood Specialties Corp. v. Burwell*, finally reached the U.S. Supreme Court as a consolidated case in 2014, referred to here simply as *Hobby Lobby*. In its *Hobby Lobby* decision, the Supreme Court ruled that closely held for-profit corporations have religious liberty—a right normally applied to individuals or religious organizations—and that the religious beliefs of some corporations trump the religious liberty and health of their employees.<sup>6</sup>

The plaintiffs’ lawyers based their case on the 1993 Religious Freedom Restoration Act, or RFRA, a federal statute that forbids the government from substantially burdening the free exercise of religion unless it has a compelling interest and is doing so through the least restrictive means possible.<sup>7</sup> However, the case was distinct from previous RFRA claims in several ways.

First, as written in an earlier appeals court ruling against Hobby Lobby’s claims, there had not been “any case ... in which a for-profit, secular corporation was itself found to have free exercise rights.”<sup>8</sup> Second, appeals for exemption from federal laws under RFRA generally stem from individuals seeking protection for religious belief or practice. In *Hobby Lobby*, the plaintiffs were seeking exemption from a law—the mandated provision of contraception coverage in employee insurance policies—in order to prevent someone else from making a choice that the plaintiffs deemed religiously unacceptable. This latter distinction, what legal scholars Douglas NeJaime and Reva Siegel called a “complicity claim” in a recent *Yale Law Journal* article, raises a particular challenge that illustrates just how deeply the *Hobby Lobby* decision cuts at the fabric of the role of religious liberty in America’s pluralistic democracy.<sup>9</sup>

In a pluralistic society such as ours, the interests of multiple parties are sometimes in competition, and courts play a key role in sorting out these conflicts. As a matter of law in religious liberty cases, this requires striking a balance that avoids causing others to bear the burdens of one’s own chosen religious beliefs and practices. According to NeJaime and Siegel, “Complicity claims are ... about how to live in community with others who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful. Because these claims are explicitly oriented toward third parties, they present special concerns about third-party harm.”<sup>10</sup>

This report argues that the *Hobby Lobby* decision represents a dangerous precedent that enables third-party harm. With its ruling, the Supreme Court widened the playing field for those who could use religion as a weapon to justify discrimination, increasing the chances that others will be harmed by the enforcement of this flawed

interpretation of religious liberty. In the *Hobby Lobby* case, the decision shifted the balance of power in favor of an employer's religious beliefs, essentially imposing those beliefs on its employees and ignoring employees' rights to be free from others' religious beliefs and their consequences.

The *Hobby Lobby* ruling expanded how third parties are and could be harmed by the expression of another's religious beliefs. Some ways are very direct and immediate, while others depend on the outcomes of future court cases or law-making. For example:

- *Hobby Lobby* immediately and negatively affected the lives of women and dependents of the company's employees by denying them access to critical health care. Employees at other closely held companies also face this harm.
- The expansion of RFRA protections to for-profit corporations and the loosening of what qualifies as a substantial burden have led to the dubious use of *Hobby Lobby* as precedent to initiate and defend a wide range of lawsuits and complaints.
- The expansion of state-level RFRA— and companion pieces of legislation aimed at allowing discrimination—exploits religious liberty to advance a conservative political and social agenda for rolling back reproductive and LGBT rights.

A number of legal and policy changes are needed to restore religious liberty in America so it is once again consistent with the nation's history and fundamental values—as well as public opinion. Building on the recommendations outlined in an earlier CAP report, “A Blueprint for Reclaiming Religious Liberty Post-*Hobby Lobby*,”<sup>11</sup> these changes include:

- Amending the federal RFRA to prevent third-party harm
- Passing comprehensive nondiscrimination protections for LGBT Americans at the local, state, and federal levels
- Passing state laws to increase access to preventive health care services

Both states and the federal government should enact these recommendations and ensure equal protection of the law, equal respect for the varied religious beliefs of a diverse nation, and equal access to the workplace, the marketplace, and the health care all Americans need to thrive.

# Reinterpreting RFRA: The impact of *Hobby Lobby*

In June 2014, Justice Samuel Alito wrote for the majority of the Supreme Court that because the owners of Hobby Lobby, a craft store chain, had “sincerely held” religious objections to certain forms of contraception—which they incorrectly claimed caused abortions—the federal Religious Freedom Restoration Act effectively exempted them from this part of the Affordable Care Act.<sup>12</sup> The decision created a new interpretation of RFRA that is unmoored from the First Amendment and grants religious rights to closely held for-profit corporations. In Justice Ruth Bader Ginsburg’s dissent, she argued that the Court had lowered the bar on what qualifies as a “substantial burden” on religious expression, making it easier to bring and defend a religious liberty claim.<sup>13</sup>

More specifically, the *Hobby Lobby* decision created three new ways that third parties could be harmed by another person’s or corporation’s religious beliefs. First, the *Hobby Lobby* decision negatively and immediately affected the lives of women and dependents of those who work for the company by denying them access to critical health care. Employees at other closely held companies also face this harm. Second, the decision’s expansion of RFRA protections to for-profit corporations and the loosening of what qualifies as a substantial burden have led to the dubious use of *Hobby Lobby* as precedent to initiate and defend a wide range of lawsuits and complaints. And third, the expansion of state-level RFRA—and companion pieces of legislation aimed at allowing discrimination—exploits religious liberty to advance a conservative political and social agenda for rolling back reproductive and LGBT rights. Taken together, the Supreme Court’s *Hobby Lobby* decision created an unprecedented threat in which all Americans could find their individual rights, freedoms, and well-being compromised because of another person’s religious beliefs—known as third-party harm. Each of these impacts is discussed in more detail below.

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## Granting religious liberty to closely held corporations

When the *Hobby Lobby* decision granted religious liberty to for-profit corporations, it essentially asked the employees of those businesses to bear the burden of their employers' religious beliefs. It did not matter what the employees of Hobby Lobby and Conestoga Wood believed about the secular or religious morality of contraceptive use or what their medical providers had advised. Employees of these two for-profit corporations were being denied the full employment benefits to which they were legally entitled—all because their employers effectively did not want anyone among their employees using certain forms of contraception.

### Religious liberty law in recent history, from *Sherbert* to *Hobby Lobby*

The modern age of religious liberty law began with the Supreme Court's 1963 decision in *Sherbert v. Verner*, which established the familiar "compelling interest" test that governed religious objectors' First Amendment claims.<sup>14</sup> Under this test, business owners could not use religious objections as a way to diminish the rights of third parties. Further illuminating this understanding in 1981, the Supreme Court explained, "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."<sup>15</sup>

The Court's 1990 decision in *Employment Division v. Smith*, however, drastically reduced the scope of religious liberty far below the level established by cases such as *Sherbert*. In *Smith*, the Supreme Court ruled that the state of Oregon could deny employment benefits to an individual using peyote, even if the drug was used as part of a religious ritual. The Court said the state was not required to accommodate religious beliefs of an otherwise illegal act, so long as the law forbidding that act applied equally to the religious and the nonreligious alike.<sup>16</sup> In response, Congress enacted RFRA to "restore the

compelling interest test as set forth" in *Sherbert* and a similar case.<sup>17</sup> That was the so-called restoration contemplated by RFRA. Congress intended to reset American religious liberty law to the standards that existed the day before *Smith* was decided and to leave the Court's pre-*Smith* religious liberty decisions intact.

Nevertheless, the Supreme Court abandoned the intention that animated RFRA in *Hobby Lobby*. Citing an amendment to RFRA that removed a reference to the First Amendment from one section of the law—but which, significantly, did not erase Congress' explicit statement that the purpose of RFRA was to restore the First Amendment test set out by cases such as *Sherbert*—Justice Alito's opinion in *Hobby Lobby* held that this amendment was "an obvious effort to effect a complete separation from First Amendment case law."<sup>18</sup>

Thus, Alito divorced RFRA from decades of case law that Congress intended the Court to apply in religious liberty cases. He then ignored the long-standing rule that a business owner's personal religious beliefs "are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>19</sup>

The Court’s decision is out of step with what Americans—especially women—believe about employer insurance coverage for contraception and the rights of women to access preventive health care. For example, a study by the Kaiser Family Foundation shows that “majorities of women in all age groups are supportive of the [ACA contraception mandate] and believe for-profit companies should abide by it even if their owners have religious objections.”<sup>20</sup> Moreover, “majorities of Catholics, white Mainline Protestants, Protestants who are members of racial and ethnic minority groups, and those who identify with other religions (or no religion) both support the requirement [and] believe it should apply to for-profit companies regardless of their owners’ objections.”<sup>21</sup>

In guaranteeing the religious liberty of the company’s owners but not its employees, the *Hobby Lobby* decision directly and negatively affected at least 23,000 Hobby Lobby employees, as well their spouses and dependents.<sup>22</sup> Currently, people who are covered by Hobby Lobby’s insurance plans must pay out-of-pocket for the contraceptive services that the company owners oppose—at a potential cost of up to \$1,200 per year per individual without insurance coverage.<sup>23</sup> In addition to the harm caused to thousands of current Hobby Lobby employees, at least 9,000 more individuals have had their health care restricted by the religious beliefs of the owners of the more than 70 companies that also filed lawsuits challenging the Affordable Care Act’s contraception requirement.<sup>24</sup> More than 90 percent of all U.S. businesses are “closely held,”<sup>25</sup> and they employ 52 percent of the nation’s workers.<sup>26</sup> As a result, approximately 80 million people work for the kinds of businesses most directly affected by the *Hobby Lobby* ruling.

In order to mitigate this harm, the U.S. departments of Health and Human Services, the Treasury, and Labor issued final rules in July 2015<sup>27</sup> that clarify how employees at companies such as Hobby Lobby will receive contraceptive coverage by the end of the year.<sup>28</sup> Closely held, for-profit corporations can now submit a letter to the Department of Health and Human Services, or HHS, or fill out a form stating their objection to providing some or all forms of contraception, just like religiously affiliated nonprofits already do. Justice Alito alluded to this solution in the majority’s *Hobby Lobby* opinion.<sup>29</sup>

But some nonprofits are objecting to this rule, even though it was designed to accommodate their beliefs. These nonprofits claim that submitting a form stating that they have a religious objection makes them complicit in the government providing insurance coverage that they find objectionable.<sup>30</sup> More than 40 of the 68 cases filed by religiously affiliated nonprofit organizations in response to the

accommodation from the Centers for Medicare & Medicaid Services, or CMS, and HHS, are pending.<sup>31</sup> Seven out of eight circuit courts have ruled against the plaintiffs, finding that submitting a form to HHS is not a burden on these non-profit organizations' religious liberty.

The most recent decision upholding the accommodation came from the 10th U.S. Circuit Court of Appeals, which ruled that the Little Sisters of the Poor, a religious order that runs elder care homes, is required to file paperwork requesting the accommodation.<sup>32</sup> The organization has since appealed to the Supreme Court.<sup>33</sup> The latest decision from the 8th Circuit<sup>34</sup> was the first ruling at that level to find for the plaintiffs. The panel determined that filing a form or signing a letter is a burden on the nonprofit's exercise of religion, thus setting up a circuit court split and increasing the likelihood that the Supreme Court will take up one or more of these nonprofit cases in its 2015-16 term. The Supreme Court should reject any interpretation of the federal RFRA that would allow these organizations to exempt themselves from the ACA or any other law they deem objectionable. To do otherwise would have considerable ramifications for the health and well-being of third parties implicated in these or other lawsuits.

## 2013 exemptions and accommodations from the ACA's contraceptive benefit

After the ACA became law, an independent panel convened by the Institute of Medicine, or IOM, determined which preventive services should be provided under the ACA without cost sharing.<sup>35</sup> Starting in August 2012, the federal government required most health insurance plans to cover these important preventive health benefits, including contraception, without cost sharing, meaning that the plans could not require copayments or contributions toward a deductible. If the insurance companies did not pay for all of the preventive services covered under the law, the federal government would levy fines against them.

In June 2013, in response to the lawsuits and other opposition described in this report, the Centers for Medicare & Medicaid Services and the U.S. Department of Health and Human Services issued final rules exempting religious employers, mainly churches and other houses of worship, from including contraception in their health plans.<sup>36</sup> In addition, these agencies extended an accommodation to religiously affiliated nonprofit organizations with similar objections.<sup>37</sup>

This accommodation requires that the objecting institution submit a form to its insurer stating that it does not wish to provide contraception or certain types of contraception. Once an entity requests an accommodation, a third-party administrator or insurance company makes sure that no funds from the nonprofit are used to cover the forms of contraception to which the entity objects, and coverage is provided by the insurance company.<sup>38</sup> Even with this accommodation in place, many nonprofit organizations have filed lawsuits claiming that the mere act of completing the coverage opt-out form is a violation of their religious beliefs.<sup>39</sup> Despite ensuring that women receive continuous contraceptive coverage, the accommodation separated contraception from other covered services in a health plan. While many religious nonprofits accepted the accommodation, others did not. They sued for exemptions from the law itself, which, if granted, would prevent their employees from receiving coverage for this vital health care need.

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## Expansion of suspect litigation invoking *Hobby Lobby*

The *Hobby Lobby* decision extended unprecedented religious rights to for-profit corporations, and it did so at the expense of the religious beliefs of the thousands of employees working for Hobby Lobby in more than 450 stores in 39 states across the country.<sup>40</sup> In the year since the decision, as Justice Ginsburg predicted, *Hobby Lobby* has created a “minefield” of opportunities for people to invoke religious liberty exemptions.<sup>41</sup> In the time since the ruling, advocates, litigators, and judges have invoked *Hobby Lobby* to justify an ever-growing number of religious liberty claims in areas including child labor, employment protections, and nondiscrimination.

Many of these claims are invoked by corporations, which did not have religious rights before *Hobby Lobby*. As marriage equality swept through the country, a few businesses involved with weddings—bakeries, florists, and others—have refused service to same-sex couples planning to marry.<sup>42</sup> Many of these businesses operate in cities with nondiscrimination ordinances that protect same-sex couples, but relying on this new and flawed interpretation of the federal Religious Freedom Restoration Act, some corporations now argue that their religious freedom trumps these civil rights laws.<sup>43</sup>

In Kentucky, for example, a judge ruled in favor of a T-shirt printing company that refused service to an LGBT rights group placing an order for promotional items referencing the city’s pride festival.<sup>44</sup> The company’s owner said that he would “disobey God” if he printed the shirts.<sup>45</sup> Although a municipal civil rights law prohibits businesses from excluding LGBT customers, the court ruled that the company’s religious beliefs trumped the customer’s right to be treated equally. The store based its defense on a state-level RFRA, and the judge in the case cited *Hobby Lobby* to justify extending the state law to cover corporate religious freedom.<sup>46</sup>

In Plymouth, Michigan, the conservative Alliance Defending Freedom, which specializes in religious liberty defenses, is representing a funeral home being sued by the Equal Employment Opportunity Commission, or EEOC, for firing a transgender employee.<sup>47</sup> The EEOC has ruled that discrimination against transgender employees qualifies as sex discrimination.<sup>48</sup> The employer is looking to undermine this protection and has signaled that it will base its defense on *Hobby Lobby*, likely arguing that its right to religious liberty under RFRA trumps the employee’s right to freedom from discrimination.<sup>49</sup>

Given *Hobby Lobby's* apparent broadening of what constitutes a substantial burden on religion,<sup>50</sup> some churches and religious nonprofits have claimed broader religious exemptions under RFRA than ever before. Just a few months after the ruling, a federal judge cited *Hobby Lobby* to justify excusing a member of a fundamentalist Mormon sect from an obligation to testify in a child labor case. The member in question claimed to have made religious vows “not to discuss matters related to the internal affairs” of the church.<sup>51</sup> The judge relied on *Hobby Lobby's* interpretation of RFRA to rule that the witness could not be required to testify, stating that the government had placed “substantial pressure” on the man to “engage in conduct contrary to his religious belief.”<sup>52</sup> While the judge found that the government has an important interest in enforcing child labor laws, he also concluded that the government’s subpoena of this church member was not the “least restrictive means” to achieve this goal, as required by RFRA.<sup>53</sup> This outcome was unlikely to have occurred without the precedent established in *Hobby Lobby*.

Conservative advocates have also used the precedent set forth in *Hobby Lobby* to secure exemptions from federal regulations beyond the contraception mandate. For example, in the 2013 Violence Against Women Reauthorization Act, Congress clarified that the Prison Rape Elimination Act, or PREA, applies to government facilities housing unaccompanied immigrant children. The law instructs the U.S. Department of Health and Human Services Office of Refugee Resettlement, or ORR, to adopt national standards for the detection, prevention, reduction, and punishment of rape in facilities holding unaccompanied immigrant children, including providing the full range of reproductive health care services.<sup>58</sup> ORR published an interim final rule on December 24, 2014, that included a religious exemption, the only set of federal PREA standards to include such a provision.<sup>59</sup> The interim final rule gives organizations with religious objections to providing a service three options: serve as a subgrantee under another grantee to ensure all services

## Clear examples of the proper use of the federal Religious Freedom Restoration Act

In *Holt v. Hobbs*, the U.S. Supreme Court ruled that an Arkansas prison policy prohibiting the growing of beards violated a Muslim prisoner’s religious beliefs.<sup>54</sup> This case was an appropriate reading of the federal RFRA since allowing the prisoner to grow a short beard did not affect any other prisoner.

Similarly in *Iknoor Singh v. John McHugh*, the U.S. District Court for the District of Columbia ruled that a Sikh college student should be allowed to enroll in the Army ROTC program without having to shave his beard, cut his hair, or remove his turban while serving.<sup>55</sup> The court ruled that the Army’s refusal to allow Singh to keep his articles of faith intact violated his rights under RFRA and did not further the Army’s compelling interests by the least restrictive means.<sup>56</sup> The Army claimed third-party harm would occur due to undermined unit cohesion, discipline, readiness, and health and safety. But in its June 2015 ruling, the court pointed out that the Army has previously accommodated Sikhs and has allowed hundreds of thousands of exemptions to its grooming rules, including more than 100,000 exceptions for medically necessary beards, none of which caused any harm to the Army’s mission or any third parties.<sup>57</sup>

are provided; apply in a consortium that would allow for the division of services between organizations; or notify ORR when the grantee has a religious objection to providing a service so that ORR can secure the needed services.

The unprecedented inclusion of a religious accommodation in this regulatory language highlights the growing influence of conservative religious groups seeking to extend the influence of their resistance to contraceptive and abortion access. Furthermore, the ORR religious exemption used logic similar to the low level of scrutiny applied in *Hobby Lobby* to request even broader accommodations—including the elimination of the requirement that objecting groups even notify the government so that alternate arrangements for reproductive health care can be made.

During the public comment period for the final rule, while many advocates commented that the inclusion of a religious exemption in PREA undermined the goal of protecting children in government custody from sexual abuse, the U.S. Council of Catholic Bishops, the National Association of Evangelicals, Catholic Relief Services, World Relief, and World Vision asserted that the religious exemption was not sufficient. For example, the interim final rule included a hypothetical case in which a grantee with a religious objection to emergency contraception could simply notify ORR that a child who was sexually assaulted had requested the medication, and ORR—not the grantee—would be responsible for directly providing the medication. In their comments to the federal government, these organizations argued that requiring them to notify ORR if they had a moral objection to complying with a requirement under PREA was a substantial burden on their exercise of religion because any requirement that they “help ensure access to” something to which they object would violate their rights.<sup>60</sup> For them, the objection was not limited to having to provide emergency contraception but extended to any action that would enable someone to access it. This objection mirrors the Court’s analysis of the objection at play in *Hobby Lobby*: the complicity claim, or “an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.”<sup>61</sup> It is unclear whether the religious exemption will be widened as of this report’s publication since ORR has not yet published a final rule.

As explained above, *Hobby Lobby* has been used to justify harm to third parties: children in need of defense in a child labor case, a transgender woman suffering employment discrimination, and a group seeking services from a public business. A 2015 report from the National Women’s Law Center outlined additional challenges to multiple areas of law, which use *Hobby Lobby* as a reference point and rationale.<sup>62</sup> It is likely that such claims will continue to proliferate, particularly because of the significant legal infrastructure in place to bring this litigation.

The little known but highly influential Becket Fund for Religious Liberty defended the plaintiffs in the *Hobby Lobby* case. This nonprofit law firm, which specializes in religious liberty cases, spent several years laying the groundwork for an eventual Supreme Court challenge to the ACA's contraception mandate. The firm has also represented multiple nonprofit entities, including Wheaton College and Little Sisters of the Poor, in their recent—and unsuccessful— attempts to avoid complying with even the modified framework for religious accommodation provided through the ACA.<sup>63</sup>

Although the firm has traditionally considered itself nonpartisan, Becket joins an increasing number of nonprofit, faith-based legal defense funds that have used religious liberty claims to erode women's health care access and LGBT equality. These include the Liberty Counsel and the American Center for Law and Justice—both of which also filed amicus briefs in favor of *Hobby Lobby* and *Conestoga Wood* for last year's Supreme Court case and have ongoing litigation efforts to justify LGBT discrimination with religious liberty claims.<sup>64</sup> These groups are providing much of the legal rationale to the right-wing religious conservatives working to use RFRA protections as a cover for discrimination.

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## Introduction of super-RFRAs in states and other discriminatory government efforts

In addition to providing conservative legal groups, individuals, and for-profit businesses with a new rationale—however specious—to claim exemption from laws to which they object, *Hobby Lobby* also created a new precedent for interpreting the federal RFRA, which affected how similar laws are now introduced at the state level. In the months and years following the passage of the 1993 federal RFRA, several states—with many also spurred by the 1997 *City of Boerne v. Flores* decision that limited the application of RFRA to federal laws only—enacted their own RFRA laws.<sup>65</sup> The language of those state laws generally mirrored the language of the federal RFRA, though states such as Connecticut, Texas, and Kentucky included additional civil rights protections to mitigate potential third-party harm. Since *Hobby Lobby*, however, even a state RFRA that simply follows the federal version carries with it the same possibilities for third-party harm. The potential for harm is exacerbated in many states due to a lack of formal legal protections for LGBT Americans or provisions enabling full access to reproductive health care.

In 2015, conservative state lawmakers found a special opportunity to try to evade or eviscerate local nondiscrimination efforts. They worked to enact new state RFRA laws, relying on a post-*Hobby Lobby* interpretation favoring loosened standards for burdens on religious practice and the extension of protections to for-profit corporations. These so-called super-RFRAs, if enacted, would expand religious liberty far beyond existing law, even further than the federal RFRA since *Hobby Lobby*. In the 2015 legislative session thus far, at least 17 states have already considered RFRA legislation and other bills purporting to advance religious liberty but whose overly broad religious exemptions would allow discrimination and inflict harm on others.<sup>66</sup>

Many state RFRA bills went one step further, actually proposing changes to existing RFRA language that could have significant negative consequences for third parties. First, although only substantial burdens on religion violate the federal RFRA, some proposed state RFRA laws would dramatically reduce the level of burden necessary to claim a religious liberty exemption.<sup>67</sup> Second, many of the bills would protect the religious beliefs of all corporations—no matter how large or small or whether closely held or not—by including for-profit corporations within the same list of protected persons and groups as houses of worship and religiously affiliated nonprofits.<sup>68</sup> Third, several super-RFRAs would create a defense to private lawsuits, such as lawsuits under anti-discrimination laws,<sup>69</sup> whereas the federal RFRA only applies in lawsuits or criminal cases in which the government is a party.

Similar to RFRA since *Hobby Lobby*, these super-RFRA bills would also radically change the balance between protecting religious liberty and ensuring compliance with the law. Under the federal RFRA, the government can justify limits on religious liberty if the limits are the “least restrictive means” of achieving the government’s goal<sup>70</sup> and there is a compelling or important interest in having a person or entity comply with a law. The *Hobby Lobby* ruling, for example, noted that the government has a “compelling interest in providing an equal opportunity to participate in the workforce without regard to race.”<sup>71</sup>

But many of the super-RFRAs would raise the standard for government interest to what is termed a “compelling interest of the highest magnitude” or something similar.<sup>72</sup> These provisions are undefined, but it is clear that they intend to create a higher standard for state governments to meet than that in the federal RFRA.

Essentially, this change would make it easier for individuals, religious groups, nonprofit organizations, or for-profit corporations to gain a religious exemption to an existing law. For example, while preventing racial discrimination has previously been ruled to be a compelling interest under RFRA, the language contained in these super-RFRAs puts the onus on state courts to decide whether preventing discrimination is an interest of the highest magnitude in future litigation. In other words, an overly broad state RFRA may trump fundamental civil rights protections and potentially allows businesses and organizations to deny, for example, service to religious minorities, reproductive health care services to women, or shelter to a single mother.

## The super-RFRA fight in action: Indiana and Arkansas

Recent efforts by lawmakers in Indiana and Arkansas show how the *Hobby Lobby* decision has shaped religious liberty legislation in the states, especially as the prospect of nationwide marriage equality seemed increasingly likely to happen before the year's end. Proposed legislation in multiple states pushed for expansion of religious liberty laws in order to limit marriage rights for same-sex couples and to expand the right of employers to refuse contraceptive coverage for their employees.<sup>73</sup>

In late February 2015, Indiana Gov. Mike Pence (R) signed the state's Religious Freedom Restoration Act into law.<sup>74</sup> In a statement, Gov. Pence argued that new legislation was necessary in light of the court's interpretation of the federal RFRA in *Hobby Lobby*, stating, "Last year the Supreme Court of the United States upheld religious liberty in the *Hobby Lobby* case based on the federal Religious Freedom Restoration Act, but that act does not apply to individual states or local government action."<sup>75</sup> In pursuing the state RFRA, the governor and some conservative state legislators seized on the opportunity provided by *Hobby Lobby* to broaden the availability of religious exemptions and used the case as cover for making even more substantial changes to state law.

Leading up to the day he signed the bill into law, Gov. Pence claimed that since the state bill was modeled on the federal RFRA, lawmakers were simply applying the same protections to state laws. However, Gov. Pence was not correct because the Indiana RFRA law added two

new provisions that raised the likelihood of third-party harm even higher than the federal law after *Hobby Lobby*. First, the Indiana RFRA formally extended the right of "the free exercise of religion" to for-profit entities, including "a partnership, a limited liability company, a corporation."<sup>76</sup> This provision could, for example, allow bakery owners to cite their religious beliefs in refusing to serve a same-sex couple readying to marry.

Second, the Indiana law made it possible for an individual to bring suit against a private party—not just the government—and to "assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding."<sup>77</sup> As Garrett Epps, University of Baltimore law professor, explained in *The Atlantic*, the second provision is especially onerous because it provides a way for businesses to mount a religious liberty defense against discrimination claims: "Of all the state 'religious freedom' laws I have read, this new statute hints most strongly that it is there to be used as a means of excluding gays and same-sex couples from accessing employment, housing, and public accommodations on the same terms as other people."<sup>78</sup>

Almost immediately after Gov. Pence signed the bill into law, an array of civil rights, business, faith, labor, and other groups organized to denounce the law, claiming that it was tantamount to state-sanctioned discrimination and was bad for pro-equality companies that wanted

to do business in or with the state. Indiana’s legislature eventually yielded to public pressure and passed new legislation that stated the law could not be used to permit discrimination.<sup>79</sup>

While this so-called fix ensured that the Indiana RFRA could not nullify existing municipal nondiscrimination protections that include sexual orientation or gender identity—such as those in Indianapolis and Bloomington—it did nothing to change the fact that discrimination against LGBT people remains legal in more than two-thirds of Indiana’s cities and towns.<sup>80</sup> Moreover, as in the *Hobby Lobby* case, a RFRA can also be invoked to justify discrimination against women based upon their reproductive health care decisions. The Indiana RFRA fix does nothing to solve these types of harm.

Despite significant backlash against Indiana’s super-RFRA, lawmakers in Arkansas worked to push through similar legislation in late spring 2015.<sup>81</sup> Some conservatives in the Arkansas legislature had already won a victory earlier in the year when they banned local jurisdictions

in the state from having nondiscrimination laws that included categories not protected by the state law. This was a direct effort to nullify local LGBT-inclusive nondiscrimination ordinances.<sup>82</sup> With the super-RFRA legislation, Arkansas lawmakers aimed to take the next step and undercut corporate LGBT nondiscrimination policies within the state, with the same negative consequences for women, religious minorities, and others. Similar to the Indiana law, the Arkansas super-RFRA explicitly protected for-profit businesses. However, also as in Indiana, Arkansas businesses opposed the proposed law. Wal-Mart, Arkansas’ largest private employer, stated its opposition, arguing that it would hurt economic growth, innovation, and tourism in the state.<sup>83</sup>

In response to concerns voiced by Arkansas Gov. Asa Hutchinson (R),<sup>84</sup> the legislature amended the proposed super-RFRA to track more closely with the federal RFRA.<sup>85</sup> But even this change left many state residents vulnerable to a wide range of harm. Additionally, as with Indiana, the amended legislation did nothing to actually ban discrimination against LGBT Arkansans.

The expansion of legislation calling for new and broader religious exemptions since *Hobby Lobby* is not limited to the introduction of super-RFRAs. In Louisiana, for example, some right-wing conservatives in the state legislature introduced the Marriage and Conscience Act, which would have prohibited the government from taking any adverse action against individuals acting in accordance with their beliefs on marriage.<sup>86</sup> The phrase “any adverse action” could include penalizing a government employee for discriminating against a same-sex couple, revoking a business license for otherwise unlawful conduct, or levying a fine for denying employment benefits.<sup>87</sup> Similar to Indiana and Arkansas, the legislation would have potentially undermined local nondiscrimination ordinances in cities such as New Orleans and Shreveport.<sup>88</sup> Fearing the public backlash already seen in other states, leading Republicans in the Louisiana legislature quickly denounced the bill.<sup>89</sup> Despite this clear opposition, Louisiana Gov. Bobby Jindal (R) proclaimed the protection of religious liberty a major priority for his administration.<sup>90</sup>

As the bill floundered in the state legislature, Gov. Jindal issued an executive order designed to accomplish many of the primary aims of the legislation. The executive order expressly cited the *Hobby Lobby* decision and the state’s previously passed Preservation of Religious Freedom Act.<sup>91</sup> In the executive order, Gov. Jindal barred public agencies under the authority of the governor from taking certain adverse actions against an employee for acting in “accordance with his religious belief that marriage is or should be recognized as the union of one man and one woman.”<sup>92</sup> The American Civil Liberties Union, or ACLU, has since filed a lawsuit challenging the order, claiming that it creates a “protected class” of persons “who are protected due to their belief that same-sex couples should be denied marriage equality” with “the apparent result ... that this protected class will be permitted to discriminate against same-sex couples.”<sup>93</sup>

In June 2015, the U.S. Supreme Court ruled in favor of a constitutional right to marry for same-sex couples in *Obergefell v. Hodges*, bringing marriage equality to all 50 states and the District of Columbia. Most states implemented the decision without incident. However, several magistrates and even some statewide elected officials used religious objections to the ruling to allow for continued discrimination against same-sex couples.

For example, Texas Attorney General Ken Paxton (R) issued a statement suggesting that state workers could refuse to issue marriage licenses to same-sex couples based on personal religious objections. He went on to say that while workers could face legal consequences for those actions, significant legal resources, potentially including the support of the state attorney general’s office, would be available to defend them.<sup>94</sup>

A lawsuit was brought against Kim Davis, a county clerk in Rowan County, Kentucky, who refused to issue marriage licenses to same-sex couples because of her religious beliefs and forbade her deputies from doing so under her authority.<sup>95</sup> In response, Davis filed a countersuit against the Kentucky governor for requiring county clerks to comply with the U.S. Supreme Court’s decision.<sup>96</sup>

In mid-August, a federal judge ruled that that Davis was free to practice her faith and to oppose marriage equality; “however, her religious conviction cannot excuse her from performing her duties that she took an oath to perform as Rowan County Clerk.”<sup>97</sup> Davis refused to abide by the federal judge’s ruling, eventually appealing to the Supreme Court, which denied a writ of certiorari in her case.<sup>98</sup> When Davis repeatedly refused to obey the court order, she was held in contempt of court. After a short period in prison for failing to comply with a court order,

Davis continued to refuse to issue marriage licenses to same-sex couples under her name but refrained from interfering with deputy clerks who issued slightly altered marriage licenses.<sup>99</sup> While the courts acted appropriately and swiftly in the instance of the Rowan County clerk, efforts to chip away at equal treatment for same-sex couples and LGBT people continue.

In total, state lawmakers have so far introduced more than 100 anti-LGBT bills nationwide during the 2015 legislative session, many of which are rooted in a new, expansive, and harmful view of religious liberty.<sup>100</sup> While most of those bills have not yet become law, several have. A new Michigan law allows employees at publicly funded adoption agencies to discriminate against potential parents on the basis of “sincerely held beliefs.”<sup>101</sup> This new law could prevent same-sex couples, single parents, divorced people, and others from adopting.<sup>102</sup>

North Carolina passed legislation, over Republican Gov. Pat McCrory’s veto, allowing magistrates to refrain from performing their responsibilities as government employees to marry couples if the denial of service is based on a “sincerely held religious objection.”<sup>103</sup> Even with the ruling in *Obergefell*, this law has allowed more than 30 clerks to refuse to treat same-sex couples equally, resulting in at least one county in which there are no clerks willing to provide licenses to same-sex couples.<sup>104</sup> This taxpayer-funded and government-authorized discrimination by public employees could be directed not only toward same-sex couples, but also interracial and interfaith couples and couples that include at least one divorcee.<sup>105</sup> In the absence of clear nondiscrimination protections for LGBT Americans and without assurances that expressions of religious liberty cannot be used to harm third parties, same-sex couples continue to be at risk of harm.

Beyond local efforts to resist marriage equality, lawmakers on the federal level are working on legislation to permit discrimination based on religious belief. Leading conservatives in the House of Representatives and U.S. Senate introduced the First Amendment Defense Act, or FADA, legislation that seeks to sanction discrimination by nonprofits and educational institutions that oppose marriage equality or sexual relations outside of marriage.<sup>106</sup> The legislation would not only undermine existing nondiscrimination protections gained for LGBT Americans through administrative or judicial action, but could also legalize discrimination against unmarried pregnant women by many employers, including numerous government-funded nonprofits. Despite little action since introduction in June, FADA continues to pick up co-sponsors, now totaling 150 sponsors and co-sponsors in the House and 38 sponsors and co-sponsors in the Senate.<sup>107</sup>

# Beyond 2015: Recommendations for addressing harm and restoring balance

As argued in this report, the Supreme Court's *Hobby Lobby* ruling altered the legal and political landscape surrounding religious liberty protections and has been used to argue for more substantial exemptions from state and federal law. The rationale has been used defensively in litigation claims and proactively in the advancement of super-RFRA laws at the state level and beyond.

Strong and swift public opposition to Indiana's super-RFRA stalled the passage of similar laws in other states, including North Carolina, Georgia, and Michigan. Public opinion stands firmly on the side of nondiscrimination, with more than two-thirds of Americans supporting federal nondiscrimination protections for LGBT people<sup>108</sup> and 80 percent saying they are against inclusion of exemptions from public accommodations laws based on religious belief.<sup>109</sup> However, looking ahead to future legislative sessions, a number of conservative state lawmakers have said that they will reintroduce super-RFRAs in 2016.<sup>110</sup> Given the passage of the Arkansas RFRA in 2015, it is possible that conservative legislators nationwide will follow Arkansas' example and shape future state RFRAs to more closely mirror federal RFRA language. If enacted, these laws would bear the same potential for third-party harm created by *Hobby Lobby*.<sup>111</sup>

Also, there is no guarantee that a future court ruling will amend the *Hobby Lobby* decision and restore a proper balance between one person's or entity's religious liberty and another's rights, health, or well-being. Based on direct and indirect impacts of the *Hobby Lobby* decision, lawmakers at both the state and federal level must take immediate steps to rein in the problematic expansion of religious liberty claims that threaten to create third-party harm. Policymakers should impose limits on the scope of complicity claims and advance expanded nondiscrimination protections. Finally, legislators must work to otherwise limit the impact of *Hobby Lobby* on future litigation.

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## Amend the federal RFRA to prevent third-party harm

As articulated in the Center for American Progress' 2014 report "A Blueprint for Reclaiming Religious Liberty Post-Hobby Lobby," Congress should amend the federal RFRA to ensure that the law cannot be used to harm third parties.<sup>112</sup> In doing so, lawmakers can maintain the strong protections for religious liberty already afforded by federal law while clarifying that exemptions can only be sought when they do not burden or discriminate against others. This approach should also serve as a model for state legislatures where RFRA bills will continue to be debated. Specifically, policymakers must rein in RFRA laws and remove overly broad permissions, such as the lowering of substantial burden to burden and allowing RFRA lawsuits between private parties.

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## Pass comprehensive nondiscrimination protections for LGBT Americans

Research indicates that LGBT Americans and their families continue to experience discrimination based on sexual orientation and/or gender identity in a number of settings, including employment, housing, and public accommodations.<sup>113</sup> Despite this widespread injustice, LGBT people are not explicitly protected under most state and federal nondiscrimination laws. Indeed, the increased risk of third-party harm resulting from *Hobby Lobby* was already a reality for many LGBT people because these clear protections are lacking at the federal level and in most states. The expansion of overly broad religious exemptions since *Hobby Lobby* worsens an already significant problem. In order to ensure that religious beliefs cannot be used to discriminate or deny the same nondiscrimination protections afforded to other Americans on the basis of characteristics such as race, national origin, and religion, Congress, state legislatures, and localities should pass comprehensive nondiscrimination protections based on sexual orientation and gender identity.

At the federal level, the Equality Act would add sexual orientation, gender identity, and—where currently absent from federal law—sex to existing civil rights statutes to modernize and expand protections in employment, housing, public accommodations, education, access to credit, jury service, and federal funding.<sup>114</sup> As introduced, the proposed legislation would also make clear that the federal RFRA could not be used as a claim or defense to evade the protections available under statutes such as the Civil Rights Act of 1964, which would protect all enumerated classes, not just LGBT people. The legislation would not alter existing First Amendment protections nor the right of religious entities to prefer co-religionists in hiring practices.

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## Proactively enact state laws to increase access to preventive health care

Several states and the District of Columbia have introduced measures to protect no cost-sharing contraception in response to the *Hobby Lobby* decision. For example, state senators in Washington introduced a bill, currently in committee, to prohibit employers from excluding contraception as part of an employee's benefits package.<sup>115</sup> In Illinois, the legislature passed a bill that put a referendum question on the 2014 general election ballot asking if health insurance plans should continue to cover birth control; the state already had a contraceptive equity law that requires prescription drug plans to include contraception.<sup>116</sup> More than 65 percent of Illinois voters agreed that insurance plans should continue to cover birth control if they cover other prescription drugs.<sup>117</sup> These types of efforts would restore access to all forms of contraception for employees of companies that refuse to cover them.

These sorts of measures carry the support of small-business owners. A 2015 poll commissioned by the Center for American Progress and the Small Business Majority and completed by Greenberg Quinlan Rosner Research shows that a majority of small-business owners—62 percent—believe that employers should be required to offer insurance that covers birth control even if it conflicts with owners' religious beliefs. These findings are consistent across small-business owners regardless of gender, race, political affiliation, religious identification, and geography.<sup>118</sup>

Still, many lawmakers are disregarding what employers and employees actually want in order to play politics with access to necessary health care. In 2014, the Council of the District of Columbia passed an ordinance prohibiting employers from discriminating against employees on the basis of their reproductive health choices.<sup>119</sup> D.C. Mayor Muriel Bowser (D) signed the ordinance into law in January 2015. Shortly thereafter in March 2015, the U.S. House of Representatives took the extraordinary measure to repeal this law. However, the Senate did not put the measure to a vote, so the District's law remains in place.<sup>120</sup> Five states introduced similar legislation related to reproductive health nondiscrimination by employers in 2015, but none have passed.<sup>121</sup>

# Conclusion

In October 2015, a married same-sex couple in Michigan brought their newborn baby into a pediatrician's office, and the doctor refused to see or care for the child once she realized that the parents were both women. In a letter to the couple written by the doctor not long after the appointment, she explicitly cited her right to perform her job according to her religious beliefs.<sup>122</sup>

As the United States continues to work to achieve a balance of respecting religious liberty and safeguarding general welfare, it is clear that overly broad religious exemptions that impose costs on third parties, including the exemption granted to Hobby Lobby, are false protectors of religious liberty and cause significant harm and impinge on the liberties of people of all faiths. Americans, whether religious or not, deserve an inclusive vision of religious liberty that protects all people and not just a favored few.

As outlined in this report, *Hobby Lobby* privileged the religious beliefs of an employer over those of the company's employees, causing immediate harm to employees and putting the employees of other closely held corporations at risk. The ruling also expanded the ways in which third parties could be harmed by the expression of another's religious beliefs and bolstered the perceived validity of a complexity claim, resulting in the use of the decision to initiate and defend a growing list of lawsuits and complaints. Finally, the decision spurred efforts to pass overly broad state-level RFRAs, which could engender even further harm if enacted.

To limit these harms, both states and the federal government should enact the recommendations described above and ensure equal protection of the law, equal respect for the varied religious beliefs of a diverse nation, and equal access to the workplace, the marketplace, and the health care all Americans need to thrive.

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