

# “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA

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## ABSTRACT

*The Religious Freedom Restoration Act (“RFRA”) excuses believers from federal laws that “substantially burden” their religious exercise, unless the government shows that the law furthers a compelling interest in the least restrictive manner. Who decides if a burden is “substantial”? RFRA claimants argue that they do.*

*Whether a burden is “substantial” is typically disaggregated into two sub-questions: would the claimant suffer substantial religious penalties from complying with a law, and substantial secular penalties from violating it? Courts may decide the second question, but not the first, because the “religious-question” doctrine bars them from adjudicating theological issues. Courts may determine whether claimants are “sincere” in alleging substantial religious penalties, but not whether those penalties are truly “substantial.” Review of claimant sincerity and secular penalties, however, leaves the crucial judgment of substantiality almost entirely within the control of RFRA claimants.*

*One need not challenge the sincerity of RFRA claimants to question this arrangement. It makes no legal sense to entrust the question of substantial burden to persons so self-interested in the answer, however sincere their belief. A bedrock principle of Anglo-American due process holds that no one may judge her own case. Exemption boundaries must be tended by courts, not exemption beneficiaries, lest the rule of law be swallowed by a sea of self-interested yet functionally unreviewable exemption claims.*

*The Supreme Court’s disposition of the religious nonprofit challenges to the contraception mandate in *Zubik v. Burwell* left undecided whether courts*

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*may adjudicate the substantiality of burdens on religion in light of the religious-question doctrine. This Article explains that courts may adjudicate this issue by relying on neutral principles of secular law, and that they must do so to implement RFRA’s purpose and uphold the rule of law.*

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*“No man is allowed to be a judge in his own cause.”*

—James Madison (1787)<sup>1</sup>

*“[P]ermitting [a person] to become a law unto himself, contradicts both constitutional tradition and common sense.”*

—Justice Antonin Scalia (1990)<sup>2</sup>

*“It sounds like what you are telling us is that the entire U.S. Code, then, is subject to strict scrutiny any time somebody raises a sincere religious objection.”*

—Judge David Hamilton (2014)<sup>3</sup>

#### INTRODUCTION: RFRA AND THE ADJUDICATION OF “SUBSTANTIAL” BURDENS

The Religious Freedom Restoration Act (“RFRA”) excuses believers from any federal law that “substantially burdens” their religious exercise unless the law is the “least restrictive means” of furthering a “compelling government interest.”<sup>4</sup> Who decides whether a burden on religion is “substantial”? The judiciary is charged with interpreting and applying federal statutes as one of its core responsibilities, but recent challenges to the reach of judicial review in RFRA cases have complicated this task.

RFRA’s “substantial burden” element is commonly disaggregated into two conceptual parts: (1) the suffering of “substantial *religious* costs” if the claimant complies with the burdensome law, and (2) the suffering of “substantial *secular* costs” if the claimant violates it.<sup>5</sup> Courts may properly adjudicate the question of “secular costs”—

1 THE FEDERALIST NO. 10, at 59 (Jacob E. Cooke ed., 1961).

2 Emp’t Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (internal citation omitted).

3 Oral Argument at 28:38, Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (No. 13-3853), [http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.13-3853\\_02\\_12\\_2014.mp3](http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.13-3853_02_12_2014.mp3) (replying to counsel’s argument that courts may review only a RFRA claimant’s sincerity in alleging a substantial burden on religious exercise, and not the substantiality of the burden itself).

4 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012). Although *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997), suggested that RFRA enacted the classic formulation of “strict scrutiny” applied in constitutional rights cases, RFRA’s legislative history indicates that Congress meant only to codify the modest balancing test used in free exercise cases prior to *Smith*, 494 U.S. 872. See Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 428–41 (2016), [http://www.yalelawjournal.org/pdf/Lederman\\_PDF\\_pt9q3ynr.pdf](http://www.yalelawjournal.org/pdf/Lederman_PDF_pt9q3ynr.pdf). This Article accordingly uses “compelling interest test” rather than “strict scrutiny” as the shorthand formulation of the compelling interest/least restrictive means test imposed by RFRA. *Id.* at 428.

5 IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 241–42 (2014) (emphasis added) (citing and discussing *Sherbert v. Verner*, 374 U.S. 398, 404

that is, whether the legal sanctions for disobeying a burdensome law are “substantial.” The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, however, that judicial review of the substantiality of “religious costs” is precluded by the Court’s “religious-question” doctrine, which bars courts from adjudicating issues of theology, doctrine, or belief.<sup>6</sup> Courts may adjudicate whether claimants are “sincere” in alleging religious costs, whether they honestly believe a law interferes with religious practice,<sup>7</sup> but courts may not rule on the substantiality of those costs.

Courts and commentators are divided over the correctness and wisdom of this limitation on judicial review. Some have insisted on it without discussing or apparently recognizing its ramifications.<sup>8</sup> Others have concluded that review of claimant sincerity and secular costs is a sufficient check on excessive RFRA claims,<sup>9</sup> and still others that

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(1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); see, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (“By requiring the [claimants] and their companies to arrange for [emergency contraception] coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs. If the [claimants] and their companies do not yield to this demand, the economic consequences will be severe.”).

The disaggregation of the substantial burden element into substantial religious and substantial secular costs is also implicit in the formulation of the substantial burden test widely employed by the federal courts—whether government action puts “substantial pressure” on a claimant to alter religious behavior or violate beliefs. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1175 (10th Cir. 2015) (2-1 decision as to self-insured ERISA plans), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557.

<sup>6</sup> 134 S. Ct. 2751 (2014); see *infra* Section I.A.

<sup>7</sup> See, e.g., *United States v. Ballard*, 322 U.S. 78, 80–82, 88 (1944) (affirming jury instruction submitting whether defendant was sincere in his religious beliefs, but prohibiting finding whether those beliefs were true or false).

<sup>8</sup> See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (finding substantial burden on religious exercise based solely on claimant sincerity and secular costs, without further discussion); Trey O’Callaghan, Comment, *Going to Hell in a HHS Notice: The Contraception Mandate’s Next Impermissible Burden on Religious Freedom*, 11 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 269 (2016) (same); John Bursch, *Symposium: Contraception Mandate Cases—Why the Supreme Court Will Instruct Lower Federal Courts to Stop Second-Guessing Religious Beliefs*, SCOTUSBLOG (Dec. 14, 2015, 5:45 PM) (same), <http://www.scotusblog.com/2015/12/symposium-contraceptive-mandate-cases-why-the-supreme-court-will-instruct-lower-federal-courts-to-stop-second-guessing-religious-beliefs/>.

<sup>9</sup> E.g., Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, MO. LAW. REV. (forthcoming 2017) (manuscript at 30–39, 44–46), <http://ssrn.com/abstract=2741136>; Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1772, 1791–1799; Chad Flanders, *Insubstantial Burdens* 2, 7–8 (June 2015) (unpublished manuscript), <http://ssrn.com/abstract=2727423>.

RFRA's compelling interest test properly and adequately screens for excessive claims.<sup>10</sup> This Article contends that all of these are wrong.

As a practical matter, limiting review to sincerity and secular costs leaves the question of substantiality wholly to RFRA claimants. Challenging a claimant's sincerity requires the government to argue and the courts to hold that claimants are lying about their beliefs—an “inquisitor-like” tactic for which lawyers and judges have little appetite.<sup>11</sup> Unsurprisingly, the government rarely contests sincerity and courts rarely adjudicate it.<sup>12</sup> Judicial review of the secular costs of disobeying a burdensome law is also of little practical consequence, as well as a conceptual non sequitur. It is the rare law whose violation triggers trivial sanctions, and the presence of substantial secular costs proves literally nothing about the presence of substantial religious costs.<sup>13</sup>

If judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant's mere say-so. Once a claimant honestly pleads unacceptable religious costs—that complying with a law violates his or her religious convictions—there remains no justiciable question whose answer will make any difference. By holding formally nonjusticiable the disaggregated question of whether a law imposes “substantial religious costs,” the religious-question doctrine

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10 See, e.g., *Hobby Lobby*, 134 S. Ct. at 2779, 2783, 2785 (restricting review to claimant sincerity and secular costs, but observing that government often justifies substantial burdens under RFRA's compelling interest); Eugene Volokh, *The Religious Freedom Restoration Act and Complicity in Sin*, WASH. POST: THE VOLOKH CONSPIRACY (June 30, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin/> [hereinafter Volokh, *Complicity in Sin*] (“[O]ne could always argue that the burden is nonetheless permissible, because it's the least restrictive means of serving a compelling government interest. . . . But, under RFRA, the question whether there is such a substantial burden should be based on the Hobby Lobby owners' sincere judgment about what constitutes culpable complicity with sin, and not on the courts' judgment.”); see also Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1911–38 (2015) [hereinafter Sepinwall, *Conscience and Complicity*] (courts must absolutely defer to a claimant's understanding of religious wrong, as well as any claim that a legally required act makes one complicit in such a wrong unless the latter is based on a mistake of empirical fact, unless the claim would impose significant burdens on third parties). See generally Amy J. Sepinwall, *Burdening “Substantial Burdens”*, 2016 U. ILL. L. REV. 43 [hereinafter Sepinwall, *Substantial Burdens*] (the accommodation process substantially burdened *Zubik* claimants by compelling ratification of contraception use, but any accommodation must also provide contraception coverage to employees and beneficiaries).

11 See William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 99.

12 See *infra* Section I.B.

13 See *infra* Section I.C.

also renders functionally nonjusticiable the ultimate “aggregated” question posed by RFRA’s text: whether a law “substantially” burdens the claimant’s religious exercise.<sup>14</sup>

The problem is exemplified by one of the Affordable Care Act (“ACA”) contraception mandate cases recently remanded by the U.S. Supreme Court.<sup>15</sup> In *Little Sisters of the Poor Home for the Aged v. Burwell*, an order of Roman Catholic nuns that operates several nursing homes objected to the mandate’s requirement that their self-insured health plan cover contraceptives prohibited by their faith in their employee health plan.<sup>16</sup> The mandate would relieve the Little Sisters of this requirement if they notify the government of their objections, after which the insurer administering their plan (their “third-party administrator” or “TPA”) would supply the coverage directly to employees and be reimbursed by the government.<sup>17</sup> The Little Sisters object to this as well, claiming that notice to the government implicates them in contraception use by causing their TPA to supply contraceptives in their place.<sup>18</sup> Because of a regulatory quirk, however, the government cannot enforce this substitute distribution requirement against the Little Sisters’ TPA, or prevent the Little Sisters from insisting that their TPA refuse to comply with the requirement as a contractual condition.<sup>19</sup>

In sum, the Little Sisters claimed that the mandate *substantially* burdens their religious exercise within the meaning of RFRA, even though (1) they may exempt themselves from its requirements by no-

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<sup>14</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>15</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

<sup>16</sup> 794 F.3d 1151, 1167 (10th Cir. 2015), *vacated and remanded for settlement discussions sub nom.* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). The Little Sisters have a self-insured health plan actually operated by an insurer acting as a “third-party administrator” or “TPA.” See *infra* note 197 and accompanying text.

<sup>17</sup> *Little Sisters*, 794 F.3d at 1166.

<sup>18</sup> *Id.* at 1178 n.25, 1188.

<sup>19</sup> The Little Sisters have a self-insured “church plan” exempt from the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001–1461 (2012)—the only means by which the government can legally enforce the accommodation’s substitute distribution requirement against TPAs. See *infra* notes 128, 168 and accompanying text. The government’s generous reimbursement scheme might entice church plan TPAs to provide contraceptives under the accommodation even though the government cannot require them to do so. On the other hand, the fact that their plan is exempt from ERISA allows the Little Sisters, if they wish, to terminate contractual relations with any TPA voluntarily complying with the accommodation, which would obviously preclude voluntary compliance. See Marty Lederman, *What to Expect from the Zubik Remand: A Possible Solution for “Church Plans,” But Otherwise No Obvious Common Ground*, BALKINIZATION (May 17, 2016), [www.balkin.blogspot.com/2016/05/what-to-expect-from-zubik-remand.html](http://www.balkin.blogspot.com/2016/05/what-to-expect-from-zubik-remand.html).

tifying the government, (2) the government has no power to require their insurer to provide contraception coverage directly to employees, and (3) the Little Sisters can terminate any insurer who provides such coverage voluntarily, because (4) despite all this, their insurer might still decide to comply with the mandate voluntarily.

One need not question the Little Sisters' sincerity—and indeed the government did not—to wonder whether the burden they claimed should count as “substantial” under RFRA. At the least, a court should review this claim that the hypothetical voluntary action of a third party can “substantially burden” a RFRA claimant’s religious exercise when the claimant is legally empowered to prevent the action that would constitute the burden. Yet, because the Little Sisters are admittedly sincere and the fines from violating the mandate are obviously debilitating, the substantiality of the claimed burden is deemed established without further judicial inquiry—or so the Little Sisters argued.<sup>20</sup>

Does it make legal sense that the Little Sisters' bare allegation is sufficient to establish the “substantiality” of a burden on their religious exercise, without meaningful judicial review? It is folly to leave this question in the hands of persons so self-interested in the answer, however sincere their belief. A bedrock principle of Anglo-American due process holds that “[n]o man is allowed to be a judge in his own cause,” as James Madison put it.<sup>21</sup> The reasons are obvious, but Madison spelled them out anyway: “[H]is interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”<sup>22</sup> For the good of both law and religion, exemption boundaries must be tended by courts, not exemption beneficiaries, lest the rule of law be swal-

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<sup>20</sup> Brief for Petitioners at 41–51, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 15-35, 15-105, 15-119, 15-191); *accord* Brief for Petitioners at 32–34, 37–40, *Zubik*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505); *see also* Brief of Amici Curiae Religious Institutions Supporting Petitioners at 19–33, *Zubik*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (arguing that claimant sincerity and substantial secular costs are sufficient to prove that government action “substantially burdens” religious exercise under RFRA); Gaylord, *supra* note 9, (manuscript at 34) (“[C]ourts are limited to deciding whether the government places substantial pressure on the religious objector to violate [religious] beliefs. Under RFRA, the religious adherent gets to define the nature of his own sincerely held beliefs as well as what constitutes a violation of those beliefs.”); Bursch, *supra* note 8 (“[O]nce the Little Sisters of the Poor have decided as a matter of moral judgment that facilitating the delivery of abortifacients by signing the HHS form is to be complicit in the sin, Article III judges lack the constitutional authority to second-guess that moral judgment and reach a different conclusion.”).

<sup>21</sup> THE FEDERALIST NO. 10, at 59. *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY ch. 2 (2003).

<sup>22</sup> THE FEDERALIST NO. 10, at 59.

lowed by a sea of self-interested yet functionally unreviewable exemption claims.

The prospect of exemptions “on demand” has spurred many judges and commentators to question a doctrinal regime that renders RFRA’s substantial burden element functionally nonjusticiable.<sup>23</sup> Interpreting and applying ambiguous statutory terms is simply what courts do, and reviewing RFRA’s substantial burden element is no exception.<sup>24</sup> None of them, however, has explained how adjudication of religious costs can be squared with *Hobby Lobby* and the religious-question doctrine.

The constitutional stakes are high. Because disaggregation functionally disables courts from adjudicating the substantiality of the alleged burden on a RFRA claimant’s religious exercise, it invests believers with a presumptive entitlement to exemption from any federal law they feel inclined to challenge. The rule of law problem posed by this functional nonjusticiability is not just present in RFRA, but also in the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), a companion to RFRA applicable to state land use regulation and prison administration which contains an identical substantial burden element.<sup>25</sup> It is likewise present in so-called “religious freedom” acts and judicial decisions in more than half the states that contain comparable substantial burden language. The efficacy of federal law and wide swaths of state law, therefore, is threatened by a religious exemption regime whose limits depend mostly on the self-restraint of the believers it benefits.

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<sup>23</sup> E.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787, 2799 (2014) (Ginsburg, J., dissenting) (accusing the Court of “elid[ing] entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger,” allowing believers and their commercial businesses to “opt out” of virtually any law “they judge incompatible with their sincerely held religious beliefs”); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 183–85 (2015); Matthew A. Melone, *Corporations and Religious Freedom: Hobby Lobby Stores—A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 501–03 (2015). See generally Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53; Caroline Mala Corbin, Issue Brief, *The Contraception Mandate Accommodated: Why the RFRA Claim in Zubik v. Burwell Fails*, AM. CONST. SOC’Y (Mar. 10, 2016), <https://www.acslaw.org/publications/issue-briefs/the-contraception-mandate-accommodated-why-the-rfra-claim-in-zubik-v>.

<sup>24</sup> See, e.g., *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (RFRA “distinguishes between factual allegations that plaintiffs’ beliefs are sincere and of a religious nature, which a court must accept as true, and the legal conclusion that plaintiffs’ religious exercise is substantially burdened, an inquiry the court must undertake.”) (internal citation, ellipses, and brackets omitted); accord Greene, *supra* note 23, at 184–90; Melone, *supra* note 23, at 502–06.

<sup>25</sup> 42 U.S.C. § 2000cc-4 (2012).



This threat to the rule of law is a judicially self-inflicted wound. The fact that a court may not adjudicate the religious costs of obeying a law does not mean it may only adjudicate the secular costs of disobeying. This confuses the question whether a RFRA claimant correctly understands his or her religion (which courts may not address), with the question whether the claimant has satisfied statutory or other legal requirements for exemption (the adjudication of which has always been an essential feature of the Court's exemption jurisprudence).

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, for example, the Court held that the religious-question doctrine prohibited it from deciding whether a fired teacher satisfied the definition of "minister" prescribed by Lutheran theology, but not from deciding whether she met the Court's own secular definition of "minister" which governs the so-called "ministerial exception" to federal employment law.<sup>26</sup> Rather than treating as dispositive the defendant's admittedly sincere allegation that the plaintiff was a minister under Lutheran doctrine and practice, the Court fashioned its own secular definition of "minister" to decide whether the ministerial exception applied.<sup>27</sup> Similarly, in *Jones v. Wolf* the Court decided that the religious-question doctrine prevented courts from resolving internal church property disputes by deciding which theological faction was more faithful to the church's doctrine and teachings.<sup>28</sup> But courts may nevertheless resolve disputed church property claims on the basis of religiously neutral principles of secular law.<sup>29</sup>

As *Hosanna-Tabor* and *Jones* illustrate, neither the religious-question doctrine nor the Court's religious-exemption jurisprudence requires the disaggregation of "substantial burden" into religious and secular costs, or the functional nonjusticiability that follows from it. While courts are properly disabled from contradicting believers when they claim that obeying a law entails substantial religious costs, courts—not claimants—must decide whether the law imposes a "substantial" burden on claimant religious exercise under RFRA. This Article argues that courts may adjudicate this question directly, without disaggregation, so long as they rely on secular law to do so. Courts may determine whether a law imposes a substantial burden on relig-

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<sup>26</sup> 132 S. Ct. 694, 706–08 (2012).

<sup>27</sup> *Id.* at 708.

<sup>28</sup> 443 U.S. 595, 602, 609 (1979).

<sup>29</sup> *Id.* at 602–05.

ious exercise, in other words, if they make this determination by reference to secular law.

This Article proceeds in four parts. Part I summarizes the religious-question doctrine,<sup>30</sup> and explains why confining judicial review to claimant sincerity and secular costs will allow a RFRA claimant’s bare allegation of substantial burden to be the final word.<sup>31</sup> Part II summarizes the abundant authority that counsels adjudication of substantiality. The Court’s own precedents adjudicated substantiality,<sup>32</sup> both before and after *Employment Division v. Smith*, and for good reason: preservation of the rule of law requires some way for courts to police the boundaries of religious exemptions lest the exemptions swallow the rule.<sup>33</sup> Congress understood and intended that courts would review whether a claimed burden is “substantial” under RFRA, and not merely the disaggregated subquestion whether the secular costs of violating a burdensome law are substantial.<sup>34</sup>

Part III illustrates this Article’s approach with the religious non-profit claims for RFRA exemptions from the ACA contraception mandate remanded by the Supreme Court in *Zubik v. Burwell*.<sup>35</sup> Unlike churches, synagogues, and other “houses of worship,” which are categorically exempt from the mandate, religious nonprofit organizations must affirmatively “self-certify” their eligibility for exemption by providing their insurer or the government with written notice of the contraceptives to which they religiously object.<sup>36</sup> Some religious nonprofits, such as the Little Sisters of the Poor, have sought RFRA exemptions from the requirement of self-certification—effectively, an “exemption from the exemption”—claiming that it causes or facilitates the provision of contraceptives by their health plan insurers to plan beneficiaries, and thus constitutes a substantial burden on their beliefs by making them complicit in and appear to encourage contraception use their faith condemns.<sup>37</sup> Although the federal circuits al-

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<sup>30</sup> See *infra* Section I.A.

<sup>31</sup> See *infra* Sections I.B, I.C.

<sup>32</sup> See *infra* Section II.A.

<sup>33</sup> 494 U.S. 872 (1990); see *infra* Section II.C.

<sup>34</sup> See *infra* Section II.B.

<sup>35</sup> 136 S. Ct. 1557 (2016).

<sup>36</sup> See *infra* Section III.A.

<sup>37</sup> See *infra* Section III.B. This Article focuses on the circuit panel decisions denying this claim which the Supreme Court remanded with a suggestion for possible compromise and settlement. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015) (2-1 decision as to self-insured ERISA plans), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557

most uniformly rejected these claims, they sometimes did so on grounds that appeared to violate the religious-question doctrine;<sup>38</sup> the Supreme Court's remand order ensures that this issue will remain open if, as is likely, all of the parties do not settle.<sup>39</sup> Part III concludes by explaining how the circuits could have adjudicated claims of substantial burden without transgressing the religious-question doctrine, by relying on religiously neutral principles of secular law,<sup>40</sup> and why this is a desirable resolution of the justiciability problem.<sup>41</sup>

Part IV explains that despite some extravagant language, *Hobby Lobby* did not confine courts to adjudication of claimant sincerity and secular costs, and permits courts to decide directly whether alleged religious burdens are substantial based on relevant secular law. This Article concludes that it is imperative that courts adjudicate the substantiality of alleged religious burdens to preserve the viability and legitimacy of exemption statutes and uphold the rule of law.

## I. ILLUSIONS OF JUSTICIABILITY

RFRA's substantial burden element is commonly disaggregated into two questions: (1) Would the claimant suffer "substantial religious costs" from obeying a burdensome law? and (2) Would the claimant suffer "substantial secular costs" from disobeying it?<sup>42</sup> While

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(No. 15-35); *Geneva Coll. v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557.

For other similar panel decisions, see *Mich. Catholic Conference v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2450 (2016); *Grace Sch. v. Burwell*, 801 F.3d 788 (2d Cir. 2015) (2-1 decision), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2011 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2450 (2016); *Wheaton Coll. v. Burwell*, 791 F.3d 792 (7th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2007 (2016); *Eternal Word Television Network, Inc. v. Secretary, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014).

Only the Eighth Circuit has found that the accommodation constitutes a substantial burden under RFRA. See *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015), *vacated and remanded for reconsideration in light of Zubik sub nom. U.S. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, No. 15-775, 2016 WL 2842448 (May 16, 2016); *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2006 (2016).

<sup>38</sup> See *infra* Section III.C.

<sup>39</sup> See *infra* Section III.D.

<sup>40</sup> See *infra* Section III.E.

<sup>41</sup> See *infra* Section III.F.

<sup>42</sup> See *supra* note 5 and accompanying text.

courts are free to address the second question, the religious-question doctrine prohibits them from answering the first, restricting judicial review to adjudication of the claimant’s sincerity in alleging religious costs, but not the substantiality of the costs themselves.<sup>43</sup>

Some commentators maintain that judicial review of claimant sincerity and secular costs is sufficient to limit the reach of RFRA’s substantial burden element and provide a check on excessive or abusive exemption claims. Professor Helfand, for example, maintains that once a claimant demonstrates his or her sincerity, the court can judge the substantiality of that burden under RFRA by ascertaining “whether engaging in religious exercise will, in fact, lead to the imposition of civil penalties that are substantial.”<sup>44</sup> By judging only claimant sincerity and secular costs, he concludes, “[c]ourts can avoid simply deferring to the assertions of plaintiffs as well as abdicating their statutory obligations under RFRA.”<sup>45</sup> Professors Flanders and Gaylord similarly argue that once a RFRA claimant demonstrates that the secular costs of a law are pressuring the claimant to abandon a sincere religious practice, RFRA’s substantial burden requirement has been satisfied.<sup>46</sup>

These arguments are mistaken for both practical and conceptual reasons. Challenging a claimant’s sincerity is a risky and difficult litigation strategy that the government almost never pursues.<sup>47</sup> Laws that entail trivial penalties are likewise rare, and conceptually the presence or absence of substantial secular costs says nothing about the presence or absence of substantial religious costs, which goes to the heart of the substantial burden element.<sup>48</sup> Neither claimant sincerity nor the substantiality of secular costs, therefore, will make a difference in answering the ultimate question whether a law “substantially” burdens religious exercise under RFRA.

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<sup>43</sup> See *infra* Section I.A.

<sup>44</sup> Helfand, *supra* note 9, at 1794.

<sup>45</sup> *Id.*

<sup>46</sup> Gaylord, *supra* note 9, (manuscript at 33–34); Flanders, *supra* note 9, at 2. Flanders would limit the judicial inquiry to whether the pressure is nontrivial, Flanders, *supra* note 9, at 2, 8–9, while Gaylord would require that the pressure be “substantial” or “significant,” Gaylord, *supra* note 9, (manuscript at 34, 38).

<sup>47</sup> See *infra* Section I.B.

<sup>48</sup> See *infra* Section I.C.

### A. *The Religious-Question Doctrine*

The religious-question doctrine prohibits civil courts from deciding questions of religious doctrine or practice,<sup>49</sup> including whether a belief or practice is logically consistent, plausible, reasonable, or weighty, or a claimant properly understands what his or her (or its) religion requires.<sup>50</sup> Such matters are “off-limits” to government.<sup>51</sup>

The doctrine emerged in *Watson v. Jones*, a federal diversity case involving a Reconstruction-era church property dispute between pro- and anti-slavery factions of a border-state Presbyterian congregation.<sup>52</sup> Each faction claimed the church’s property, on the ground that it adhered to theologically authentic Presbyterian belief and doctrine from which the other faction had departed.<sup>53</sup> Among other things, *Watson* held that principles of general jurisprudence precluded American courts from deciding essentially religious questions,<sup>54</sup> and thus deprived courts of the power to decide which of the litigating factions of a church is the “true” representative entitled to use and enjoyment of

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49 Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 497–98 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998); Christopher C. Lund, *Rethinking the “Religious-Question” Doctrine*, 41 PEPP. L. REV. 1013, 1013 (2014); see also Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1190–96 (agreeing with this characterization of the doctrine, but calling it by a different name); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 519–41 (2013) (acknowledging this understanding of the doctrine, but criticizing it as a departure from its original purpose).

50 *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (“[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.”) (internal parentheses omitted); *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 886–87 (1990) (“It is [not] appropriate for judges to determine the ‘centrality’ of religious beliefs . . . [or] the place of a particular belief in a religion or the plausibility of a religious claim.”); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (People “may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”); see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) (“In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”).

51 LUPU & TUTTLE, *supra* note 5, at 53; accord Goldstein, *supra* note 49, at 497–98; Greenawalt, *supra* note 49, at 1844, 1856; Helfand, *supra* note 49, at 547; Lund, *supra* note 49, at 1015.

52 80 U.S. (13 Wall.) 679, 683–85 (1871).

53 *Id.* at 690–713.

54 *Id.* at 733–34.

congregational property.<sup>55</sup> Instead, courts were required to defer to the decision of the highest ecclesiastical authority in the denomination about who owned church property, if the church were hierarchical,<sup>56</sup> or to the decision indicated by laws governing voluntary associations, if the church were congregational.<sup>57</sup>

Eighty years later, *Kedroff v. St. Nicholas Cathedral* elevated *Watson*’s “religious-question” doctrine from general common law to constitutional rule.<sup>58</sup> *Kedroff* involved whether a New York City cathedral was owned and controlled by the Patriarch of the Russian Orthodox Church residing in Moscow, or by American diocesan authorities residing in New York City (who feared the Patriarch had been co-opted by Soviet authorities).<sup>59</sup> Constitutionalizing *Watson*, the Court reversed the lower court’s award of the property to the American diocese, siding instead with the denominational leader in the Soviet Union; it held that the free exercise of religion protects the right of religious bodies to make their own decisions about internal governance free from pressure or interference by government.<sup>60</sup> Subsequent decisions confirmed the doctrine,<sup>61</sup> extended it to disputes about church offices,<sup>62</sup> and disavowed judicial review even when a church ignored or violated its own procedures.<sup>63</sup>

The religious-question doctrine received a recent and ringing endorsement in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, in which the Court endorsed the judge-made “ministerial exception” to the antidiscrimination provisions of federal employment law.<sup>64</sup> Reasoning that a congregation’s choice of its leader was a quintessentially religious decision that courts are powerless to review, the Court confirmed “that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”<sup>65</sup> The Free Exercise and Establishment Clauses thus precluded application of federal or state employment law to a church’s decision about whom it will employ as a minister:

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<sup>55</sup> *Id.* at 728–29.

<sup>56</sup> *Id.* at 727.

<sup>57</sup> *Id.* at 725.

<sup>58</sup> 344 U.S. 94 (1952).

<sup>59</sup> *Id.* at 95–96, 102–03, 108–09.

<sup>60</sup> *Id.* at 116, 119–21.

<sup>61</sup> See *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 447–49 (1969).

<sup>62</sup> *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721–22 (1976).

<sup>63</sup> *Id.* at 713–14.

<sup>64</sup> 132 S. Ct. 694, 706 (2012).

<sup>65</sup> *Id.* at 704.

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>66</sup>

Although the religious-question doctrine evolved in the context of church property and office cases, it also played a decisive role in some pre-*Smith* free exercise exemption decisions. In *Thomas v. Review Board*, for example, Thomas, a Jehovah's Witness steelworker, was denied unemployment benefits after quitting his job rather than work on military weapons in violation of his religion, which prohibited him from "producing or aiding in the manufacture of items used in the advancement of war."<sup>67</sup> Thomas had been working without objection in a position in which the steel he fabricated went to the manufacture of military weapons, among other industrial uses.<sup>68</sup> When that job was eliminated, Thomas was involuntarily transferred to a new one which required that he work directly on military tanks, to which he objected.<sup>69</sup> The Court held that Thomas was entitled to benefits, even though a Witness co-worker had no objection to the same job,<sup>70</sup> and both jobs seemed to constitute "producing or directly aiding" in the manufacture of weapons:<sup>71</sup>

Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. . . . [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.<sup>72</sup>

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<sup>66</sup> *Id.* at 706.

<sup>67</sup> 450 U.S. 707, 710–11, 711 n.4 (1981).

<sup>68</sup> *Id.* at 710–11. Although there was no specific finding on how much of the steel Thomas fabricated went to weapons manufacture, Thomas's employer devoted virtually all of its activities to weapons manufacture, *id.* at 711 n.4, and the Court found it "reasonable to assume" that some of the steel Thomas processed ultimately went to "tanks or other weapons." See *id.* at 711 n.3.

<sup>69</sup> *Id.* at 710. Thomas had no objection to working on steel that was later made into weapons, but claimed he could not in good conscience work directly on weapons. *Id.* at 710–11.

<sup>70</sup> *Id.* at 715–16.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; accord *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (dictum) (courts are not competent "to question . . . the validity of particular litigants' interpretations of th[eir] creeds").

In similar fashion, the Court rejected attempts in *Smith* itself to save constitutionally mandated exemptions by restricting their application to government burdens on “important” or “central” beliefs and practices. “What principle of law or logic,” asked the Court, “can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of different religious claims.”<sup>73</sup>

### B. Review of Claimant Sincerity

Professor Helfand suggests that the boundary-maintenance problems created by nonjusticiable religious costs should be solved by “increased sincerity skepticism,” not “increased substantial burden skepticism.”<sup>74</sup> By closely evaluating whether a claimant has honestly alleged a substantial burden on religious exercise, he predicts, courts can prevent RFRA from being abused by fraudulent claims: “[T]he more considerations courts can incorporate into their sincerity analysis, the better courts can serve as gatekeepers, ensuring the overall integrity of a religious accommodations regime.”<sup>75</sup> Others have made similar arguments.<sup>76</sup> None of them acknowledges the difficulties and dangers that close review of sincerity would entail.

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<sup>73</sup> Emp’t Div., Dep’t of Human Res. v. *Smith*, 494 U.S. 872, 887 (1990) (dictum) (citation omitted); accord *Hernandez*, 490 U.S. at 699 (courts are not competent “to question the centrality of particular beliefs or practices to a faith”).

The religious-question doctrine does not apply to exemption claims involving government administration of its own programs and properties. *E.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 440 (1988) (holding Native Americans not entitled to enjoin construction of road on government property even though road would burden their ability to practice their religion on adjacent property); *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (holding parent not entitled to enjoin government use of child’s social security number in government’s possession, even though he sincerely believed this use was inflicting spiritual harm on his daughter).

<sup>74</sup> Helfand, *supra* note 9, at 1801.

<sup>75</sup> *Id.*

<sup>76</sup> *E.g.*, Nathan Chapman, *Adjudicating Religious Sincerity*, WASH. L. REV. (forthcoming 2017) (arguing that courts can and should adjudicate sincerity using conventional standards of evidence, so long as insincerity is not inferred from the implausibility of the belief at issue); Samuel J. Levine, *A Critique of Hobby Lobby and the Supreme Court’s Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 46 (2015) (Judicial review of sincerity is “one of the safeguards against the unfettered reliance on religious claims as a defense to prosecution for otherwise illegal conduct, or as a basis for an exemption from an otherwise valid law. . . . [A] court has the authority to inquire whether an individual is expressing a sincerely held religious belief.”); Kara Loewentheil, *Secrets That Reside in the Hearts of Men* (unpublished manuscript) (on file with author) (arguing that courts can and should closely examine claimant sincerity to properly police religious-exemption boundaries).



The government rarely questions the sincerity of exemption claims.<sup>77</sup> Since the development of religious liberty jurisprudence in the early 1960s, the government has conceded claimant sincerity in virtually every religious exemption case to reach the Supreme Court,<sup>78</sup> including all of the religious nonprofit cases remanded by *Zubik*.<sup>79</sup> The only such cases in which the government seriously questioned claimant sincerity are *Thomas* and *Hosanna-Tabor*—both of which the government lost.<sup>80</sup>

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<sup>77</sup> Except in prisoner cases, where both courts and governments are reflexively skeptical of such claims. See Loewentheil, *supra* note 76, (manuscript at 5 & n.14).

<sup>78</sup> See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting in the granting of an injunction); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 919 (Blackmun, J., dissenting); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 138 n.2 (1987); *Bowen v. Roy*, 476 U.S. 693, 725, 729 (1986) (O'Connor, J., concurring in part and dissenting in part); *Goldman v. Weinberger*, 475 U.S. 503, 525 (1986) (Blackmun, J., dissenting); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972); *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 601–02 (1961); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 584 (1983) (noting lower court assumed sincerity of university's racially discriminatory beliefs for purposes of summary judgment motion); *Gillette v. United States*, 401 U.S. 437, 440 (1971) (noting lower court rejected exemption “not because of doubt about the sincerity or the religious character of petitioner's objection to military service, but because his objection ran to a particular war”); *United States v. Seeger*, 380 U.S. 163, 166 (1965) (noting lower court found claimant's anti-war beliefs sincere).

Professor Levine has argued that Justice Ginsburg's *Hobby Lobby* dissent appears to preclude review of claimant sincerity even when the government contests it. Levine, *supra* note 76, at 43–45.

<sup>79</sup> See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1174 (10th Cir. 2015) (2-1 decision as to self-insured ERISA plans), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Geneva Coll. v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557.

<sup>80</sup> For *Hosanna-Tabor*, see Brief for the Federal Respondent at 22, 24, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553) (arguing termination of teacher by private religious school was a “textbook case” of employer retaliation for teacher's assertion of rights under Americans with Disabilities Act); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 409–13 (2013) (detailing evidence in record suggesting school's deployment of ministerial exception was pretext for disability discrimination). For *Thomas*, see *Thomas v. Review Board*, 450 U.S. 707, 710–13 (1981) (detailing hearing officer and lower courts' skepticism of Thomas's theological distinctions); *supra* text accompanying notes 67–72.

The government’s reticence to challenge claimant sincerity is not surprising. Sincerity challenges require the government’s attorney to convince the trier of fact that the claimant is a liar—that he or she has fabricated either the allegedly burdened religious belief or practice, or the claimant’s religious obligation to observe it. Attempting to prove this is risky. Merely making the accusation may forfeit the sympathy of the trier of fact, especially if it is a jury; no one likes their faith to be called a fraud, and most are not anxious to publicly label the faith of others fraudulent.<sup>81</sup>

Proof is also difficult. The government might examine the claimant,<sup>82</sup> but this is almost certainly a losing proposition. The claimant will be hostile and uncooperative, and interrogating a witness under oath to prove she does not believe what she claims evokes images of the Inquisition, the Salem witch trials, the McCarthy hearings, and other sordid episodes in European and American history.<sup>83</sup>

Insincerity can be proven with extrinsic evidence, but this, too, is hard to come by. Consider a Catholic who uses contraception, or whose spouse uses it, but seeks exemption from the contraception mandate for business reasons.<sup>84</sup> Finding a prescription for contraceptives filled by the claimant or spouse would be evidence of insincerity,

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<sup>81</sup> Unless, perhaps, it is an unpopular minority religion.

<sup>82</sup> Cf. Marshall, *supra* note 11, at 23 (“How else can the state refute the sincerity of a religious claim other than by uncovering alleged inconsistencies or contradictions in the claimant’s religious convictions in order to impeach her assertions?”).

<sup>83</sup> See *Thomas*, 450 U.S. at 710–11.

<sup>84</sup> Cf. *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 629 n.3 (8th Cir. 2013) (suggesting that corporate challenge to mandate was motivated as much by CEO’s secular libertarian commitments as by his Catholic faith), *vacated and remanded sub nom.* *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014); Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, GALLUP (May 22, 2012), <http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx> (reporting 82% of Catholics say using birth control is morally acceptable).

Under the mandate’s religious accommodation, self-insured claimants are relieved of the obligation to cover contraception and related services, which are instead provided directly to plan beneficiaries by claimant TPAs who, in turn, are reimbursed that expense by the government. Self-insured claimants thus receive the financial benefits of increased contraceptive use—reduced claims for prenatal care, childbirth, and postnatal complications—without incurring the expense of covering the contraception that generates these benefits, which is reimbursed by the government.

Now that *Hobby Lobby* has extended the mandate’s religious accommodation to closely held business corporations, it is at least conceivable that some such self-insured corporations might find a RFRA exemption from the mandate financially attractive, irrespective of their owners’ subjective religious beliefs about contraception. See Marshall, *supra* note 11, at 38–40 (detailing the economic incentives of RFRA exemptions after *Hobby Lobby*).

but such information is protected by medical privacy laws.<sup>85</sup> One might depose friends and family in hopes of uncovering a claimant's private admission of contraception use, though they are likely to be as uncooperative as the claimant. One could hire a private investigator to troll through the claimant's or spouse's activities in hopes of finding evidence of behavior inconsistent with claimed anticontraception beliefs—a visit to Planned Parenthood, perhaps, or a purchase of over-the-counter contraceptives? Such a fishing expedition would be expensive, a court is unlikely to permit it, and a jury would be repulsed by it.<sup>86</sup>

The risk of alienating the trier of fact might be worth the gamble, and the difficulty of gathering evidence the trouble, if there were the real possibility of a significant payoff—a judicial finding of insincerity that would defeat a claim for RFRA relief. But courts are as reluctant as governments to involve themselves in questions about a religious claimant's sincerity.<sup>87</sup> The Court's sincerity doctrines, moreover, make any such payoff unlikely. Courts must defer to the claimant's construction of her beliefs, however implausible it may appear to others.<sup>88</sup> For example, it would seem that if Thomas's old job did not constitute a material contribution to war in violation of Jehovah's Witness beliefs, then the new job should not have either—as both Thomas's co-religionists urged and the state supreme court found.<sup>89</sup> But the Court held that Thomas was entitled to draw his own theological distinctions, regardless of how implausible they might appear to others.<sup>90</sup>

Even when religiously contradictory behavior is evident, the courts defer to the claimant's explanations. In *Hobby Lobby*, for ex-

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<sup>85</sup> *E.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, § 221, 110 Stat. 1936, 2009.

<sup>86</sup> *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

<sup>87</sup> *See* Loewentheil, *supra* note 76, (manuscript at 2) (“[C]ourts are almost unanimous in agreement that the sincerity of litigants seeking a religious exemption should not be questioned.”); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 326 (“The tendency of our courts and bureaucracies is to avoid questions of religious sincerity.”); *see also* Anna Su, *Judging Religious Sincerity*, 5 OXFORD J.L. & RELIGION 28, 35 (2016) (noting similar minimalist conceptions of sincerity review in decision of the Supreme Court of Canada and the European Court of Human Rights).

<sup>88</sup> *See supra* notes 50–51 and accompanying text.

<sup>89</sup> *See* *Thomas v. Review Bd.*, 450 U.S. 707, 711, 714–16 (1981).

<sup>90</sup> *See supra* text accompanying notes 71–72. The Court left open the possibility that a claimant might press a belief or practice “so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause,” *Thomas*, 450 U.S. at 715, but gave no hint of what such a claim might look like.

ample, the company’s health plan had covered emergency contraceptives for years despite its owners’ stated belief that such contraceptives are abortifacients prohibited by their religion.<sup>91</sup> It was only after the contraception mandate controversy arose and a law firm approached the owners about a court challenge that they became aware of this coverage and belatedly eliminated it.<sup>92</sup> The company claimed an oversight, but these events would also have supported an inference that the owners were insincere in claiming a *substantial* burden on their religious exercise: after all, they had not been careful to exclude objectionable contraceptives from coverage, and they discovered and excluded that coverage only while preparing to sue the government. At every level, however, the courts ignored this possibility, accepting the company’s explanation at face value.<sup>93</sup>

It is no surprise that the government hardly ever challenges an exemption claimant’s sincerity. In the vast majority of RFRA cases, proof of insincerity can be had only at great risk and with great difficulty, and thus is rarely sought.

### C. Review of “Secular Costs”

Do religiously burdensome laws with insignificant penalties even exist? None of the commentators who argue for the adequacy of reviewing claimant sincerity and secular costs has offered a single real-world example in which such review did or would result in a finding of no substantial burden on religion.<sup>94</sup>

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<sup>91</sup> Verified Complaint at 14–15, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE).

<sup>92</sup> See *id.*; Janet Adamy, *Are Firms Entitled to Religious Protections?*, WALL ST. J. (Mar. 21, 2014, 10:33 PM), <http://www.wsj.com/articles/SB10001424052702304026304579451342576281698> (reporting that Hobby Lobby was unaware its health plan covered emergency contraception until the Becket Fund for Religious Liberty solicited its participation in a lawsuit planned against the forthcoming mandate). Hobby Lobby also apparently invests employee retirement accounts in funds with holdings in manufacturers and distributors of emergency contraception. See Loewentheil, *supra* note 76, (manuscript at 24 & n.81).

<sup>93</sup> *Hobby Lobby*, 870 F. Supp. 2d at 1285 (observing without explanation that claimants elected not to maintain grandfathered status), *rev’d*, 723 F.3d 1114, 1124 (10th Cir. 2013) (same), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014) (same).

<sup>94</sup> See *supra* note 9. Professor Helfand implies that the compulsory school attendance law in *Wisconsin v. Yoder* was such a law, since the fine for violating it was only five dollars. Helfand, *supra* note 9, at 1794–95 (observing that the Court deeply explored whether a state compulsory school attendance law burdened the Amish claimants, but not the five dollar fine for violating it). But violation of the *Yoder* statute would have triggered criminal liability for Amish parents without an exemption. 406 U.S. 205, 207–08, 207 n.2 (1972); *id.* at 237 (Stewart, J., concurring). A violation that labels one a convicted criminal, creates a criminal record, and triggers collateral penalties would seem to be per se “substantial” even if the violation is otherwise considered minor and the monetary fine trivial.

It is not surprising that religiously burdensome laws with insignificant sanctions are scarce. It seems unlikely that Congress or a state legislature would attempt to shape or control general public behavior by laws that may be safely ignored because violation carries trivial sanctions. Where such laws exist, it is doubtful that the government devotes its scarce resources to enforcing them. If this is the kind of RFRA claim that adjudication of secular costs screens out, then adjudication is hardly worth the trouble.

Adjudication of secular costs also fails for a more fundamental reason: substantial secular costs are not correlated—at all—with substantial religious costs.<sup>95</sup> If obedience to a law entails minimal *religious* costs, then the law has not imposed a substantial burden on the believer's free exercise, even if the *secular* sanction is enormous. This is a matter of simple logic: if two factual premises are necessary to prove a conclusion, then the conclusion cannot follow from proof of only one of the premises. If a claimant suffers insubstantial religious costs in obeying a purportedly burdensome law, then his or her religious exercise has not been "substantially" burdened, regardless of the substantiality of the secular cost of violating the law.<sup>96</sup> This is why the disaggregated substantial burden element requires *both* a substantial religious cost for obeying a religiously burdensome law *and* a substantial secular cost for disobeying the law.<sup>97</sup>

Judicial review of claimant sincerity does no meaningful analytic work in identifying "substantial" burdens on religion, because it is almost never questioned. As for review of secular costs, laws with trivial or nonexistent sanctions are rare, and in any event one cannot logically conclude that a "substantial burden" exists under RFRA solely from proof of substantial secular costs for disobedience. The only way

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<sup>95</sup> See Greene, *supra* note 23, at 181 (If a law's burden on religious practice "is legally insubstantial, it cannot become legally substantial just because the penalty for disobeying is high.").

<sup>96</sup> Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 125, 138 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter *CORPORATE RELIGIOUS LIBERTY*].

<sup>97</sup> Professor Greene argues that a "substantial burden" on religious exercise exists under RFRA so long as a claimant shows that obeying a law would involve substantial religious costs, even if the secular costs of disobedience are trivial or nonexistent. See Greene, *supra* note 23, at 181. But if a claimant may disobey a religiously burdensome law without legal repercussions, it is hard to see any burden at all, let alone a "substantial" one. The practical consequences of Greene's position nonetheless coincide with those of mine because laws with trivial or nonexistent sanctions are rare. We thus agree that courts should address the ultimate question of substantial burden directly, without disaggregating it into religious and secular costs. See *id.* ("The proper RFRA question is whether the legal demand to do X or to fail to do Y substantially burdens the religious exercise in question . . .").

a court can reach a conclusion of substantial burden from substantial secular costs is to assume the existence of substantial religious costs, thereby begging the very question the substantial burden element is designed to answer.

Disaggregation presents the illusion of adjudication, while rendering the ultimate question of substantial burden functionally non-justiciable. Disaggregation appears to leave courts with important things to do in deciding whether a legal burden on religion is substantial, but in practice it guarantees that the only question material to proof of the substantial burden element will be one the court is barred from answering. Restricting judicial review to claimant sincerity and secular costs thus leaves courts in a doctrinal Catch-22; the religious-question doctrine prohibits them from answering the only question that matters: whether the religious costs of obeying an allegedly burdensome law are substantial.<sup>98</sup> Disaggregating the substantial burden element into substantial religious costs and substantial secular costs thus renders the entire substantial burden question functionally nonjusticiable.

## II. JUSTIFICATIONS FOR JUSTICIABILITY

The Court’s own precedents, RFRA’s text and legislative history, and rule-of-law imperatives together provide compelling authority for judicial review of the substantiality of burdens on religion alleged by RFRA claimants.

### A. *Limits of the Religious-Question Doctrine*

The religious-question doctrine is sometimes misunderstood as precluding judicial review of any dispute that involves a theological or other religious question.<sup>99</sup> The doctrinal prohibition is narrower: judges may not decide a case involving a theological question *by answering that question*; they are fully empowered, however, to decide such cases by reliance on principles of secular law.<sup>100</sup>

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<sup>98</sup> See Priscilla J. Smith, *Who Decides Conscience? RFRA’s Catch-22*, 22 J.L. & POL’Y 727, 727–28 (2014).

<sup>99</sup> See Goldstein, *supra* note 49, at 502 (criticizing growth of the doctrine into “an apparently absolute prohibition on judicial examination of all questions touching on religion”); Helfand, *supra* note 49, at 557 (“[A]ny hint of a religious question is currently understood by courts to trigger First Amendment concerns . . . .”); Lund, *supra* note 49, at 1019 (the doctrine seems “massively overbroad” and may have “grown far beyond what its rationales would justify”); see also Hamilton, *supra* note 49, at 1191 (“The mere presence of religious belief or ecclesiology” in a case “does not necessarily bar the Court’s jurisdiction.”).

<sup>100</sup> See LUPU & TUTTLE, *supra* note 5, at 69–70; Hamilton, *supra* note 49, at 1190, 1191; see

The Court made this clear nearly forty years ago in *Jones v. Wolf*.<sup>101</sup> *Jones* involved the familiar pattern of congregational schism over theological disagreement, with the parties divided on whether the congregation's property belonged to the national denominational body with which the congregation was affiliated, or to the congregational majority who wished to break away.<sup>102</sup> As we have seen, the religious-question doctrine prohibits courts from resolving such disputes by deciding which of such factions is truer to denominational beliefs.<sup>103</sup> *Jones* held, however, that courts are free to decide church property disputes—even those in which theological disagreement plays a material role—by reference to “neutral principles of law.”<sup>104</sup> Courts may rely, for example, on the name in which legal title is held, the provisions of local and national denominational constitutions, corporate charters and bylaws, relevant state statutes, the course of dealing between local congregation and national denomination, and so on.<sup>105</sup> In other words, the religious-question doctrine prohibits courts from deciding cases between religious parties by resolving *theological* disputes, but not from deciding such cases on the basis of *secular* legal principles.

*Hosanna-Tabor* applied this distinction to the ministerial exception in an illuminating way. The Court found that ministerial employment decisions are exempt from the Americans with Disabilities Act (“ADA”) because the Religion Clauses each prohibit the government from telling a church whom it must appoint as its minister.<sup>106</sup> The Court nevertheless formulated its own definition of “minister” for the purpose of administering the ministerial exception that it had just recognized. Carefully reviewing the record, the Court found that the ADA plaintiff in that case, Cheryl Perich, “was a minister within the

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also Corbin, *supra* note 23, at 5 (religious-question doctrine does not prevent courts from ruling on “purely secular factual and legal assumptions” that undergird substantial burden claims).

<sup>101</sup> 443 U.S. 595 (1979).

<sup>102</sup> *Id.* at 597–99.

<sup>103</sup> See *supra* Section I.A.

<sup>104</sup> 443 U.S. at 602; accord *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”).

<sup>105</sup> See, e.g., *Jones*, 443 U.S. at 603; *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 & n.15 (1976) (denominational constitutions and property deeds); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367–68 (1970) (state religious corporation statutes, conveyance deeds, corporate charters, and the national denominational constitution); *LUPU & TUTTLE*, *supra* note 5, at 66.

<sup>106</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706–07 (2012).

meaning of the exception”<sup>107</sup> because both she and the defendant church had held her out as a minister, she had been formally educated and commissioned as a minister, and, perhaps most importantly, she had performed duties which *the Court* found quintessentially ministerial—teaching the Church’s beliefs and practices and otherwise working in service to its mission.<sup>108</sup> Courts may not decide the ministerial exception cases on the basis of a theological definition of “minister,” but they are free to do so on the basis of a secular common law definition.

In sum, both *Jones* and *Hosanna-Tabor* teach that courts may decide cases involving religious questions so long as they rely solely on secular law to do so.

### B. RFRA’s Text and Legislative History

In 1990, *Smith* held that the Free Exercise Clause does not require that religious believers be excused from obeying religiously neutral and generally applicable laws, even when obedience would significantly interfere with their religious exercise.<sup>109</sup> Congress was outraged at this apparent doctrinal revision,<sup>110</sup> and immediately set about to mitigate or reverse it. *Smith* itself endorsed so-called “permissive” legislative exemptions—those not constitutionally mandated by the Free Exercise Clause, but voluntarily enacted by legislatures in accordance with the Establishment Clause—so Congress sought to restore religious exemptions by means of a statute that would allow gov-

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<sup>107</sup> *Hosanna-Tabor*, 132 S. Ct. at 709.

<sup>108</sup> *Id.* at 707–08 (“In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”); see also *id.* at 711–12 (Alito, J., concurring) (“The ‘ministerial’ exception . . . should apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”).

<sup>109</sup> 494 U.S. 872, 885, 890 (1990).

<sup>110</sup> It has been widely observed that *Smith* did not effect a significant doctrinal change because the exemption regime it abandoned was honored mostly in the breach, especially in the Supreme Court. See, e.g., James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1413–22 (1992). Other studies show, however, that exemption claims fared significantly better in the lower courts under the pre-*Smith* exemption regime than they did under *Smith*. See, e.g., Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 246–55 (2004).

*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), mitigated the effect of *Smith* by clarifying that it does not apply to religious gerrymanders and other targeted discrimination against religion.



ernment to interfere with religious exercise only when it had a strong justification.

Congress's early proposals to statutorily restore religious exemptions did not specify the weight or significance of the government interference with religion that Congress wished to alleviate.<sup>111</sup> The first version of RFRA provided only that "[g]overnment shall not burden a person's exercise of religion" unless the burden furthered "a compelling government interest" by the "least restrictive means."<sup>112</sup> Although both the House and Senate committee reports occasionally referred to "substantial" burdens on religious exercise,<sup>113</sup> each committee reported out the actual bill unchanged, with all textual references to "burden" left unqualified.<sup>114</sup> The House passed the bill in the same form.<sup>115</sup> It was only very late in the enactment process that "substantial" and "substantially" were added to modify "burden" and create the version of RFRA that actually became law:

Government shall not *substantially* burden a person's exercise of religion even if the burden results from a rule of general applicability, [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.<sup>116</sup>

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<sup>111</sup> See, e.g., S. 2969, 102d Cong. § 3 (1992) ("Government shall not burden a person's exercise of religion" unless it satisfies the compelling interest test.); H.R. 4040, 102d Cong. § 3 (1991) ("Government shall not burden the practice of religion by any person" unless it satisfies the compelling interest test.); H.R. 2797, 102d Cong. § 3 (1991) ("Government shall not burden a person's exercise of religion" unless it satisfies the compelling interest test.); H.R. 5377, 101st Cong. § 2 (1990) ("[A] governmental authority may not restrict any person's free exercise of religion" unless it satisfies the compelling interest test.); S. 3254, 101st Cong. § 2 (1990) ("[T]he government of the United States, a State, or a subdivision of a State may not restrict any person's free exercise of religion" unless it satisfies the compelling interest test.).

<sup>112</sup> S. 578, 103d Cong. § 3 (1993); accord H.R. 1308, 103d Cong. § 3 (1993).

<sup>113</sup> The House Report's section-by-section analysis describes RFRA as providing simply that "the government cannot burden a person's free exercise of religion" unless it satisfies the compelling interest test, H.R. REP. NO. 103-88, at 10 (1993), and is elsewhere inconsistent in its usage, sometimes referring to "substantial burdens" on religious exercise, and at other points referring only to unspecified "burdens" on such exercise. See *id.* at 6-7. The Senate Report more consistently uses "substantial" to modify "burden," in both the section-by-section analysis and other parts of the report, see S. REP. NO. 103-111, at 2, 8-9, 14 (1993), though it refers only to unspecified "burdens" in criticizing government interference with the free exercise of religion by prisoners and members of the military. See *id.* at 10, 11.

<sup>114</sup> See H.R. REP. NO. 103-88, at 10; S. REP. NO. 103-111, at 3.

<sup>115</sup> H.R. REP. NO. 103-88, at 10 (citing H.R. 1308 § 3).

<sup>116</sup> 42 U.S.C. § 2000bb-1(a)-(b) (2012) (emphasis added) (dashes and paragraph designations omitted).

A purely textual analysis of RFRA would require judicial review of the substantiality of burdens on religion under mainstream approaches to statutory interpretation. Interpretive canons provide that the text of a law should be interpreted in a manner that gives independent significance to each of its words.<sup>117</sup> As judges later observed, a “substantial” burden must mean something other than “any” burden, or there would have been no point to Congress’s adding “substantial” and “substantially” to the statute.<sup>118</sup> RFRA’s legislative history decisively confirms that Congress did indeed intend “substantial” to narrow the range of RFRA relief by requiring that a claimant show that the burden on religion is objectively serious or weighty as a precondition to the grant of exemption.<sup>119</sup>

RFRA enjoyed broad congressional support despite its initial failure to specify the substantiality of the religious burden that would trigger exemptions. Some members of Congress, however, expressed concern that governments would have to satisfy the compelling interest test even when laws only trivially or minimally burdened religious exercise; the effect of RFRA on public school and prison administration was a particular concern.<sup>120</sup> Senators Harry Reid (D-Nev.) and Alan Simpson (R-Wyo.) ultimately introduced an amendment to RFRA that would have categorically removed the nation’s prisons from its reach.<sup>121</sup> Expressing similar concerns about public school ad-

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<sup>117</sup> *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

<sup>118</sup> *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting); *see also* Caroline Mala Corbin, *Deference to Claims of Substantial Religious Burden*, 2016 U. ILL. L. REV. ONLINE 10, 14–15 (“[S]ubjecting to strict scrutiny laws that impose only negligible burdens on those seeking to circumvent them is not the balance RFRA, with its substantial burden requirement, envisions.”); Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents at 18, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (absolutely deferring to a claimant’s allegation of substantial burden, as urged by the *Zubik* claimants, would read “substantial” out of the statute).

<sup>119</sup> *See* Brief of Baptist Joint Committee for Religious Liberty as Amicus Curiae Supporting Respondents at 18, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (inferring that RFRA’s cosponsors must have feared that, unless modified, “burden” would be interpreted and applied too permissively).

<sup>120</sup> *E.g.*, S. REP. NO. 103-111, at 18–37 (1993) (additional views of Senator Alan Simpson (R-Wyo.), with letter from twenty-six state attorneys general urging amendment exempting prisons from RFRA); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 239–43 (1994) (describing concerns relayed to Senate Judiciary Committee by state attorneys general); Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 188 n.74 (1995) [hereinafter Lupu, *A Lawyer’s Guide*] (describing concerns relayed to House Judiciary Committee by the National School Boards Association (“NSBA”)).

<sup>121</sup> 139 CONG. REC. 26,181–82 (1993); *see* Laycock & Thomas, *supra* note 120, at 242–43.

ministration, the National School Boards Association (“NSBA”) urged that RFRA be amended to provide relief only from “substantial” government burdens on religion.<sup>122</sup>

Neither proposed amendment would have made much sense if the existence of a “burden” depended solely on the substantiality of secular costs—that is, the substantiality of the penalty for violating a burdensome law. In most cases both inmates and public school children are already subject to objectively significant penalties for violating rules and regulations governing their respective institutions, ranging from loss of privileges to denial of early release (in case of prisoners), and classroom discipline to detention and expulsion (in case of school children). In these two contexts, a claim of burden is virtually always a claim of “substantial” burden because violation of the burdensome rule or regulation to keep faith with one’s religion would trigger objectively significant penalties. Why the need to clarify that only *substantial* burdens qualify for RFRA relief, when “substantial” would merely have described already-substantial secular costs for violation?

Of course, the focus of both the Reid amendment and the NSBA proposal was the potential cost of providing religious exemptions from institutional rules and regulations based on modest or minimal burdens on religious practice, and not the seriousness of any penalty for violating the rules and regulations imposing such burdens. This was borne out by an amendment on the Senate floor that added “substantial” and “substantially” to modify “burden” in the version of RFRA ultimately adopted by the Senate.<sup>123</sup> Support for the proposed Reid amendment was sufficiently strong when RFRA reached the Senate floor that its floor managers and principal cosponsors, Senators Edward Kennedy (D-Mass.) and Orrin Hatch (R-Utah), felt compelled to co-opt it. They offered the NSBA’s suggested amendment, proposing that “substantial” or “substantially” be inserted to modify every use of “burden” in the language of the bill,<sup>124</sup> thereby making explicit that RFRA would provide relief only from “substantial” government burdens on religious exercise. This changed the operative provision of RFRA to require compliance with the compelling interest test only in

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122 See Lupu, *A Lawyer’s Guide*, *supra* note 120, at 188 n.74. The NSBA suggested additionally amending RFRA’s strict scrutiny test to use the words “narrowly tailored” to a compelling government interest, rather than the “least restrictive means” of furthering such an interest. *Id.* This amendment was never formally proposed. *Id.*

123 139 CONG. REC. 26,180 (1993).

124 *Id.*

cases of *substantial* government burdens on religion rather than *all* government burdens, as the text originally provided.

The expectation that judicial review of substantiality would preclude RFRA claims for less weighty religious costs was the principal argument made by Hatch, Kennedy, and other opponents of the Reid amendment. Kennedy urged that his and Hatch’s amendment would eliminate the need for extraordinary justification “for every governmental action[ ] that ha[s] an incidental effect on religious institutions,” requiring this only for actions imposing a “substantial burden on the exercise of religion.”<sup>125</sup> Hatch similarly observed that the amendment would prevent the government from having “to justify every action that has some effect on religious exercise.”<sup>126</sup> “Only action that places a substantial burden on the exercise of religion” would have to satisfy the compelling interest test.<sup>127</sup>

The Kennedy-Hatch amendment did not define “substantial.” But its cosponsors offered their explanations against the backdrop of a Supreme Court that had commonly adjudicated allegations of religious burden by directly judging the substantiality of the alleged burden a law imposed on religion, rather than by the disaggregation of religious and secular costs that became common in the wake of RFRA’s passage.<sup>128</sup> Their arguments would not have made sense had they been directed only at the substantiality of the secular costs of violating religiously burdensome laws.

The Kennedy-Hatch amendment passed (apparently by unanimous consent).<sup>129</sup> The Senate then took up the Reid amendment,<sup>130</sup> which failed on a formal vote, forty-one to fifty-eight.<sup>131</sup> RFRA as amended by Kennedy and Hatch was thereafter adopted by the Sen-

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391–92 (1990) (analyzing general sales tax applied to sale of Bibles and other religious materials in terms of its effect on ministry rather than weight of sanction for failing to collect tax); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (dictum) (analyzing denial of tax deductibility of Scientology “auditing” session in terms of its effect on Scientologist beliefs rather than weight of sanction for unauthorized deduction); *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303–05 (1985) (analyzing Fair Labor Standards Act in terms of its effect on activities of religious foundation rather than weight of sanction for violating it); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (analyzing compulsory school attendance law in terms of its effect on religious exercise of Amish community rather than weight of five-dollar misdemeanor fine for violating it).

<sup>129</sup> 139 CONG. REC. 26,180 (1993).

<sup>130</sup> *Id.* at 26,181, 26,407–14.

<sup>131</sup> *Id.* at 26,414.

ate;<sup>132</sup> the House passed RFRA in the same form a week later,<sup>133</sup> and it became law with President Clinton's signature on November 16, 1993.

The discussion of the Reid and the Kennedy-Hatch amendments on the Senate floor left little doubt that Congress anticipated judicial evaluation of the objective substantiality of alleged burdens on religious exercise in the adjudication of RFRA exemption claims. Neither the House and Senate reports, nor the crucial floor debate that added substantiality to RFRA's *prima facie* claim for relief, linked "substantial burdens" to the penalty for violating a burdensome law, but only ever referred to it as an objective measure of the degree of government interference with religious exercise itself.<sup>134</sup>

### C. *Boundary Maintenance and the Rule of Law*

As *Hosanna-Tabor* makes clear, courts may properly reject a church's classification of an employee as a "minister," whose hiring and firing are exempt from federal and state employment law, when the employee does not function in accordance with the *court's* definition of "minister."<sup>135</sup> The church remains free to treat such an employee as a minister in accordance with its theology and doctrine, but before the law the employee is nonministerial and entitled to legal protection.

This judicial review is crucial. Without a secular definition of minister, church employers would decide for themselves which of their employees are ministers lacking employment law protections. The potential for abuse is obvious. Any person or body that may exempt itself from legal liability by means of a self-administered definition that is not subject to judicial review has powerful incentives to fashion as broad a definition as possible. Judicial review has, in fact, reigned in excessive ministerial exception claims.<sup>136</sup> If employers are to be relieved of legal liability when they hire and fire ministers, it is crucial

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<sup>132</sup> *Id.* at 26,416.

<sup>133</sup> *Id.* at 27,240–41.

<sup>134</sup> See H.R. REP. NO. 103-88 (1993); S. REP. NO. 103-111 (1993); 139 CONG. REC. 26,180.

<sup>135</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–08 (2012).

<sup>136</sup> See, e.g., *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1176–77 (N.D. Ind. 2014) (rejecting claim by Catholic school that female teacher was "minister" exempt from Title VII protection because her position required that she be a Christian role model); *Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 710–11 (D. Md. 2013) (rejecting same claim by synagogue regarding custodian); *Buscetto v. Saint Bernard High Sch.*, No. CV116011089, 2014 WL 4494362, at \*13–17 (Conn. Super. Ct. July 25, 2014) (rejecting claim by Catholic high school that athletic director/baseball coach was "minister" exempt from Title

that courts, not employers, police the boundaries of that relief. Allowing churches to make this determination without meaningful judicial review would subvert majoritarian government and the rule of law.

Believers seeking RFRA exemptions have every incentive to draw the boundary between “substantial” and “insubstantial” burdens so as to insulate the maximum amount of their activities from legal liability.<sup>137</sup> Judicial maintenance of this boundary is thus necessary and proper to prevent RFRA from spawning a regime of exemptions that subverts the rule of law.

During the pre-*Smith* era and despite the religious-question doctrine, the Court denied exemptions based upon its own independent determinations that exemption claimants had not alleged legally cognizable burdens on their religious exercise notwithstanding the sincerity of their allegations. *Jones*, *Hosanna-Tabor*, and other cases teach that the religious-question doctrine bars courts from deciding whether an alleged burden on religious exercise is *theologically* substantial, but courts are free to decide whether an alleged burden is *legally* substantial for the purpose of applying the substantial burden prong of RFRA.<sup>138</sup> The latter is simply a matter of implementing the congressional understanding of substantiality evident in RFRA’s text and legislative history.<sup>139</sup> Courts must decide and define the kind of burden from which RFRA was enacted to provide relief, if the rule of law and RFRA’s purpose are to be upheld in exemption cases.<sup>140</sup>

### III. JUDGING “SUBSTANTIAL” BURDENS: THE RELIGIOUS NONPROFIT CONTRACEPTION CASES

The religious nonprofit complicity cases remanded to the federal circuits by *Zubik v. Burwell* provide an instructive example of how courts may properly adjudicate “substantial burdens” under RFRA without violating the religious-question doctrine. The mandate’s religious accommodation is at the heart of these cases,<sup>141</sup> with the nonprofits having sought RFRA exemptions from the process prescribed for

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VII protections); *Weiter v. Kurtz*, No. 2011-CA-001058-MR, 2012 WL 6213759, at \*5 (Ky. Ct. App. Dec. 14, 2012) (rejecting same claim regarding bookkeeper/receptionist of Catholic parish).

<sup>137</sup> Cf. Hamilton, *supra* note 49, at 1108 (“RFRA was a brash repudiation of the principle that laws governing conduct apply to United States citizens, regardless of identity . . .”).

<sup>138</sup> See *supra* Section II.A.

<sup>139</sup> See *supra* Section II.B.

<sup>140</sup> See *supra* Section II.C.

<sup>141</sup> See *infra* Section III.A.

claiming the accommodation.<sup>142</sup> Some circuit panel decisions seemed to make prohibited theological judgments about claims of complicity with the evil of contraception,<sup>143</sup> but the Court's remand order gives them a second look at this issue.<sup>144</sup> The panels may properly adjudicate these claims in accordance with the religious-question doctrine by relying on traditional legal principles governing responsibility for private wrongs—namely, factual causation in tort and products liability.<sup>145</sup>

### A. *The Religious Nonprofit Accommodation*

The contraception mandate regulations creating the “religious accommodation” initially provided that a religious nonprofit would be exempted from the mandate if it completed a government form certifying that it (1) has religious objections to some or all of the mandated contraceptives; (2) is organized and operated as a nonprofit entity under applicable federal law; and (3) holds itself out as a religious organization; and then supplied that form to its third-party insurer or, if self-insured, to its third-party administrator (“TPA”).<sup>146</sup> The form constitutes notice to the insurer or TPA that the nonprofit's employee health plan will not offer the religiously objectionable contraceptives, and that the insurer or TPA must consequently supply them directly to plan beneficiaries outside of the health plan.<sup>147</sup> In case of TPAs, the form is additionally treated as a designation of the TPA as a “plan administrator” under ERISA, thereby authorizing the TPA to provide contraception directly to plan beneficiaries and otherwise to process claims for contraception and related services in accordance with ERISA.<sup>148</sup>

The mandate regulations prohibit the insurer or TPA from shifting any costs of supplying religiously objectionable contraceptives to the accommodated nonprofit, and from commingling funds used to supply such contraceptives with plan premiums paid by the nonprofit

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<sup>142</sup> See *infra* Section III.B.

<sup>143</sup> See *infra* Section III.C.

<sup>144</sup> See *infra* Section III.D.

<sup>145</sup> See *infra* Section III.E.

<sup>146</sup> 45 C.F.R. § 147.131(b) (2013).

<sup>147</sup> *Id.* § 147.131(c)(1).

<sup>148</sup> See Marty Lederman, *Unpacking the Forthcoming RFRA Challenges to the Government's Accommodation (with Emphasis on Self-insured Plans)*, BALKINIZATION (July 18, 2014, 2:33 PM), <http://balkin.blogspot.com/2014/07/unpacking-forthcoming-rfra-challenges.html>.

and its employees or with any other funds used to pay covered expenses under the nonprofit’s health plan.<sup>149</sup>

The government recently amended the final regulations to permit self-certification by letter to the government instead of by government form to its insurer or TPA.<sup>150</sup> Any objecting religious nonprofit may now obtain the accommodation without completing the form by advising the government of its objections in writing and naming its insurer or TPA.<sup>151</sup> Under this arrangement, upon receipt of the self-certification letter, the government notifies the insurer or TPA of its obligation to directly supply the religiously objectionable contraceptives,<sup>152</sup> and this notice constitutes the required designation of the TPA as an ERISA plan administrator.<sup>153</sup>

### *B. Circuit Adjudications of Substantial Burden*

Religious nonprofit challenges to the accommodation process make two basic arguments: the act of self-certifying their eligibility for the accommodation facilitates the sin or evil of contraceptive use, or fosters “scandal” by appearing to encourage the use of contraceptives, by (1) “triggering,” “authorizing,” “facilitating,” or otherwise causing the provision of contraceptives to employees by a claimant’s health plan insurer or administrator;<sup>154</sup> or (2) converting employee and stu-

<sup>149</sup> § 147.131(c)(2)(ii).

<sup>150</sup> See Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (codified at 45 C.F.R. § 147.131(c)(1) (2015)) (codifying orders in *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting preliminary relief from completion of government form so long as claimants advise government by letter of religious objections to contraceptives); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014) (same); and *Zubik v. Burwell*, 135 S. Ct. 2924 (2015) (enjoining enforcement of contraception mandate pending disposition of petitions for certiorari if claimants supply required information by letter)).

The government also amended the final regulations to take account of the holding in *Hobby Lobby* itself, see Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318–47, which held that the religious nonprofit accommodation constituted a less restrictive alternative to unconditionally imposing the mandate on closely held *business* corporations whose owners religiously object to the mandate. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780–83 (2014). The amendments extend the accommodation to such businesses. 45 C.F.R. § 147.131(b)(2) (2015).

<sup>151</sup> 26 C.F.R. § 54.9815-2713A(b)(1)(ii) (2015).

<sup>152</sup> *Id.* § 54.9815-2713A(b)(1)(ii)(B).

<sup>153</sup> 80 Fed. Reg. at 41,323.

<sup>154</sup> *E.g.*, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1167, 1168–69, 1174 & n.20 (10th Cir. 2015) (2-1 decision as to self-insured plans), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Geneva Coll. v. U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 435, 437 (3d Cir. 2015), *vacated and remanded for settlement discussions sub*



dent health plans into “conduits” or otherwise “commandeering” or “hijacking” them for use by insurers and TPAs as the vehicle for providing religiously objectionable contraceptives.<sup>155</sup>

The circuit courts largely rejected these arguments, and generally in the same way. They first held that as a component of the RFRA prima facie case, the substantiality of an alleged burden on religious exercise is a question of secular law, which courts are fully empowered to consider and decide.<sup>156</sup> They then found that the legal obligation of insurers and administrators to supply the mandated contraceptives exists whether or not religious nonprofits opt out of the mandate under the nonprofit accommodation.<sup>157</sup> The panels generally maintained, in other words, that a religious nonprofit’s self-certification is entirely outside any conceivable chain of factual causation ending in the use of religiously problematic contraceptives by plan beneficiaries. As the Fifth Circuit reasoned, the legal obligation of insurers and TPAs to supply directly to health plan beneficiaries all mandated contraceptives that a religious nonprofit refuses to cover exists whether or not

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*nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 237, 253–54 (D.C. Cir. 2014), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557.

<sup>155</sup> *E.g.*, *Little Sisters*, 794 F.3d at 1193–94; *E. Tex. Baptist*, 793 F.3d at 459–60, 459 n.36; *Geneva Coll.*, 778 F.3d at 438 n.13; *Priests for Life*, 772 F.3d at 237, 253–54. For a finer-grained dissection of the various nonprofit claims, see Lederman, *supra* note 148.

A third argument not developed in the courts below, but emphasized in the claimants’ Supreme Court briefing, is that the mandate regulations substantially burden their religious exercise by forcing them to contract for health plans or administrative services with insurers or TPAs that supply the claimants’ plan beneficiaries with religiously objectionable contraceptives. *See, e.g., Priests for Life*, 772 F.3d at 251, 254. Contrary to the conclusion of one circuit panel, *see id.* at 255–56, the mandate regulations do indeed appear to prevent an insurer or TPA that is subject to ERISA and that objects to supplying contraceptives directly to an accommodated plan’s beneficiaries from continuing as an insurer or TPA, *see Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,880–81 (July 2, 2013) (to be codified at 45 C.F.R. pts. 147, 156), which would necessarily require the ERISA plan to find another insurer or TPA willing to supply the contraceptives directly. *See Lederman, supra* note 148.

<sup>156</sup> *Little Sisters*, 794 F.3d at 1176–77; *E. Tex. Baptist*, 793 F.3d at 456; *Geneva Coll.*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247. *But see Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 939 (8th Cir. 2015) (“[W]e must accept a religious objector’s description of his religious beliefs, regardless of whether we consider those beliefs acceptable, logical, consistent, or comprehensible. . . . [O]ur narrow function in this context, therefore, is to determine whether the line drawn reflects an honest conviction.”) (ellipses and internal citations omitted), *vacated and remanded on other grounds sub nom. U.S. Dep’t of Health & Human Servs. v. CNS Int’l Ministries*, 136 S. Ct. 2006 (2016).

<sup>157</sup> *E.g.*, *Little Sisters*, 794 F.3d at 1181; *E. Tex. Baptist*, 793 F.3d at 459–60; *Geneva Coll.*, 778 F.3d at 437–38; *Priests for Life*, 772 F.3d at 252–53. *But see Sharpe Holdings*, 801 F.3d at 939–42 (rejecting this conclusion).

the nonprofit perfects the accommodation by self-certifying.<sup>158</sup> The nonprofit’s self-certification, in other words, “cannot authorize or trigger what others are already required by law to do.”<sup>159</sup>

### C. *Religious-Question Pitfalls*

To conform to the religious-question doctrine, a court must avoid substituting its judgment about theological complicity for the claimant’s. The circuit panels were not uniformly successful in avoiding this. The Third Circuit flatly rejected the claim that self-certification would make the claimants there complicit in the supply of contraceptives:

[S]ubmission of the self-certification form does not make the appellees “complicit” in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage.<sup>160</sup>

The Tenth Circuit rejected a theological distinction offered by the claimants in *Little Sisters of the Poor*, because it did not make sense to the panel: “[P]laintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not.”<sup>161</sup> The D.C. Circuit in *Priests for Life v. U.S. Department of Health & Human Services* even concluded that neither the mandate nor the accommodation compelled a claimant to facilitate contraception “in a manner that violates *the teachings of the Catholic Church*.”<sup>162</sup>

Of course, the claimants were using causal concepts with theology rather than law in mind. It does not matter that the theological distinctions drawn by Geneva College, the Little Sisters of the Poor, or

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<sup>158</sup> *E. Tex. Baptist*, 793 F.3d at 459.

<sup>159</sup> *Id.*; accord *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 615 (7th Cir. 2015), *vacated and remanded on other grounds*, 136 S. Ct. 2007 (2016) (“If the government is entitled to require that female contraceptives be provided to women free of charge, it is unclear how signing the [self-certification] that declares Notre Dame’s authorized refusal to pay for contraceptives for its students or staff, and its mailing the authorization document to those companies, which under federal law are obligated to pick up the tab, could be thought to ‘trigger’ the provision of contraceptive coverage.”).

<sup>160</sup> *Geneva Coll.*, 778 F.3d at 438–39 (emphasis in original); accord *E. Tex. Baptist*, 793 F.3d at 459 (“Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives.”).

<sup>161</sup> 794 F.3d at 1178 n.25.

<sup>162</sup> 772 F.3d at 246–47 (emphasis added).

Priests for Life may not have made legal or rational sense to the panel—what matters is whether they made sense to the religious entities that drew them. As the Court held in both *Hobby Lobby* and *Thomas*, claimants are entitled to draw their own theological lines and make their own doctrinal distinctions about what their religion does and does not permit, and these need not track the lines and distinctions that might be drawn by unbelievers, those of other faiths, judges and other government officials, or even members of the same faith.<sup>163</sup>

#### D. *The Zubik Remand Order*

After oral argument, the Supreme Court issued an order to all of the parties in *Zubik v. Burwell* to file supplemental briefs reacting to a settlement proposal authored by the Court itself: (1) a religious non-profit objecting to the mandated contraceptive coverage would arrange with an insurer for a plan excluding that coverage; (2) the nonprofit's interactions with the insurer would constitute actual notice to the insurer that the nonprofit's plan would lack the mandated coverage; and accordingly (3) the insurer would supply the mandated contraceptives and services directly to employees and other beneficiaries without any further action by the nonprofit.<sup>164</sup> The Court subsequently vacated and remanded all of the *Zubik* cases and all other pending religious nonprofit challenges to the accommodation, because it perceived in the supplemental briefing a realistic possibility that the parties could settle their differences along these lines.<sup>165</sup>

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<sup>163</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778–79 (2014) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981)); see *supra* text accompanying notes 62–68.

<sup>164</sup> Order, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (requesting supplemental briefs).

[P]etitioners would contract to provide health insurance for their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds. Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees. At the same time, petitioners' insurance company—aware that petitioners are not providing certain contraceptive coverage on religious grounds—would separately notify petitioners' employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioners' health plan. The parties may address other proposals along similar lines . . . .

*Id.* As the quoted language indicates, the Court did not expressly address the separate and more complicated problem of self-insured ERISA plans with TPAs. See *id.*

<sup>165</sup> *Zubik*, 136 S. Ct. at 1560.

Petitioners have clarified that their religious exercise is not infringed where they “need to do nothing more than contract for a plan that does not include coverage

This possibility of settlement exists only in the imagination of a deadlocked Court apparently desperate to avoid summarily affirming the judgments below.<sup>166</sup> While all parties purported to accept the Court’s settlement suggestion, each side insisted on further conditions unacceptable to the other. The claimants would require that employees of third-party insured plans obtain contraception coverage through a separate insurance plan offered by the primary insurer, which employees and beneficiaries would opt into;<sup>167</sup> the claimants

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for some or all forms of contraception,” even if their employees receive cost-free contraceptive coverage from the same insurance company. The Government has confirmed that the challenged procedures “for employers with insured plans could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage. In light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the respective United States Courts of Appeals . . . . Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans “receive full and equal health coverage, including contraceptive coverage.” We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.

*Id.* (internal citations omitted). The order emphasized that it was not a decision on the merits of any of the issues before it. *Id.*

<sup>166</sup> One can only assume that if there had been a clear majority in favor of the claimants or the government, an opinion on the merits would have been issued for that majority disposing of the cases in accordance with normal Court rules and practice. That no such opinion was issued can only mean that the Court is split 4-4 on one or more issues necessary to the resolution of the cases, and that it issued its remarkable orders in an effort to somehow dispose of the cases without affirming them by the equally divided Court that has periodically manifested itself since Justice Scalia’s unexpected death in February 2016.

The order has nonetheless occasioned unfounded assertions about the Justices’ views on the merits, *see, e.g.*, Eugene Volokh, *Prof. Michael McConnell on Zubik v. Burwell (Yesterday’s Supreme Court RFRA/Contraceptive Decision)*, WASH. POST: THE VOLOKH CONSPIRACY (May 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/prof-michael-mcconnell-on-zubik-v-burwell-yesterdays-supreme-court-rfra-contraceptive-decision/> (concluding on scant evidence that the government may have lacked “even four votes” for its position on substantial burden (quoting Prof. McConnell)), as well as polarized interpretations of its meaning and effect, *compare* Nelson Tebbe et al., *Symposium: Zubik and the Demands of Justice*, SCOTUSBLOG (May 16, 2016, 9:07 PM), <http://www.scotusblog.com/2016/05/symposium-zubik-and-the-demands-of-justice/> (The order vindicates the government’s opposition to accommodations requiring separate opt-in plans or otherwise denying women “full and equal health care” in the workplace.), *with* Volokh, *supra* (the order was a “face-saving, non-precedent-setting defeat for the government” (quoting Prof. McConnell)), *and* Erin Morrow Hawley, *Symposium: The Return of Chief Justice Roberts*, SCOTUSBLOG (May 16, 2016, 5:33 PM), <http://www.scotusblog.com/2016/05/symposium-the-return-of-chief-justice-roberts/> (the order was an unqualified win for the claimants which will force the government to settle as “direct[ed]” by the Court).

<sup>167</sup> Supplemental Brief for Petitioners at 6, 9–10, 13, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418,

further envision that employees of self-insured plans would obtain contraception coverage by purchasing such a contraception-only plan from either the TPA of the primary plan or another insurer.<sup>168</sup> For its part, the government rejected separate contraception-only opt-in plans because they would present various problems under state law, interfere with “seamless” contraception coverage, and require additional enrollment steps by potential insureds that would function as obstacles to their obtaining contraception coverage.<sup>169</sup>

The Court has no power to force the parties to settle on terms they consider unacceptable. While the remand order might result in settlements by ERISA-exempt church plans and some third-party insured plans, it is unlikely that all the *Zubik* cases will settle, and even more unlikely that all potential religious nonprofit claimants in the United States will find the terms of such settlements sufficiently attractive to forestall litigating their own exemption claims under RFRA.<sup>170</sup> In the absence of settlement, finally, there is nothing to prevent the federal circuit panels to which the cases have been remanded from affirming—even summarily—their previous judgments on the merits, all but one of which found in favor of the government on substantial burden.<sup>171</sup> It is inevitable, then, that this question will soon find its way back to the Court.

### *E. Properly Adjudicating Substantial Burdens*

Some of the circuit panels in *Zubik* violated the religious-question doctrine if, as it appears, they rejected the claimants’ theological conclusions about complicity and scandal for not making rational sense from the panels’ secular perspectives.<sup>172</sup> As the Court’s religious-question precedents make clear, rationality or plausibility to secular or other outsiders is irrelevant; what matters is not whether *the court* finds a claimant’s understanding of theological consequences

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14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191); Supplemental Reply Brief for Petitioners at 5–6, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

<sup>168</sup> Supplemental Brief for Petitioners, *supra* note 167, at 20–24.

<sup>169</sup> Supplemental Brief for the Respondents at 14 & n.6, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191); Supplemental Reply Brief for the Respondents at 3–6, 8–10, *Zubik*, 136 S. Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

<sup>170</sup> See, e.g., Sepper, *supra* note 23, at 56; Lederman, *supra* note 19 (suggesting that only religious nonprofits with ERISA-exempt “church plans” are likely to settle along the lines sketched by the Court).

<sup>171</sup> Sepper, *supra* note 23, at 56; see *supra* note 37 and accompanying text.

<sup>172</sup> See *supra* Section III.C.

credible, but whether *the claimant* does.<sup>173</sup> Unless claims like this are to be dismissed outright as nonjusticiable, what is needed is a way to adjudicate them on the basis of secular law without slipping into substantive review and rejection of the religious beliefs offered as predicates for substantial burden claims.

To judge whether the accommodation process is a “substantial” burden on religion within the meaning of RFRA without running afoul of the religious-question doctrine, courts must decide substantiality without challenging the claimant’s own religious understanding of complicity, scandal, and other theological doctrines which are believed to prevent participation in the process. They can do this by relying on relevant doctrines of secular law. American law is replete with legal doctrines that determine when responsibility for a wrongful act may properly be attributed to someone who was not the primary actor, notably the common law of torts.<sup>174</sup> Courts can observe the limitations of the religious-question doctrine by relying on causation and related tort doctrines to adjudicate the substantiality of burdens on religion alleged in exemption claims sounding in complicity, in the way that *Jones* held that church property disputes may be decided based on the basic principles of the law of property.<sup>175</sup> Or, courts might use such doctrines as analogical authority to create secular definitions of substantiality using their judicial power to interpret federal statutes and make federal common law in appropriate circumstances,<sup>176</sup> much as the Court in *Hosanna-Tabor* set forth touchstones for defining those “ministers” not protected by Title VII because of the ministerial exception.<sup>177</sup>

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<sup>173</sup> See *supra* Section I.A. Secular inconsistency might function as a proxy for insincerity. This only underlines, however, the dangers of the sincerity inquiry, see *supra* notes 11–13 and accompanying text, which too often functions as a proxy for the unreasonableness of minority and otherwise unfamiliar religious practices. Cf. *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (“One can, of course, imagine an asserted [religious exemption] claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause . . .”).

<sup>174</sup> See generally Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) [hereinafter Lupu, *Where Rights Begin*] (suggesting use of a common law tort baseline to adjudicate claims of religious burden under the pre-Smith Free Exercise Clause); see also MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 3, 7 (2009) (noting the widespread use of causal rules in criminal and tort law and their importance to theories of liability); cf. Sepper, *supra* note 23, at 59 (observing that courts “regularly apply principles of proximity, causation, and attenuation in a variety of First Amendment contexts”).

<sup>175</sup> See *supra* text accompanying notes 101–05.

<sup>176</sup> See, e.g., RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 622–26 (6th ed. 2009).

<sup>177</sup> See *supra* text accompanying notes 106–08; see also, e.g., Greene, *supra* note 23, at

To enlist common law tort principles as secular sources for measuring the substantiality of burdens on religion in the religious non-profit cases, one would posit contraception use as a hypothetical “harm” or “injury” for which the claimant might be held responsible.<sup>178</sup> The best analogy in the nonprofit religious accommodation cases is to the law of products liability: the religious nonprofit’s participation in the accommodation process is analyzed as if the nonprofit were the defendant in a hypothetical products liability claim grounded on the nonprofit’s participation in the sale or other distribution of a harmful drug. Would the common law of torts recognize a causal link between a religious nonprofit’s claiming the accommodation, and the hypothetical harm of third-party use of contraceptives subsequently supplied by the nonprofit’s insurer or TPA, assuming that contraception use were harmful? If not, then a court would find by analogy that there is no substantial burden under RFRA.<sup>179</sup>

The precise analysis depends on whether the claimant’s health plan is (1) purchased from a third-party insurer, (2) self-insured and administered by a TPA under ERISA, or (3) a “church plan” exempt from ERISA. Causation-in-fact doctrines deal with the first situation, distributor liability for defective drugs resolves the second, and intervening cause the third.

### 1. *Third-Party Insured Plans Funded by Premiums*

The argument most commonly made in the federal circuits by the *Zubik* claimants was that the accommodation process authorizes or “triggers” the direct supply of contraceptives by the insurer to plan beneficiaries.<sup>180</sup> The claimants generally framed this as a question of

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185–90 (defining substantiality by analogy to other First Amendment definitions); *supra* note 73 (summarizing Supreme Court holdings that exclude from the constitutional definition of “burden” interference with free exercise caused by the government’s internal management of its programs and properties).

<sup>178</sup> See, e.g., Lupu, *Where Rights Begin*, *supra* note 174, at 966–67 (arguing that whether a constitutionally cognizable government burden on religious exercise exists could be determined by asking whether common law tort liability would result if the religiously burdensome action had been committed by another private party rather than the government).

<sup>179</sup> Causation principles are not used to determine the ultimate question of liability, but only to establish the element of causation as secular analogue to theological complicity.

<sup>180</sup> *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1168–69, 1174 n.20, 1180 (10th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459–60 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Geneva Coll. v. U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 251, 252 (D.C. Cir. 2014) *vacated and remanded*

“but-for” or factual causation: in their view, the required notice to the government or the insurer initiates a causal chain that ends in religiously objectionable contraceptives being supplied by the insurer and used by plan beneficiaries.<sup>181</sup>

Proof of factual causation is necessary for products (and any other tort) liability.<sup>182</sup> This element is demonstrated by showing that “the harm would not have occurred” in the absence of the tortious act—in this case, distributing a harmful drug.<sup>183</sup> The presence or ab-

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for settlement discussions *sub nom.* *Zubik*, 136 S. Ct. 1557; *see also* *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 614 (7th Cir. 2015), *vacated and remanded for reconsideration in light of Zubik*, 136 S. Ct. 2007 (2016).

<sup>181</sup> *Little Sisters*, 794 F.3d at 1174 n.20 (“Plaintiffs make causation the centerpiece of their RFRA claim. They allege that opting out of the Mandate would cause or make them complicit in providing contraceptive coverage, and thus substantially burdens their religious exercise.”); *Geneva Coll.*, 778 F.3d at 435 (Claimants “urge that there is a causal link between providing notification of their religious objection to providing contraceptive coverage and the offering of contraceptive coverage by a third party.”); *see E. Tex. Baptist*, 793 F.3d at 460 (“[T]he self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrator eligible for the government’s reimbursement.”); *Priests for Life*, 772 F.3d at 235 (Claimants “believe that, even if they opted out, they would still play a role in facilitating contraceptive coverage.”); *see also Univ. of Notre Dame*, 786 F.3d at 613 (Claimant treats mandate regulations “as having made its mailing of the certification form to its third-party administrator . . . the *cause* of the provision of contraceptive services to its employees in violation of its religious beliefs.”) (emphasis in original).

Causation theory distinguishes between causal “linkage” and causal “necessity.” An action is a factual or but-for cause of an injury if the injury would not have occurred in the absence of the action—e.g., a staircase weakened by rot is the factual cause of injury to a person who falls through a rotted step because the accident would not have occurred in the absence of rot. By contrast, an action is causally linked to an injury if it makes the injury more likely to occur even though not necessary to such occurrence—e.g., failure to adequately light a flight of stairs is causally linked to a person’s falling down the stairs because it makes such a fall more likely, but inadequate lighting is not a factual cause of such falls because they can occur even when lighting is adequate. *See, e.g.,* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71–72 (1975). Allegations that self-certification “facilitates” contraception coverage are claims of causal linkage because coverage makes subsequent contraception use more likely, whereas allegations that self-certification “triggers” such coverage are claims of factual causation because coverage would be unavailable in its absence. The circuit courts seem not to have distinguished causal linkage from factual causation in the *Zubik* cases, probably because the concepts largely overlapped in those factual scenarios.

<sup>182</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM LAW INST. 1997) [hereinafter RESTATEMENT (THIRD): PRODUCTS LIABILITY] (seller or distributor of defective product is liable for harm “caused” by the product); *id.* at § 15 (causation in products liability claims determined by same rules that govern causation in tort claims generally); 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (AM LAW INST. 2010) [hereinafter 1 RESTATEMENT (THIRD): PHYSICAL HARM] (“Tortious conduct must be a factual cause of harm for liability to be imposed.”); 1 RESTATEMENT (THIRD): PHYSICAL HARM § 26 cmt. f (causal analysis requires identification of “the relevant, legally cognizable harm” and “the conduct of the actor alleged to be tortious”).

<sup>183</sup> 1 RESTATEMENT (THIRD): PHYSICAL HARM, *supra* note 182, § 26; *accord id.* cmt. f



sence of factual causation is measured counterfactually: “[W]hat would have occurred if the actor had not engaged in the tortious conduct”?<sup>184</sup> If the claimed injury would have occurred anyway, even in the absence of defendant’s act, that act is not a factual cause of the injury, and the defendant cannot be liable.<sup>185</sup>

Applying the causal analysis to health plans sold by third-party insurers and funded by employer and employee premiums, the relevant question is whether plan beneficiaries would have received and used contraception without cost-sharing even in the absence of the nonprofit’s self-certification for the accommodation. The answer is yes. The analysis is straightforward. The contraception mandate regulations are part of a minimum legal coverage requirement for health insurance plans.<sup>186</sup> Accordingly, employers may only purchase, and third-party insurers may only offer, health plans that provide coverage of FDA-approved contraceptives without cost-sharing. Unless the plan is exempt from the mandate or perfects the religious accommodation, the beneficiaries of a group health plan purchased by their employer from a third-party insurer receive the mandated contraception through the purchased plan. Under the law of causation, therefore, nothing legally significant changes when a religious nonprofit avails itself of the accommodation—as before, the third-party insurer remains obligated to supply contraceptives without cost-sharing; it simply supplies them directly to plan beneficiaries rather than through the health plan it sold to the accommodated nonprofit. Plan beneficiaries receive the mandated contraceptives without cost-sharing *in either event*.

Religious nonprofits that purchase a health insurance plan from a third-party insurer are only in a chain of factual causation ending in contraception use because they arrange for the mandated contraception coverage and pay (along with employees) health insurance premiums, a small portion of which funds such coverage. Once a nonprofit avails itself of the accommodation, it has nothing further to do with

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(“[T]he causal inquiry asks whether the harm would have occurred if the actor had not acted tortiously.”); see also H. L. A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 68 (2d ed. 1985) (“Every event which would not have happened if an earlier event had not happened is the consequence of that earlier event.”).

<sup>184</sup> 1 RESTATEMENT (THIRD): PHYSICAL HARM, *supra* note 182, § 26 cmt. e; cf. MOORE, *supra* note 174, at 84 (“[B]ut for the defendant’s action, would the victim have been harmed in the way the criminal law prohibits? . . . [D]id the defendant’s act make a difference?”).

<sup>185</sup> DAN B. DOBBS, *THE LAW OF TORTS* 411 (2000); HART & HONORÉ, *supra* note 183, at 110.

<sup>186</sup> See 26 U.S.C. §§ 4980H(a)(1), (c)(2), 5000A(f)(2) (2012); 42 U.S.C. § 300gg-13(a)(4) (2012).

arranging or paying for the objectionable coverage; it is removed entirely from the chain of causation. The causal chain instead runs directly from the third-party insurer to the employees and other plan beneficiaries who ultimately decide whether to use the contraceptives that the nonprofit has opted out of providing. In either event, therefore—that is, whether the religious nonprofit claims the accommodation or not—plan beneficiaries will receive the religiously objectionable contraceptives from the insurer without cost-sharing, either through the plan the insurer sells and operates, or directly from the insurer itself. Allowing religious nonprofit employers to opt out of the mandated coverage through the accommodation leaves the obligation where it has always been—on the insurer.

Courts do not violate the religious-question doctrine when they rely on secular principles of factual causation in tort law to hold, as all but one of the circuits have, that the process for claiming the religious accommodation does not impose a substantial burden on claimant religion.<sup>187</sup> Participation in the process is simply not a factual cause of any subsequent use of contraceptives supplied directly to plan beneficiaries by the insurer. Claimants may continue to believe that participation constitutes a *theological* cause that they consider substantial, and the religious-question doctrine bars courts from reviewing that determination. Factual causation instead acts as a justiciable secular proxy for measuring the substantiality of the claimed burden on religious exercise, thus vindicating congressional purpose in adding “substantial” to the statute, due process values that counsel against allowing a person to be the judge of her own cause, and the religious-question doctrine’s prohibition on adjudication of theological questions.

## 2. *Self-Insured Plans Administered by TPAs Under ERISA*

Causation-in-fact does not provide a basis for denying the substantiality of alleged burdens on religion in case of self-insured health plans funded by the accommodated nonprofit and administered by a TPA under ERISA, because the religious employer is a link in a chain of factual causation ending in contraception use. As indicated above, a nonprofit’s written notice to the government or its TPA is apparently essential for designation of the TPA as a plan administrator, and that designation is apparently essential for the TPA to supply the religiously objectionable contraceptive coverage directly to beneficiaries

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<sup>187</sup> See *supra* note 37 and accompanying text.

under ERISA.<sup>188</sup> Only an ERISA “plan administrator” may provide health plan services and process and reimburse provider claims, and the nonprofit’s notice to its TPA or the government that it is availing itself of the government is the principal means by which the TPA is designated a plan administrator.<sup>189</sup>

Some self-insured religious nonprofits have argued that self-certification makes them complicit in use of religiously objectionable contraceptives, on the ground that self-certification is a “but-for” or factual cause of the direct supply of contraceptives by their TPAs and the eventual use of such contraceptives by their plan beneficiaries.<sup>190</sup> The circuit panels have struggled to explain why these circumstances do not make a religious nonprofit complicit in subsequent receipt and use of contraceptives by beneficiaries of its health plan. They emphasize that a TPA’s obligation to supply contraceptives directly originates with the government and not with the accommodated nonprofit,<sup>191</sup> but this is a non sequitur: as dissenting and separate opinions have pointed out, so long as the self-certification is in the chain of causation ending in direct supply of contraceptives to employees and

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<sup>188</sup> See *supra* note 148 and accompanying text.

<sup>189</sup> It remains unclear whether a claimant’s written self-certification is necessary for the government to designate the claimant’s TPA as a plan administrator under ERISA. Without the notice, one could argue, there is no “instrument under which the plan is . . . operated” that the government or the TPA can treat as a designation of the TPA as a plan administrator authorized to pay claims directly for contraceptives and related services. 29 U.S.C. § 1024(a)(6) (2012). The *Zubik* claimants thus argued that the notice constitutes an “authorization” for the TPA to deliver direct contraception coverage to employees and other beneficiaries whether delivered to a TPA or the government.

The government has taken the position that it by itself may designate the TPA of a self-insured plan as an ERISA administrator through its own written notice, and that this government-generated notice constitutes an “instrument under which the plan is . . . operated” sufficient to authoritatively designate the TPAs that receive it as plan administrators under ERISA. *Id.* See generally *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1182 nn.28 & 29 (10th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Geneva Coll. v. U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 438 (3d Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 255 (D.C. Cir. 2014), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557.

The Author is indebted to Professors Cancelosi, Laycock, and Lederman for sharing their respective understandings of ERISA’s effect on the accommodation.

<sup>190</sup> E.g., *Little Sisters*, 794 F.3d at 1178–79, 1178 n.25, 1181 n.28, 1185–86, 1185 n.36; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 460 (5th Cir. 2015), *vacated and remanded for settlement discussions sub nom. Zubik*, 136 S. Ct. 1557; *Geneva Coll.*, 778 F.3d at 439–40; *Priests for Life*, 772 F.3d at 254–55.

<sup>191</sup> See, e.g., *Little Sisters*, 794 F.3d at 1180–81, 1187; *E. Tex. Baptist*, 793 F.3d at 459; *Geneva Coll.*, 778 F.3d at 437–38; *Priests for Life*, 772 F.3d at 254–56.

dependents, it is irrelevant where the legal obligation requiring such supply originates.<sup>192</sup>

But even so, a religious nonprofit would not be considered responsible under principles of causation in tort. Factual causation is rarely sufficient to prove the causal element of a tort cause of action; one must also prove proximate causation. A cause of action for products liability based on the defendant’s sale or distribution of a harmful product includes a species of proximate causation that generally requires the defendant to have actually sold or distributed the product.<sup>193</sup> Using the analogy of tort liability to adjudicate whether self-certification imposes a substantial burden on a religious nonprofit seeking the religious accommodation, a court should find that no substantial burden exists despite the presence of the notice in the chain of factual causation, for lack of proximate causation.<sup>194</sup>

A hypothetical illuminates the analysis. Assume that a pharmaceutical Distributor markets a Drug made by a Manufacturer under an exclusive territorial license for sales of all of Manufacturer’s drugs. Under an arrangement with Manufacturer, Distributor provides the Drug to a low-income medical Clinic at no cost as a public service; Clinic doctors prescribe the Drug to patients for free, and Clinic supplies copies of such prescriptions to Distributor and Manufacturer.

Over time, Distributor becomes concerned that the Drug has harmful side effects, and advises Manufacturer that it is contemplating a withdrawal from the market. Manufacturer replies that while Distributor may continue to sell Manufacturer’s other drugs, Manufacturer will treat any notice by Distributor of withdrawal from the market for this particular Drug as a waiver of its exclusive territorial license to distribute the Drug, and a concomitant grant of permission

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<sup>192</sup> See, e.g., *Priests for Life v. U.S. Dep’t Health & Human Servs.*, 808 F.3d 1, 10 n.3 (D.C. Cir. 2015) (Brown, J., dissenting from denial of rehearing en banc); *Little Sisters*, 794 F.3d at 1211–13 (Baldock, J., dissenting in part); *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dep’t Health & Human Servs.*, 756 F.3d 1339, 1347–48 (11th Cir. 2014) (Pryor, J., specially concurring).

<sup>193</sup> See RESTATEMENT (THIRD): PRODUCTS LIABILITY, *supra* note 182, § 1 (“One engaged in the business of selling or otherwise distributing products *who sells or distributes a defective product* is subject to liability for harm to persons or property caused by the defect.”) (emphasis added); *id.* § 6(a) (same with respect to “prescription drugs” and “medical devices”); *id.* § 7 (same with respect to “food products”).

<sup>194</sup> Cf. *Chelton v. Keystone Oilfield Supply Co.*, 777 F. Supp. 1252, 1256 (W.D. Pa. 1991) (Distributor would be liable if it habitually sold manufacturer’s products and plaintiff proved defective product was made by manufacturer and distributed through normal channels.); *Joseph v. Yenkin Majestic Paint Corp.*, 690 N.Y.S.2d 611, 612 (N.Y. App. Div. 1999) (holding products liability does not attach to a “party that is outside the manufacturing, selling, or distribution chain”).

to Manufacturer to supply the Drug directly to Clinic. Distributor does in fact notify Manufacturer of its withdrawal from the market, and Manufacturer begins to distribute the Drug directly to Clinic. The side effects suspected by Distributor turn out to be real, and all patients who have taken the Drug eventually file suit against Clinic, Distributor, and Manufacturer.

Distributor is not likely to be found liable for harms caused by Drug prescriptions supplied directly by Manufacturer to Clinic patients after Distributor had withdrawn from the market, even though it was precisely that withdrawal that enabled Manufacturer to (1) void Distributor's exclusive license, and (2) distribute the Drug directly to Clinic. Theories of distributor liability for defective Drugs or other products are confined to sales or distributions in which the defendant participated.<sup>195</sup> Distributor would of course be responsible for distributions of the Drug to Clinic which took place before its withdrawal from the market, but not for the direct distributions by Manufacturer to Clinic patients in which Distributor played no role because they took place after its withdrawal from the market. Despite Distributor's presence in the factual chain of causation, products liability law cuts off its causal responsibility once it removes itself from the distribution process.

By analogy, products liability law would similarly cut off a religious nonprofit's liability for the purported "harm" of downstream supply and use of contraceptives, once the nonprofit self-certifies for the accommodation and thereby removes itself from the distribution chain for those contraceptives to which it objects. Using the products liability analogy, therefore, a court could find that the self-certification process is not a "substantial" burden on its contraception beliefs notwithstanding that self-certification may be present in the factual chain of causation.<sup>196</sup>

### 3. *Self-Insured Church Plans Not Subject to ERISA*

Some self-insured religious nonprofit plans are exempt from ERISA as so-called "church plans." These include one of the highest profile and superficially sympathetic of the religious nonprofit claimants, the Little Sisters of the Poor, a Catholic order of nuns which operates

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<sup>195</sup> See *supra* notes 192–94 and accompanying text.

<sup>196</sup> Additionally, as some of the circuits observed, a self-insured claimant could remove itself even from the factual chain of causation by switching from a self-insured plan operated by a TPA, to an insured plan purchased from a third-party insurer. See, e.g., *Little Sisters*, 794 F.3d at 1183 n.32.

nonprofit residence and care facilities for the elderly poor. Because church plans are exempt from ERISA, the government lacks authority to treat the notice by a nonprofit with such a plan as a means of designating the plan’s TPA as a plan administrator under ERISA. As the government has conceded in such cases, it lacks any means of enforcing the obligation of church-plan TPAs to supply the mandated contraceptives that church-plan sponsors refuse to supply on religious grounds. In short, church-plan TPAs are free to ignore their obligation to supply contraceptives directly in case of nonprofit self-certification under the accommodation.<sup>197</sup>

But it is not clear that all of the church-plan TPAs will do so. The government’s reimbursement schedule to TPAs is generous; some church-plan TPAs might decide to voluntarily supply religiously objectionable contraceptives when a nonprofit is accommodated, even though the government has no means of requiring that action.<sup>198</sup> Self-insured nonprofits that sponsor such plans have thus claimed a substantial burden under RFRA, arguing that the voluntary supply of contraceptives by church plan TPAs makes the claimants complicit in the distribution and eventual use of such contraceptives by their employees and dependents, by leaving them in the chain of causation that begins with the mandate and ends in the religiously prohibited use.

Tort law provides an analogy here as well, in the form of “intervening cause” principles. An intervening cause is “a new cause that comes into play after the defendant’s negligent conduct.”<sup>199</sup> Interven-

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<sup>197</sup> One of the Little Sisters’ TPAs, Christian Brothers Trust, has indicated that it will not participate in direct distribution of contraceptives directly to Little Sisters employees and beneficiaries; its other TPA, ExpressScripts, has not indicated its intentions, although the Little Sisters apparently could terminate ExpressScripts as a TPA unless it agrees not to comply with the mandate. See Lederman, *supra* note 148. These facts constitute one of the exceedingly rare situations in which violation of a law does not trigger legal sanctions. See *supra* Section I.C.

<sup>198</sup> See *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 613 (7th Cir. 2015) (observing that the government’s reimbursement schedule is “generous,” and that TPAs might view the opportunity to supply contraceptives directly under the accommodation as a “possibly lucrative” business opportunity), *vacated and remanded on other grounds*, 136 S. Ct. 2007 (2016).

As noted above, a church plan could prevent even voluntary compliance by making non-compliance a condition of their administration contract. See *supra* note 197 and accompanying text. The alleged burden on church plans, therefore, is not just insubstantial, it is nonexistent. The causation analysis in this section provides an alternate substantial burden analysis for those church-plan sponsors, such as the Little Sisters, who continue to insist that self-certification substantially burdens their religious exercise.

<sup>199</sup> DOBBS, *supra* note 185, at 461; accord MOORE, *supra* note 174, at 229 (“Certain interventions by third-party actors or by nature break the causal chains that would otherwise have existed between some defendant’s action and some harm to another.”).

ing causes are conventionally divided into “extraordinary natural events” and “wrongful human actions.”<sup>200</sup> As Professors Hart and Honore observed, the general rule holds that “the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant, negatives causal connection.”<sup>201</sup> In other words, the intervention of a third person, which results in plaintiff’s harm or injury, breaks the causal chain that would otherwise run from plaintiff to defendant, even (or especially) when the intervention is blameworthy.<sup>202</sup>

The application of this principle to sponsors of ERISA-exempt church health plans is simple. When a religious nonprofit with a church plan gives the notice required to claim the religious accommodation, nothing legally obligates its TPA to supply contraceptives directly to the plan beneficiaries. If the TPA does so voluntarily, however, this would constitute the voluntary intervention of a third party which breaks any causal chain between the self-insured religious nonprofit and the eventual receipt and use by plan beneficiaries of religiously objectionable contraceptives.

#### F. *The “World of Second Best”*

Some commentators are critical of arguments, like those in this Article, which propose the assessment of “substantial burdens on religious exercise” under RFRA by reference to neutral principles of secular law. As Professor Helfand urges, “the fact that a claim for religious accommodation entails a theory of causation that would fail under standard tort principles ought to be irrelevant for the purposes of RFRA.”<sup>203</sup> “[I]mposing a secular framework of causation” on RFRA’s substantial burden element, argues Helfand, “misses the entire object of RFRA.”<sup>204</sup> Professor Flanders similarly argues that courts have “made a mess” of adjudicating the substantiality of burdens on religion: “[t] involves drawing fine lines, and lines that moreover courts are not good at drawing and really have no business

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<sup>200</sup> MOORE, *supra* note 174, at 233.

<sup>201</sup> HART & HONORÉ, *supra* note 183, at 136 (emphasis omitted); *accord* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 334–35 (1985) (“[W]hen we examine a sequence of events that follows a person’s action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor’s action is something the second actor causes, and no one else can be said to have caused it through him.”).

<sup>202</sup> MOORE, *supra* note 174, at 230, 234.

<sup>203</sup> Helfand, *supra* note 9, at 1789.

<sup>204</sup> *Id.*; *accord* Sepinwall, *Substantial Burdens*, *supra* note 10, at 48 (It begs the question to assume that secular complicity law is even relevant to theological complicity claims.).

drawing. Better that courts stay out of it . . . .”<sup>205</sup> If there is really a need to define the substantiality of burdens on religion, Flanders concludes, “leave it to the plaintiff.”<sup>206</sup> Professor Gaylord provides the most vivid critical image, suggesting that this approach “requires courts to do incompatible things (like drawing a figure that is both a square and a circle): objectively assess whether an action . . . makes a religious adherent complicit in wrongdoing without ‘testing’ that person’s (admittedly) sincere religious belief that the action *does* make her complicit in sin.”<sup>207</sup>

Secular legal principles are admittedly an imperfect fit for measuring the substantiality of a burden on religious belief or practice—an indisputably theological judgment on which RFRA relief nevertheless depends.<sup>208</sup> In a perfect world, only burdens on religious exercise that are truly theologically substantial from the claimant’s internal point of view would generate such relief.

Of course, we do not live in a perfect world, and because we do not, we cannot permit courts to judge whether a burden is theologically substantial, nor can we leave the judgment of legal substantiality entirely to RFRA claimants. We do not trust courts to make these judgments correctly, and even if we did, allowing them to impose a religious orthodoxy on RFRA claimants would strike at the heart of the religious liberty protected by both Religion Clauses. At the same time, we cannot trust claimants to be disinterested in their allegations of substantiality.

However things stand in the realm of theory, in the real world where we all live courts must exercise meaningful control over whether an alleged burden on religious exercise is sufficiently “substantial” to merit RFRA relief.<sup>209</sup> Judicial review of the substantiality of alleged burdens on religion is necessary to implement Congress’s understanding of the limited reach of RFRA relief, and to uphold the

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<sup>205</sup> Flanders, *supra* note 9, at 7–8.

<sup>206</sup> *Id.*

<sup>207</sup> Gaylord, *supra* note 9, (manuscript at 52) (emphasis in original).

<sup>208</sup> Cf. Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19, 21 (to claim a “substantial” burden on one’s religious exercise is necessarily to claim that a law “significantly, importantly, or centrally” interferes with that exercise).

<sup>209</sup> Though he disclaims it, Professor DeGirolami is engaged in precisely this sort of perfectionism when he asserts that only the claimant’s belief system may logically be used to give content to “substantial burden.” See *id.* at 26 (“[E]ven in this imperfect world, the substantial burden inquiry is incoherent without considering the religious perspective of the claimant.”). But there is no contradiction in pragmatically controlling exemption claims by affording exemption relief from burdens on religion only when secular principles of law would afford comparable relief in analogous situations.



rule of law. Judicial review of claimant sincerity and secular costs will neither implement congressional purpose nor protect rule-of-law values, as has been shown. However imperfect, using neutral principles of secular law to judge the substantiality of burdens on religious exercise is currently the only doctrinal game in town.

Resolving religious nonprofit claims of substantial religious costs by reference to secular principles of causation is essentially what the circuit panels in the religious nonprofit cases thought they were doing. The panels repeatedly invoked the idea of factual causation in support of their holdings that the accommodation did not substantially burden the claimants' religion.<sup>210</sup> Their problems with the religious-question doctrine were two-fold. First, they sometimes cited secular principles of causation as if they were theologically normative, instead of making clear that they were deploying secular causal principles to give content to the statutory command that only "substantial" burdens on religion be afforded RFRA relief. Accordingly, it often appeared as if the panels were evaluating the reasonableness or correctness of the claimants' theologies of complicity.<sup>211</sup> And second, principles of factual causation were insufficient to resolve complicity claims in case of self-insured ERISA and church plans; the panels there should have relied on relevant principles of products distributor liability and intervening cause.<sup>212</sup>

The foregoing use of causation and related torts principles is not meant as a comprehensive solution to all RFRA claims or even to all complicity claims, but only as an example of how analogous principles of secular law can profitably be used to resolve such claims without violating the religious-question doctrine. Other bodies of secular law may be more apt for other aspects of complicity claims. The claim that self-certification constitutes the "commandeering" or "hijacking" of the accommodated nonprofit's plan for government use as a "conduit" for supplying religiously objectionable contraception, which the *Zubik* claimants pressed in the Supreme Court, might be judged by analogy to trespass to land or chattels;<sup>213</sup> and claims of scandal by reference to doctrines developed to ascertain when government has endorsed activities as to which it has a constitutional obligation to remain neu-

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<sup>210</sup> See *supra* Section III.B.

<sup>211</sup> See *supra* Section III.C.

<sup>212</sup> See *supra* Section III.E.

<sup>213</sup> Cf. Sepinwall, *Substantial Burdens*, *supra* note 10, at 46 (suggesting the "hijacking" claim is an imperfect analogy to unauthorized "joyriding" in another's car).

tral,<sup>214</sup> or whether government expenditures are attributable to taxpayers in such a way as to generate Article III standing to challenge them.<sup>215</sup> Principles of causation and accomplice liability in the criminal law might also provide sources for adjudication.<sup>216</sup> And so on.

One might argue that this variation and flexibility is much more vice than virtue, giving license to judges to cast about for whichever analogy best fits their preexisting view of whether a claimed burden is substantial. Judges are as subject to confirmation bias as the rest of us, but embedded features of the American legal tradition are likely to keep this tendency in check.

Reasoning by analogy is ubiquitous in American jurisprudence,<sup>217</sup> with deep roots in both the classical common law and the western philosophical tradition.<sup>218</sup> Analogical reasoning is just as pervasive in statutory interpretation.<sup>219</sup> The adversary system would ensure that at each level of litigation RFRA litigants will present the strongest secular legal analogies for adjudicating whether a claimed religious burden is substantial.<sup>220</sup> Courts would choose among them, of course, but would have to justify their choice in writing as against the competing alternatives, by showing that the chosen analogy has more similarities

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<sup>214</sup> E.g., Caroline Mala Corbin, *The Contraception Mandate*, 107 Nw. U. L. REV. 1469, 1476–79 (2013); Greene, *supra* note 23, at 183–84; *see also* Sepinwall, *Substantial Burdens*, *supra* note 10, at 48–50 (analogizing the accommodation process to ratification of contraceptive use).

<sup>215</sup> E.g., Sepinwall, *Conscience and Complicity*, *supra* note 10, at 1945–48. Professor Sepinwall ultimately rejects this analogy.

<sup>216</sup> E.g., Volokh, *Complicity in Sin*, *supra* note 10. *See generally* HERBERT MORRIS, ON GUILT AND INNOCENCE (1976). One problem with the use of accomplice liability in this context is the varying circumstances in which criminal liability requires and dispenses with specific intent to aid commission of the principal crime as an element of accomplice liability. *See, e.g.*, MORRIS, *supra*, at 143–44; Volokh, *Complicity in Sin*, *supra* note 10. The religious nonprofit claimants obviously have no specific intent to assist in the use of contraceptives, so use of accomplice liability would always result in a finding of no substantial burden. The Author thus agrees with Professor Sepinwall that principles of accomplice liability have little relevance even as analogies to complicity claims for exemption, *see* Sepinwall, *Substantial Burdens*, *supra* note 10, and text accompanying notes 29–30, at least when such liability requires specific intent to aid the commission of the crime.

<sup>217</sup> *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949).

<sup>218</sup> *See, e.g.*, ARISTOTLE, TOPICS, *reprinted in* THE BASIC WORKS OF ARISTOTLE 187, 205 (Richard McKeon ed., W. A. Pickard-Cambridge trans., 1941) (“The examination of likeness is useful with a view both to inductive arguments and to hypothetical reasonings, and also with a view to the rendering of definitions.”); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 200 (1966) (“[I]f any new and unwonted circumstances . . . shall arise, then if anything analogous has happened before, let the case be adjudged in like manner, since it is a good opportunity for proceeding from like to like.” (quoting Bracton) (Latin parentheticals deleted)).

<sup>219</sup> *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 65–73 (2d ed. 1995).

<sup>220</sup> *See generally* LEVI, *supra* note 217, at 5.

and fewer dissimilarities to the paradigm case than any proffered alternative.<sup>221</sup> These choices would be appealed, unpersuasive ones reversed, and precedential criteria developed for this judgment. Close cases and controversial holdings will undoubtedly recur, as they always do when courts give meaning to vague and ambiguous texts, but at any particular point in time one may reasonably expect judgments to have coalesced around certain bodies of secular law as the best measures for adjudicating the substantiality of religious burdens alleged under RFRA.<sup>222</sup>

One may credit the sincerity of the *Zubik* claimants—as the government did—when they argue that claiming the religious accommodation entails theological complicity, facilitation, or scandal, and thus entails religious costs from their internal theological perspective. This does not and cannot dispose of the legal question whether this sort of burden—that is, a burden on religious exercise that secular principles of law would not recognize as substantial in analogous secular circumstances—is nevertheless “substantial” under RFRA. Secular legal limits to complicity can provide a check on the level of complicity needed to support a judicial finding that a law “substantially” burdens religious exercise under RFRA.

#### IV. *HOBBY LOBBY* AND THE JUSTICIABILITY OF “SUBSTANTIAL” BURDENS

The use of secular legal principles to adjudicate substantial burdens in the nonprofit mandate cases must of course square with the Court’s holding in *Hobby Lobby*. Language in the majority opinion seemed to take the side of the RFRA claimants, suggesting that only they—and not a court—may decide whether a burden on religious exercise is “substantial.” The actual holding, however, is narrower: a substantial burden under RFRA obviously exists when the burdensome law requires a claimant to arrange and pay for goods and services whose use is religiously prohibited, as would have been required of Hobby Lobby’s owners without a RFRA exemption.<sup>223</sup>

The crucial language appears immediately after the Court accuses the government of having questioned the reasonableness of the owners’ belief that emergency contraception destroys human life in the

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<sup>221</sup> See generally *id.* at 3

<sup>222</sup> See generally *id.* at 4–6.

<sup>223</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

form of an embryo *in utero*,<sup>224</sup> and that covering this in its health plan would be inconsistent with their belief that life begins at conception:

This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed.<sup>225</sup>

After explaining that the religious-question doctrine prohibits the courts from making such a judgment,<sup>226</sup> the Court declared that its “‘narrow function in this context is to determine’ whether the line drawn [by the owners] reflects ‘an honest conviction,’ and there is no dispute that it does.”<sup>227</sup> The Court then concluded that the owners’ sincerity, when coupled with the enormous fines they faced if they violated the mandate, proved that the mandate imposed a “substantial burden” on their religious exercise.<sup>228</sup>

Judges and commentators have pointed to this language as decisive authority that *Hobby Lobby* confines judicial review to claimant sincerity and secular costs.<sup>229</sup> If this is really what the Court held, how-

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<sup>224</sup> The majority’s description of the government’s argument bore little resemblance to the argument the government actually made. The government argued that *Hobby Lobby* merely contributed with employees to an undifferentiated fund marked for employee health care treatments and services. Brief for the Petitioners at 33, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354). Only a miniscule portion of this pool paid for emergency contraception—and then only if employees or covered dependents with their own legal rights and interests independently chose to use it. *Id.* at 33–34. The government thus urged the Court to find that “RFRA does not protect against the burden on religious exercise that arises when one’s money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one’s own.” *Id.* at 34 (citations omitted).

In the Court’s defense, while the government sought to distinguish the content, validity, reasonableness, and centrality of the owners’ anticontraception beliefs from the substantiality of the burden on their ability to live out those beliefs, it failed clearly to explain how the Court could make the latter judgment without also making the former ones. The government thus looked as if it were directly challenging either the validity of the owners’ beliefs or the owners’ understanding of them; neither, of course, is a judgment that any court may make. As this Article has suggested, some of the circuit panels made the same error in the religious nonprofit cases currently before the Court. See *supra* Section III.C.

<sup>225</sup> *Hobby Lobby*, 134 S. Ct. at 2778.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 2779 (internal ellipses and citation omitted) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

<sup>228</sup> *Id.* at 2779.

<sup>229</sup> E.g., *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 8–10 (D.C.

ever, it will inevitably have to limit this holding.<sup>230</sup> At some point, an allegedly burdensome connection to contraception use becomes so remote that the burden of complicity simply cannot count as substantial, regardless of what the RFRA claimant sincerely believes.<sup>231</sup> Suppose, for example, that Hobby Lobby had objected to its employees' using their wages to purchase emergency contraceptives, on the ground that it was indirectly paying for religiously objectionable contraceptives.<sup>232</sup> The courts would have undoubtedly rejected outright the proposition that an employee's use of her own lawfully earned wages to purchase contraception might substantially burden her employer's religious anticontraception beliefs under RFRA.<sup>233</sup>

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Cir. 2015) (Brown, J., dissenting from denial of rehearing en banc); *see also id.* at 15–17 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting), *vacated and remanded on other grounds*, 136 S. Ct. 2007 (2016); *Eternal Word Television Network, Inc. v. U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J., specially concurring), *stay lifted*, 818 F.3d 1122 (11th Cir. 2016); Flanders, *supra* note 9, at 3–4; Gaylord, *supra* note 9, (manuscript at 34, 38); Helfand, *supra* note 9, 1779–80, 1790–91.

<sup>230</sup> *See, e.g.,* Douglas Laycock, *The Campaign Against Religious Liberty*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 96, at 231, 234 (The Court “will surely have to qualify” the apparent holding that courts may not adjudicate “how attenuated the burden on religious exercise” is.).

<sup>231</sup> *See* Greenawalt, *supra* note 96, at 140 (“[G]iven the need for exemptions that are administrable, the substantiality of a burden should be based partly on whether the connection between the actions of a claimant and the practices to which he objects is not too remote from a more general perspective[.] . . . tak[ing] account of practical difficulties and more general public perceptions.”); *cf.* MORRIS, *supra* note 216, at 115 (“[I]f we are responsible for everything . . . there is no longer any service being performed by the concept of responsibility.”).

<sup>232</sup> *Cf.* O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1160 (E.D. Mo. 2012) (“[C]ontribution to a health care plan has no more . . . impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees.”), *rev'd in part, vacated in part and remanded*, 766 F.3d 862 (8th Cir. 2014); Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 271 (2013) (suggesting that deference to claimant allegations of substantial burden would permit employers to limit how employees spend their wages and salaries); Melone, *supra* note 23, at 505 (“[U]nless the shareholders are willfully blind, surely they must be aware that the paycheck that they provide to certain employees will be used to engage in activities that are deeply disturbing to their faith.”); Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727, 756 (2015) (“Why, after all, do employers not also have the right to prevent their employees from using their wages on contraception? Logically, the rights and obligations that arise out of the duty not to facilitate sin can apply to *any* action that has the effect of providing ‘sinners’ with financial resources that enable them to engage in their sinful conduct.”).

<sup>233</sup> *See* Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE 135, 144 (2012) (“It is axiomatic that religious employers have no religious liberty right to limit the spending of employee compensation to conform to the employer's religious sensibilities.”); Stolzenberg, *supra* note 232, at 728 (“Paying wages . . . is not usually thought to make employers morally responsible for their employees' expenditures.”); *see also* Brief of Baptist Joint Committee for Religious Liberty as

The religious costs at issue in *Hobby Lobby* were generated by the owners’ direct participation in the purportedly wrongful act—arranging and paying for the coverage of emergency contraception that they knew would be used by at least some employees and beneficiaries of their health plan. While one might have argued, as Justice Ginsburg did, that the independent decisions of employees and beneficiaries to use contraception were something like “intervening causes” which cut off the owners’ responsibility,<sup>234</sup> it is also reasonable to conclude that those third-party decisions are insufficient to terminate responsibility when owners’ *themselves* are required to arrange and (partially) pay for coverage of the objectionable contraceptives.<sup>235</sup>

*Hobby Lobby* thus addressed a very different question than the one at issue in the nonprofit accommodation cases. To put this in the language of tort law, what the mandate would have required of Hobby Lobby was less like negligence than an intentional tort, which has its own logic of causation.<sup>236</sup> As the circuit panels held, there is a meaningful difference between arranging and paying for contraception coverage, knowing that some employees and beneficiaries will decide independently to use it, and opting out of arranging and paying for

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Amicus Curiae in Support of Respondents at 14–16, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191) (suggesting and criticizing comparably attenuated complicity claims) (Douglas Laycock, counsel of record); Sepper, *supra* note 23, at 60–61 (discussing comparably attenuated claims that have actually been litigated).

<sup>234</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2799 (Ginsburg, J., dissenting); *see supra* Section III.E.3.

<sup>235</sup> Although he later problematizes this argument, Professor Greenawalt states it clearly and powerfully:

If I believe, based on religious conviction, that use of a particular contraceptive device sometimes amounts to an abortion that constitutes the killing of innocent human life, I should not have to provide the device directly, any more than I myself should have actually to perform an act with that possible consequence. I may further think that if I provide money to someone knowing she will use it for that purpose, my involvement is still too great. And I may even believe that providing insurance coverage that some women will use in that way still keeps me so involved that I would rather suffer serious penalties. If I am convinced I would somehow be involved in taking innocent life, does that not constitute a substantial burden on *my* religious exercise, determined by my religious convictions?

Greenawalt, *supra* note 96, at 139; *see also* Laycock, *supra* note 230, at 234 (Although courts “have to police the boundary of what burdens count as substantial,” *Hobby Lobby* was not near the boundary because “this burden was not attenuated.”).

<sup>236</sup> Professor Fee suggested an illuminating hypothetical. If a Mafia boss instructs a Mafia member to arrange for a murder and the member does so, he will be criminally liable because he specifically contracted for the act. But suppose the same Mafia member is instructed by the boss to arrange for a murder, but says, “No, I won’t do it”—knowing full well that these words will cause the boss to arrange for someone else to do it. There is no theory in law that would hold the member responsible for those words or the ultimate murder.

such coverage, knowing that *others* will arrange and pay for it, and thus allow some employees and beneficiaries to use it.<sup>237</sup>

Nothing in *Hobby Lobby* overruled or limited *Hosanna-Tabor* (which the Court favorably cited) or *Jones*. The Court would have done better to have rejected the government's arguments on their own terms—that is, to have simply found that the independent decisions of employees to use mandated contraceptive coverage does not eliminate or reduce the burden of the mandate on employers whose religion condemns contraception, when the employer itself is legally constrained to financially and otherwise affirmatively enable the objectionable coverage. This would not have been because *Hobby Lobby* or its owners sincerely believed it to be so and would have suffered serious penalties for defying the mandate, but rather because analogous secular legal principles so hold. As Professor Sepinwall has pointed out, “the law distinguishes between direct participation and remote facilitation . . . .”<sup>238</sup> A person who pays for someone to acquire a harmful product with the knowledge that the person will use it to harm is generally held secondarily liable for foreseeable harm,<sup>239</sup> but an employer is rarely held legally responsible for its knowledge about

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<sup>237</sup> See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1186 (10th Cir. 2015) (“Although opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage, that is the point of an accommodation . . . . The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable.”), *vacated and remanded on other grounds sub nom. Zubik*, 136 S. Ct. 1557; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 462 (5th Cir. 2015) (“[*Hobby Lobby*] did not resolve the issue [of remote facilitation] but, instead, rejected the government’s notion that there was no substantial burden, because the intervening acts of third parties . . . made the connection between the plaintiffs’ providing contraceptive coverage and the destruction of an embryo too attenuated.”), *vacated and remanded on other grounds sub nom. Zubik*, 136 S. Ct. 1557; *Geneva Coll. v. U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 436–37, 442 (3d Cir. 2015) (“The issue of whether there is an actual burden was easily resolved in *Hobby Lobby*, since there was little doubt that the actual *provision* of services did render the plaintiffs ‘complicit.’ . . . [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset, but totally disconnected from the [claimants].”), *vacated and remanded on other grounds sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 245 (D.C. Cir. 2014) (“[In *Hobby Lobby*,] the Court concluded that, *in the absence of any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the religious exercise of [the claimants] because [they] were required either to provide health insurance coverage that included contraceptive benefits in violation of their religious beliefs, or to pay substantial fines. [Here, t]hey can avoid both providing the contraceptive coverage and the penalties associated with non-compliance by opting out of the contraceptive coverage requirement altogether.”), *vacated and remanded on other grounds sub nom. Zubik*, 136 S. Ct. 1557.

<sup>238</sup> Sepinwall, *Conscience and Complicity*, *supra* note 10, at 1938.

<sup>239</sup> Cf. DOBBS, *supra* note 185, at 937 (“One who *knowingly* provides substantial aid or encouragement to another’s commission of a tort is also jointly and severally liable for it along

how employees spend their wages.<sup>240</sup> The latter connection is simply too remote and attenuated.

*Hobby Lobby* left courts free to measure the substantiality of religious costs without violating the religious-question doctrine when the claimant is not as directly involved in the religiously objectionable conduct as the claimants would have been in *Hobby Lobby*, so long as they do so by reference to relevant secular law.

#### CONCLUSION: WHY COURTS MUST JUDGE “SUBSTANTIAL” BURDENS

If judicial review of RFRA claims of substantial burden is limited to claimant sincerity and secular costs, then this element is effectively established by the claimant’s bare allegation of substantial burden. If this were really the law, then every burden on religion allegedly caused by federal law would yield a RFRA exemption unless the government could show that the burden furthers a compelling interest in the least restrictive manner—a standard of review the government usually fails to satisfy.<sup>241</sup>

Allowing churches and believers to claim RFRA exemptions without the check of meaningful judicial review is bad for both law and religion. Knowing that their claims of substantial burdens are functionally nonjusticiable, churches and believers will be tempted to make such claims even when legal burdens are not theologically sig-

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with the person who actually carries out the tortious acts. . . . One who aids, abets or encourages a tort need not participate in it to be liable, but the aid or encouragement must be substantial.”).

<sup>240</sup> See 2 RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. LAW INST. 2006) (“If an employee’s tortious conduct is unrelated either to work assigned by the employer or to a course of conduct that is subject to the employer’s control, the conduct is outside the scope of employment” and the employer is not liable for it.). What an employee does with his wages is obviously beyond the effective control of the employer. See *supra* note 231 and accompanying text.

<sup>241</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 tbl. 1 (2006) (Government has historically satisfied strict scrutiny in only 22% of freedom of speech cases, 24% of fundamental rights cases, 27% of suspect class discrimination cases, and 33% of freedom of association cases.); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (RFRA’s least restrictive means test is “exceptionally demanding”); *id.* at 2762 (RFRA requires the protection of religious exercise “to the maximum extent permitted” by federal statutes and the Constitution.); *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (RFRA’s least restrictive means test is the “most demanding test known to constitutional law”).

Professor Lederman has recently shown that notwithstanding dicta to the contrary in *Flores* and *Hobby Lobby*, RFRA’s compelling interest test is not, and was not intended by Congress to be, the classic “strict scrutiny” deployed by the Court in equal protection and other constitutional cases, but rather the modest balancing test used in pre-*Smith* decisions under the Free Exercise Clause. See Lederman, *supra* note 4, at 428–40.



nificant.<sup>242</sup> And once entangled in RFRA litigation, churches and believers will also be tempted to reshape their theologies and exaggerate religious costs in order to win.<sup>243</sup> The first temptation undermines the secular integrity of the legal system, by allowing exemptions that are not really needed. The second threatens the spiritual integrity of churches and believers themselves, by allowing the exigencies of litigation to effect theological change.

The use by courts of tort and other established bodies of secular law to adjudicate the substantiality of religious burdens avoids both problems. Such a system is not perfect; it can only approximate substantiality from the internal theological viewpoint of RFRA claimants. But unlike a regime in which allegations of substantial burden are functionally nonjusticiable, the use of secular law analogies upholds the rule of law and thus ensures the continued political viability of permissive religious exemptions. As Professor Koppelman and the Author have elsewhere observed, “RFRA is a *statutory* accommodation, and *Hobby Lobby* is a mere *statutory* interpretation that Congress has the power to undo.”<sup>244</sup> Voters are unlikely to view religious exemptions as legitimate if their availability is determined by the churches and believers they benefit rather than the courts. Consequently, “[t]he existence and vitality of RFRA—and other statutory accommodations of religion—ultimately depends on the sufferance of Congress and the voters who elect it.”<sup>245</sup>

As the Court’s precedents show, the religious-question doctrine does not preclude courts from adjudicating the substantiality of burdens on religious exercise in determining whether to grant a RFRA exemption, so long as they do so on the basis of secular law. RFRA’s text likewise suggests that courts may adjudicate the substantiality of religious burdens, and its legislative history shows that this was Congress’s intention. The rule of law demands that the determination

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<sup>242</sup> Cf. Marshall, *supra* note 11, at 39 (“A financial incentive combined with a high likelihood of success is a dangerous mix.”).

<sup>243</sup> See, e.g., M. Cathleen Kaveny, *Law, Religion, and Conscience in a Pluralistic Society: The Case of the Little Sisters of the Poor* (Boston College Law Sch. Legal Studies Research Paper Series, Research Paper No. 394, 2016), <http://ssrn.com/abstract=2756148> (suggesting that the Little Sisters of the Poor misrepresented traditional Catholic teachings on complicity and scandal to gain tactical advantage in litigating their RFRA exemption claim); cf. Marshall, *supra* note 11, at 41 (“A system that encourages persons to frame their objections to neutral laws in religious terms in order to gain economic benefit can corrupt the purity and integrity of religious beliefs . . .”).

<sup>244</sup> Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty than Smith?*, 4 ST. THOMAS J.L. & PUB. POL’Y 223, 247 (2016).

<sup>245</sup> *Id.*

whether religious costs are substantial should be made by impartial courts and not self-interested claimants. The religious nonprofit cases, finally, illustrate that adjudication of substantial burdens on the basis of secular law is a practical and viable means of applying RFRA, and is consistent with *Hobby Lobby*. All of these considerations counsel that courts may—and indeed *must*—decide the substantiality of burdens on religious exercise under RFRA.