2017

Burdens, Accommodations, and More Burdens: Using ADA Case Law to Evaluate Third-Party Costs Imposed On Employees In Corporate RFRA Cases

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In Burwell v. Hobby Lobby Stores, Inc., the Supreme Court ruled that under the Religious Freedom Restoration Act of 1993 (RFRA), Hobby Lobby Stores and other closely-held companies could exempt themselves from the Contraceptive Mandate of the Patient Protection and Affordable Care Act of 2010 (ACA). This was the first time that the religious convictions of a for-profit company were recognized under RFRA. Though it has only been two years since the Hobby Lobby ruling, scholars have tried to fully understand the ramifications of the decision. One major area of debate among scholars has been the issue of third-party costs in similar RFRA cases. There are questions as to whether or not this issue was properly addressed in Hobby Lobby, and whether it should be addressed in future cases. These questions are especially substantial as experts attempt to predict what other religious exemptions employers might seek in the future — and whether or not they will be granted. However, there has been limited scholarly research exploring how the third-party costs of a RFRA exemption should be weighed against the burdens a religious objector would face without an exemption. Kara Lowentheil has provided what is likely the most thorough, but largely theoretical, framework for weighing the two. This paper seeks to build off of Lowentheil's framework using existing case law from a comparable area: the Americans with Disabilities Act (ADA). Both RFRA and the ADA allow for accommodations for individuals protected under the respective laws, given that they do not create undue hardships for others. Specifically, ADA cases related to the workplace can help us establish a clearer picture of the benchmarks that might exist for weighing third-party costs in future corporate RFRA cases.

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BURDENS, ACCOMMODATIONS, AND MORE BURDENS:

USING ADA CASE LAW TO EVALUATE THIRD-PARTY COSTS IMPOSED ON EMPLOYEES IN CORPORATE RFRA CASES

By

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An Undergraduate Thesis submitted in partial fulfillment of the requirements for the

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MAY 2017
Abstract

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court ruled that under the Religious Freedom Restoration Act of 1993 (RFRA), Hobby Lobby Stores and other closely-held companies could exempt themselves from the Contraceptive Mandate of the Patient Protection and Affordable Care Act of 2010 (ACA). This was the first time that the religious convictions of a for-profit company were recognized under RFRA. Though it has only been two years since the *Hobby Lobby* ruling, scholars have tried to fully understand the ramifications of the decision. One major area of debate among scholars has been the issue of third-party costs in similar RFRA cases. There are questions as to whether or not this issue was properly addressed in *Hobby Lobby*, and whether it should be addressed in future cases. These questions are especially substantial as experts attempt to predict what other religious exemptions employers might seek in the future — and whether or not they will be granted. However, there has been limited scholarly research exploring how the third-party costs of a RFRA exemption should be weighed against the burdens a religious objector would face without an exemption. Kara Lowentheil has provided what is likely the most thorough, but largely theoretical, framework for weighing the two. This paper seeks to build off of Lowentheil’s framework using existing case law from a comparable area: the Americans with Disabilities Act (ADA). Both RFRA and the ADA allow for accommodations for individuals protected under the respective laws, given that they do not create undue hardships for others. Specifically, ADA cases related to the workplace can help us establish a clearer picture of the benchmarks that might exist for weighing third-party costs in future corporate RFRA cases.
Introduction

In Burwell v. Hobby Lobby, the Supreme Court recognized, for the first time, a for-profit corporation’s right to receive a religion exemption under the Religious Freedom Restoration Act of 1993 (RFRA). While the court’s decision was limited to only closely-held corporations, it was novel in that it affirmed that artificial, for-profit entities can have religious beliefs and therefore claim exemptions to federal laws that interfere with those beliefs. More specifically, the Court held that the contraceptive mandate of the Affordable Care Act of 2010 (ACA) was not the “least restrictive” means for the federal government to improve access to birth control, and therefore closely-held companies with sincere religious beliefs — like Hobby Lobby — should be given exemptions to that section of the law.

Still, Justice Samuel Alito, in writing the majority opinion, acknowledged that an exemption under RFRA needed to pass an additional hurdle. He reaffirmed the unanimously agreed upon point in Cutter v. Wilkinson that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” That is, the consideration of costs imposed on third parties by such RFRA exemptions is crucial. In this case, the Court determined that the “effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.” As such, the Court agreed to extend an exemption to Hobby Lobby.

On the other hand, in her passionate dissenting opinion, Justice Ruth Bader Ginsberg argued that according to the majority “RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith — in these cases, thousands of

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women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.” Nelson Tebbe, Micah Schwartzman and Richard Schragger later argued that “it would be churlish and naive to deny that female employees, as well as the female dependents of male employees, were harmed when the company denied its employees full contraceptive coverage.” They explained that the ACA was passed with the consultation of medical experts who deemed female contraceptive coverage a necessity, and that the Court wrongly allowed workers and their families to lose this medical necessity to protect the religious beliefs of their employers. Additionally, while the Obama Administration eventually granted these workers access to the same free contraceptive coverage provided for employees of religious non-profits, it took an entire year to implement the work-around arrangement. Tebbe, Schwartzman, and Schragger argued that this time lag should definitely be considered harmful to employees of Hobby Lobby and similar firms. The lapse in access to medically necessary contraceptives could significantly impact the health of female employees who might not otherwise be able to afford such coverage.

The concerns that Ginsberg, along with Tebbe, Schwartzman, Schragger, and other critics voiced extend beyond the facts of Hobby Lobby to any case where an employer opposes some legal requirement on religious grounds and its employees do not share their employers’ religious beliefs. Women, LGBTQ individuals, and other historically underrepresented groups might be especially vulnerable because they may be at risk of losing many of the federal safeguards put in place to ensure fair and equal treatment in the workplace. Central to these concerns is the idea that allowing for-profit corporations to claim religious exemptions will encourage corporate

3 Id. at 2780.
paternalism\(^5\), place the interests of corporations over those of their employees\(^6\) and “exacerbate the power imbalance between corporate employers and their employees.”\(^7\) That is, corporations already hold a lot of power over their workers and religious exemptions could provide another tool for influencing their workers’ private lives. Using Hobby Lobby as an example, a company’s desire to exempt itself from providing contraceptive coverage for employees could be viewed as an attempt to discourage employees from using contraceptives, thus imposing the religious convictions of the employer on the employee.

I agree that it is imperative for courts to consider third-party burdens in deciding whether to grant religious exemptions. The problem, as other scholars have noted and I go on to describe below, is that we have no good mechanism or set of rules for judging when third-party costs are or are not justifiable. This is likely, in part, due to the very case-specific nature of religious exemption cases that make a one-size-fits-all — or at least a somewhat specific — rule nearly impossible to establish. This difficulty, however, does not and should not preclude us from attempting to establish some general boundaries of when third-party burdens are unacceptable in RFRA cases — and therefore creating a more unified approach among the courts and across cases.

In this paper, I argue that courts can arrive at the relevant test by appeal to a similar test employed in the doctrine developed under the Americans with Disabilities Act (ADA), given the striking similarities between exemptions under the ADA and RFRA. As I explain below, ADA case law is also incredibly fact-specific, making the use of specific rules quite difficult. Under a test modeled after the ADA case law, a court confronted with a bid for a religious exemption that


\(^7\) Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONSTITUTIONAL COMMENTARY 277-308 (2015).
risks third-party harm would have more extensive precedent to help guide their decision. More specifically, they would have general guidelines to help determine when a third-party burden is unacceptable.

To defend the guidelines I propose, I begin in Section I with an overview of RFRA, the Hobby Lobby decision, and the debate about third-party costs to which it gave rise. In Section II, I then describe the ADA and outline its similarities with RFRA. In Section III, I extend the ADA test to RFRA, offering a new way to think about RFRA case law. Finally, in Section IV, I address some potential pushback to this paper.

I. RFRA, Hobby Lobby, and third-party burdens

Passed by a unanimous House and nearly unanimous Senate, and later signed by President Bill Clinton, RFRA was a bipartisan effort to limit government interference with individual religious freedom. RFRA essentially reinstated the Sherbert Test\(^8\) for determining if an individual’s religious freedom is unjustly infringed upon by the government, thus requiring the use of strict scrutiny. Under the Sherbert Test, an individual can seek an exemption to a law or government policy if they can prove that they hold a sincere religious belief, and that this belief is being substantially burdened by the government. The government however, can circumvent this, if they can prove that they are working for a compelling public interest, and that they are going about it in the “least restrictive” means. Though the Supreme Court ruled in 1997 that RFRA was unconstitutional when applied to state and local governments\(^9\), the law is still applied to actions of the federal government, like the Patient Protection and Affordable Care Act of 2010 (ACA).

Hobby Lobby Stores — a national chain of 600 arts-and-crafts stores privately owned by devout Christians David and Barbara Green — opposed the Contraceptive Mandate of the ACA. The company claimed that being required to provide contraceptive coverage for female employees infringed upon the firm’s religious freedom and sued the federal government under RFRA. In a combined case with other closely-held companies, the Court ruled that the contraceptive mandate was not the “least restrictive” means for the government achieving its goal of access to birth control. In fact, an alternate accommodation from the Department of Health and Human Services (HHS) already existed for religious non-profits such as churches and Catholic universities. Thus, Hobby Lobby and other petitioners were granted exemptions to the contraceptive mandate of the ACA.

As explained above, some Supreme Court justices, as well as many legal scholars, have raised concerns about how the Hobby Lobby ruling will affect workers — especially those from historically underrepresented groups, or those who do not share their employers’ beliefs. Caroline Mala Corbin worries that religious exemptions will empower corporations to fight against laws designed to protect employees. She lists The Fair Labor Standards Act, The Federal Occupational Safety and Health Act, Title VII of the Civil Rights Act, and The Family and Medical Leave Act as some of the employee protections that could be unraveled in the future with religious exemptions. She wrote, “Despite the Supreme Court’s claim that its decision is narrow, corporate religious liberty leaves all these employee protections vulnerable to religious exemptions.”\(^\text{10}\).

While critics of the Hobby Lobby decisions have considered it the opening of a Pandora’s Box, not everyone is as concerned about the implications it will have for third parties in future corporate religious exemption cases — even if they agree that the consideration of third-party

\(^{10}\) CORBIN, supra note 7, at 305.
costs is crucial. Frederick Mark Gedicks finds it ironic that Hobby Lobby, a multi-billion dollar
corporation, argued that it should be protected against any marginal costs that result from their
religious convictions, while imposing significant costs on employees for their beliefs and
practices. However, he noted that Justice Anthony Kennedy, who voted with the majority, joined
the four dissenting justices in asserting that exemptions under RFRA cannot simply “shift the
costs of observing a religion from those who practice and believe it to those who do not”\(^\text{11}\) (i.e.
making employees pay out-of-pocket for contraceptive coverage rather than a company paying to
opt-out of such coverage plans). Since a majority of justices agreed on this principle, Gedicks is
confident that in future cases in which a third party’s cost is real and measurable, religious
exemptions will not be granted.\(^\text{12}\) Still, Kennedy’s status as the “swing vote” on the current Court
might not remain for long. Kennedy and two members of the Court’s liberal wing, Justices
Breyer and Ginsburg are all above the age of 78 and might relinquish their seats in the coming
years due to retirement or natural causes. With a new Republican White House, it is possible that
as many as three conservative justices could be nominated to the bench during this presidential
administration, significantly altering the ideological makeup of the Supreme Court. A more
conservative court would undoubtedly be even more sympathetic to corporate RFRA cases, and
would, at the very least, be willing to consider more exemptions.\(^\text{13}\)

\(^{11}\) Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly

\(^{12}\) Frederick Mark Gedicks, and Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby

\(^{13}\) There are also those who are not concerned about Hobby Lobby’s implications because
they believe that third-party burdens should be of minimal concern when evaluating claims for
religious exemptions. For example, Christopher Lund argued that the magnitude and likelihood
of third-party harm is usually overstated, especially when the burdens can be spread across many
people. Furthermore, he explained that a stronger religious need for an exemption could justify a
heavier burden being imposed on third parties. For example, he wrote of the Hobby Lobby case:
“We are routinely expected to bear each other’s burdens; remember again Hobby Lobby arises
only because of the Green family’s objections to bearing the burden of providing someone else’s
Finally, there has been some work on weighing the burdens imposed on religious corporations if not granted exemptions with the burdens of third parties if exemptions are granted. A question that stands is whether or not this is a “zero-sum game.” That is, does lifting the burden from an individual or corporation seeking a religious exemption automatically impose an equal burden on someone else? Some scholars believe that Burwell v. Hobby Lobby is not a “zero-sum game” because there was an alternative accommodation for female employees to receive contraceptive coverage without paying out-of-pocket. So, exempting corporations from paying for contraceptives did not automatically shift an equal burden onto employees. (However, as previously explained, Tebbe, Schwartzman, and Schragger — among others — contested this idea of no third-party cost, highlighting the fact that it took employees nearly a year to receive the alternative contraceptive coverage) As a rule of thumb, Kathryn Kovacs argued that: “If the government is involved in allocating a limited resource such that the religious burden eased is equal to the secular burden imposed, granting the requested religious accommodation simply shifts the burden to a third party.” Furthermore, she believes that RFRA only allows for the easing of one’s religious burden — not the transferring of it to others. So, in cases that are “zero-sum games” exemptions should not be granted. While Kovacs’ argument is useful for conceptually understanding equal burdens, it is important to note that burdens do not need to be

equal to the religious considerations to be important. There very well could be third-party costs that are of a relatively lesser magnitude that are still unacceptable.

A. Weighing Third-Party Costs in Future RFRA Cases

If we are indeed on the cusp of a wave of corporations seeking exemptions under RFRA, there should be a stronger effort to understand how such exemptions would impact third parties — especially employees. When are third-party burdens acceptable to accommodate a closely-held corporation’s religious beliefs? When are such burdens not acceptable? While there has been significant scholarly work on the consideration of third-party costs in corporate RFRA cases, there have been very few efforts to establish a comprehensive framework for weighing such costs against the burdens imposed on the religious objectors in Hobby Lobby and future cases. Perhaps the most thoughtful framework is the one established by Kara Lowentheil. Lowentheil argues that RFRA cases like Hobby Lobby are often wrongly framed as a struggle between the government and a religious objector, when there are often conflicts with third-party rights holders that are more important. Therefore, she believes an important distinction should be made between “cases in which the state’s primary interest is its own efficient administration of a government law or program and cases in which the state is primarily representing significant, often equality-implicating interests of third parties who are dependent on the state for enforcement of their existing rights.”

Lowentheil states that there is currently no generally accepted framework for adjudicating the latter type of case, even though it is more significant than the former type. So, she proposes her own set of analytical questions to help guide the consideration of burdens imposed on third parties (whom she calls “Existing Rights Holders” or “ERHs”) in related RFRA cases. She persuasively explains, “Given that, under the RFRA, a

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15 Kara Lowentheil, *When Free Exercise is a Burden: Protecting ‘Third Parties’ in Religious Accommodation Law*, *Drake L. Rev.* 433-501 (2014). It should be noted that this work was published after Hobby Lobby arguments were heard, but before the Court’s decision was issued.
court must apply strict scrutiny to a challenged law once a religious objector has shown a substantial burden on religious exercise, it seems only fitting that a similar threshold would be appropriate for the protection of ERHs.”16

In Lowentheil’s theoretical framework for Hobby Lobby-like cases, the government must first ask, “…[I]s there a solution the state can provide that would alleviate the substantial burden on the objector’s religious exercise and that would prevent ERHs from suffering a substantial burden caused by the accommodation?”17 If there is indeed a solution that would be both feasible and not overly costly, she believes the government should be obligated to implement such a solution. In the case of Hobby Lobby, Lowentheil suggests enforcing the contraceptive alternative offered to non-profits and extending it to religious for-profit entities. She believes that this could hypothetically work to “make everyone happy.” She further explains that when the government cannot offer a feasible solution, the protection of “equality-implicating” rights should prevail because it is clear that preventing discrimination is a strong national priority. “Equality-implicating” rights, as opposed to practical or expressive rights, are those that allow all Americans to equally participate in civil society. In other words, when a potential RFRA exemption pits the rights of the religious objector against those of a third-party, the side protected by anti-discrimination laws should take precedence. If both sides can claim this, then the government should be free to choose which equality-implicating rights it wishes to further.

It is clear that Lowentheil’s theoretical framework is the most thorough in weighing the burdens imposed on religious objectors against the potential third party costs of a RFRA

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16 Lowentheil, supra note 15, at 477.
17 Lowentheil, supra note 15, at 479
exemption.\textsuperscript{18} It is especially constructive to distinguish RFRA cases in which the state’s compelling interest is not so much that of the administration of government, and more to protect the rights of third parties. This allows us to bring more focus to the conflicting rights at stake and first attempt to “make everyone happy.” While there is certainly a strong interest in promoting the rights of minority groups if there is no solution to protect the rights of both sides in RFRA cases, it might be an overgeneralization to suggest that equality-implicating rights should always prevail over non-equality implicating rights. There could be more nuances to account for. Still, it is reasonable to suggest that at some point if there are conflicting equality-implicating rights at stake, the government can prioritize one over another.

This paper seeks to establish practical boundaries on acceptable and unacceptable third-party burdens imposed on employees under RFRA using existing case law as guidance. Specifically, given the meaningful similarities between accommodations under RFRA and accommodations under the Americans with Disabilities Act, a review of some important ADA cases can provide a helpful lens for considering third-party burdens in future RFRA cases.

**II. Comparing Accommodations under RFRA and ADA**

Signed into law by President George H.W. Bush in 1990, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against individuals on the basis of disability. Under the law, employers are required to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability”\textsuperscript{19} unless the employer can prove such an accommodation would impose an “undue hardship” on the operation

\textsuperscript{18} As previously explained, Lowentheil is the first to propose a method for weighing the rights of religious objectors and third parties in cases where the government’s main interest is protecting third parties.

\textsuperscript{19} 42 U.S.C. § 12112(b)(5)(A).
of the business. Much of the scholarly discussion and political pushback on the ADA has focused on the affect accommodations would have on others, especially employers and coworkers of individuals with disabilities.\textsuperscript{20} The uniqueness of the ADA, especially compared to other anti-discrimination laws such as the Civil Rights Act of 1964, makes it well suited for comparison with RFRA. In this section, I describe the relevant similarities between the two laws.

\textbf{A. Treating Individuals Differently in the Workplace through Accommodations}

Scholars have paid much attention to a distinct difference between the ADA and other anti-discrimination protections. While other laws look to level the playing field for minority groups, the ADA seeks to make disabled individuals equal to their coworkers by providing them with special accommodations. For example, an employee with serious vision impairment may be entitled to a larger computer monitor or special text to speech software at their desk to help them do their job. This employee would be receiving special treatment in a way because he or she is getting better technology that their colleagues with good vision are not entitled to. However, the

\textsuperscript{20} See, e.g., Alex B. Long, \textit{The ADA’s Reasonable Accommodation Requirement and “Innocent Third Parties,”} 68 MO. L. REV. 863, 901 (2003). Long argues that ADA cases should focus most on how other employees would be impacted. He advocates for a rule that holds that “a proposed accommodation is unreasonable when it would violate the contractual rights of another employee or otherwise result in an adverse employment action (as that term is defined through case law) for a non-disabled employee.” But, he also admits that “constructing a bright-line rule” for such cases is very difficult to do; Stephen F. Befort, \textit{The Most Difficult ADA Reasonable Accommodation Issues: Assignment and Leave of Absence,} 37 WAKE FOREST L. REV. 439 (2002). Befort contends that reassigning a disabled employee to a vacant position even if he or she is not the most qualified for that job is generally “reasonable.” Thus, another, more qualified employee can be passed over for the job to accommodate the disabled worker. However, if this accommodation would require a company to disrupt an established policy (such as the seniority policy in \textit{US Airways v. Barnett}), the accommodation can be considered unreasonable; Cheryl L. Anderson, \textit{“Neutral” Employer Policies and the ADA: The Implications of \textit{US Airways, Inv. V. Barnett Beyond Seniority Systems,}} 51 DRAKE L. REV. 1,37 (2002). Anderson argues that in order to prevent ADA accommodations from violating company neutrality policies, employers should have to “show modification of the policy for this particular employee is an undue hardship because it will cause irreparable, lasting damage.” More specifically, this damage would be a result of the damage done to employees who have come to rely on such a policy and are burdened by the accommodation that violates it.
ultimate goal is that this special treatment will enable the employee to carry out the duties of his or her job on an even playing field with his or her peers. In some cases, reasonable accommodations under the ADA can include the shifting of working hours or minimal job functions.

RFRA is similar in this respect for individuals with sincere religious beliefs. The following simplification of the two laws shows their similarities: Under the ADA, a qualified individual with disability is granted a special accommodation to compensate for something they physically/mentally cannot do; while under RFRA, an individual with a sincerely held belief is granted a special accommodation to compensate for something they morally cannot do. Additionally, both of these laws tend to focus on issues in the workplace.\(^\text{21}\)

**B. Fact-Specific and Individualized**

Both the ADA and RFRA are open-ended without much guidance from Congress on how cases that arise under these laws are to be resolved. This is largely due to the fact-specific nature of such cases. Just as there are many different religious denominations and sects that one might identify with, there is a plethora of distinct disabilities covered by the ADA that an individual might have—especially given the broadened definition of protected disabilities under the ADA Amendments Act of 2008\(^\text{22}\). Furthermore one’s specific needs will vary based on their individual circumstances and the nature of their work. That is, not every devout Catholic would require similar accommodations under RFRA just as not every dyslexic individual would require similar accommodations under the ADA. Outcomes are individualized based on the facts of the specific cases.

**C. Requirements and Legal Bounds to Accommodations**

\(^{21}\) RFRA is not restricted to workplace challenges but the workplace is a site where accommodations threaten to impose burdens on third parties – namely, employees.

\(^{22}\) 42 U.S.C. § 12102 (4).
Both the ADA and RFRA are limited in the sense that they cannot unfairly elevate an individual above another because of his or her disability or religious beliefs. The ADA is limited by the idea of “reasonable accommodation.” It would be unreasonable to give a disabled employee preferred treatment simply because of their disability if this would result in a substantial hardship for other workers. At the same time, RFRA is constrained by the Establishment Clause of the First Amendment. That is, a religious accommodation to a federal law or regulation that unfairly benefits one individual could be viewed as the government wrongly promoting one individual’s religious beliefs over another’s (or no religious beliefs at all).

D. Third-Party Pushback

As explained above, a major concern about RFRA cases like Hobby Lobby is the effect it would have on innocent third parties (i.e. employees) who are not involved in the actual litigation. Lowentheil’s framework is appealing because it gives special consideration to RFRA cases where the government’s compelling interest is protecting the rights of third parties. In these cases, while the actual disagreement is between a religious corporation and the government over a federal regulation, the burden imposed on employees must be considered. The same could be said about the ADA, which was initially criticized for the effect it would have on the coworkers of disabled individuals who wouldn’t have a say in the nature of the accommodation granted to a disabled worker even when that accommodation would negatively impact his or her coworkers. There are many ADA accommodations—such as the larger monitor and text to speech software example explained above—that assist disabled employees without affecting their coworkers in any way. However, there are also more controversial cases in which the only way to ease a burden on a disabled employee is to shift some of it to his or her peers. Thus, while cases are
litigated between employees and their employers, several scholars have framed ADA cases as a struggle between the rights of employees with disabilities and the rights of their coworkers.\textsuperscript{23} This is useful in thinking about RFRA cases because, as we have seen, RFRA is sometimes framed as a struggle between the rights of religious companies and the rights of their employees\textsuperscript{24}, even though the actual litigation is between the companies and the federal government. In the past, companies have pushed back against the ADA citing the undue hardships that accommodations would impose on both the company and its other employees. Now, those same ideas can be used to protect against the undue hardships that other companies are trying to impose on their employees. While acceptable burdens might vary depending on the specific nature of a case, there are clear boundaries that should make certain burdens unacceptable under ADA, RFRA or any other similar law.

**III. Important ADA Cases to Consider**

Given the similarities between ADA and RFRA, the following cases can provide additional perspective on how the court might consider third party burdens in Hobby Lobby-like cases in the future. In what follows, I present three different ways that federal courts have addressed third-party costs in the ADA and related cases, and then spell out their relevance for RFRA cases. I then go on to synthesize the different lines of case law, infer general principles therefrom, and evaluate the strengths and weaknesses of these principles for addressing the relevant RFRA cases.

**A. Keeping the Status Quo: US Airways, Inc. v. Barnett**

In 1990, Robert Barnett, a US Airways employee, hurt his back as a cargo handler and


\textsuperscript{24} See, e.g., TEBBE, SCHWARTZMAN & SCHRAGGER, *supra* note 4; LOWENTHEIL, *supra* note 15.
used the seniority system at the company to transfer to a less physically demanding mailroom job. Several months later, two employees with seniority over Barnett sought to be transferred to the more desirable mailroom job. Would Barnett’s right to a “reasonable accommodation” for his disability under the ADA trump the other employees’ right to move jobs under the firm’s seniority rules? US Airways claimed that violating the seniority system rules made Barnett’s accommodation request inherently unreasonable. Barnett disagreed, but granted that the violation of seniority rules could be used to argue that the accommodation would impose an “undue hardship” on US Airways.

The District Court issued a summary judgment in favor of US Airways, recognizing that the decades-old seniority system governed the company’s 14,000 agents and was common to the airline industry. Thus, “…[A]ny significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees.”25 The US Court of Appeals for the Ninth Circuit reversed the lower courts’ decision, explaining that the seniority system was simply a factor that needed to be considered in a “case-by-case fact intensive analysis” to determine if the requested accommodation resulted in undue hardship.26 With the Fourth Circuit reaching a different conclusion in a similar case on the ADA and seniority systems27 the Supreme Court agreed to hear US Airways’ appeal.

Interestingly, in the majority opinion, Justice Stephen Breyer acknowledged that in this case, they were specifically addressing the potential struggle between “…(1) the interests of a disabled worker who seeks assignment to a particular position as a “reasonable accommodation,” and (2) the interests of other workers with superior rights to bid for the job under an employer’s

26 Barnett v. US Air, Inc., 228 F. 3d 1105, 1120 (9th Cir. 2000).
seniority system.”^28 This acknowledgement is important because it recognizes that while US Airways is the one being sued by Barnett, it is his coworkers who will ultimately feel the biggest burden of a ruling in his favor.

The court appropriately rejected both parties’ interpretation of what constituted a “reasonable accommodation.” US Airways claimed that the ADA only required employers to treat disabled workers or applicants equally; they were not required to give special preference. Thus, in their view, any accommodation that treated a disabled employee specially would be unreasonable. The Court knocked down this view, explaining that preferences would be sometimes required to achieve the ADA’s goal of equal opportunity. Breyer explained, “By definition any special “accommodation” requires the employer to treat an employee with a disability differently, i.e., preferentially.”^29 This description is apt because the ADA would be completely ineffective under US Airways’ interpretation. How could the distinct needs of disabled employees be met under any circumstance if special treatment were not allowed in any way? The court also rejected Barnett’s claim that a “reasonable accommodation” is meant to be an “effective accommodation,” in other words, one that can successfully meet the needs of a disabled employee. He argued that if “reasonable accommodation” was meant to address the effect on others, it would make the inclusion of “undue hardship” redundant. While Barnett’s interpretation has more merit than US Airways, the Court logically explained why it was also flawed: the word “effective” and the word “reasonable” are not synonymous. The Court is correct because if Congress wanted “reasonable” to mean “effective” in the ADA, they would have simply used the word effective. However, in “reasonable accommodation” it is the word “accommodation” that requires effectiveness, as an ineffective accommodation will not properly

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^29 Id. at 397.
accommodate an employee.\textsuperscript{30}

Under normal circumstances, the court ruled, a “reasonable accommodation” was one that an employee could prove to seem reasonable in typical cases. This is appropriate in that it simply underlines how the average person would interpret the term “reasonable accommodation” — one that is practical or realistic under ordinary circumstances. Under ordinary circumstances, it would seem practical or realistic for an employee to request reassignment to a less physically taxing job. It would then be the company’s responsibility to prove how this seemingly reasonable accommodation would present an undue hardship for their business. However, the Court recognized that in this case they had to address whether it would be reasonable to request a reassignment that disrupts a company’s longstanding seniority system. They determined that the violation of the established seniority system at US Airways made the accommodation unreasonable, especially given the effect it would have on Barnett’s coworkers. Breyer wrote, “…[T]he typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment”\textsuperscript{31} as well as appropriate notions of job security.\textsuperscript{32} While the majority said that Barnett could provide additional information to show how in his specific case his request was reasonable, they concluded that disrupting seniority systems should be considered unreasonable by rule. This is logical because, generally speaking, it is not quite reasonable to breach a system that thousands of employees have come to rely on. Yet, the court rightly keeps the door open for Barnett and those after him to prove why the

\textsuperscript{30} Id. at 400.  
\textsuperscript{31} Id. at 404.  
\textsuperscript{32} For a strikingly similar case dealing with an airline employee seeking to bypass an established seniority system and collective bargaining agreement for religious regions (under Title VII of the Civil Rights Act), \textit{See Trans World Airlines, Inc. v. Hardison}, 432 U. S. 63 (1977). As in \textit{US Airways vs. Barnett}, the court was not willing to violate the firm’s seniority system given the impact it would have on other employees.
circumstances of their specific case might make upsetting the status quo reasonable.

Some have argued that the Court should have rejected the requested accommodation not because it was unreasonable, but because it would cause undue hardship on US Airways and its employees. Regardless of this, the US Airways ruling has the same impact when drawing parallels to RFRA cases. The court held here that upsetting the status quo that employees relied on would cause so much disruption to them that it made the accommodation unreasonable. Since the court explained that passing the “reasonable” test should be a general benchmark before having to determine if there is an undue burden, they are affirming that such an accommodation for Barnett would be a significantly undue burden. In terms of RFRA, an argument can be made that religious accommodations requested by employers cannot upset the existing status quo that employees rely on. This could be important in potential cases where religious employers seek accommodations that fundamentally change established systems within the firm.

The implications this ruling has for third-party costs in RFRA cases can best be described with a hypothetical but realistic example. Lets imagine that US Airways (now a subsidiary of American Airlines) was purchased by an ultra-Orthodox Jewish family and taken private. Under Jewish law it is forbidden for a man and woman who are not married to be alone together in a secluded area. This could be troublesome for the airline’s very religious new owners as the cockpit of an airplane is bolted shut from the inside and occupied by only the pilot and co-pilot—who may be of opposite genders. Given the relatively small proportion of female pilots, they would likely have to be reassigned to a limited number of flights where their co-pilot is guaranteed to be another female. This type of reassignment would not only violate the firm’s seniority system for pilots, which dictates the routes, schedules, and aircraft assigned, but also the Civil Rights Act of 1964 on the grounds of gender-based discrimination. Suppose the
closely-held company sought a narrow accommodation to the Civil Rights Act or related federal regulations in order to follow its belief that an unmarried man and woman cannot be alone in the cockpit. How would this play out in a federal court?

Just as Barnett needed to first prove that he had a disability that affected his ability to do his job, the new airline company would have to first prove that this is their sincere religious belief and that government is sincerely impeding on this belief. Barnett’s need to then prove that his requested accommodation is reasonable doesn’t have a statutory equivalent in RFRA. But, as I previously stated, by ruling Barnett’s accommodation request to be unreasonable because of the burden imposed on others, the Court implied that had the “reasonable” requirement not existed, they would have rejected the accommodation because of the significant undue hardship it imposed. Breyer underlined the importance US Airways’ seniority system because employees had come to rely on it for fair and equal treatment and job security, as the well-established system had governed over 14,000 agents for decades. Extending this logic to the hypothetical case, an opponent of RFRA exemption could argue that it would cause an undue hardship. Just as thousands of employees had come to rely on the US Airways seniority system, millions of Americans have relied on the Civil Rights Act and related regulations for fair and equal treatment and job security for over 50 years. As a rule, upsetting this status quo that has governed millions of workers should not be violated for a RFRA exemption because doing so would constitute an undue hardship.

Just as US Airways employees have come to rely on the guarantees of the seniority system, American workers have come to rely on the guarantees of federal worker protections.

33 Though, perhaps it could be argued that any RFRA accommodation also has to be “reasonable” given this court’s interpretation. That is, a request for an accommodation that does not seem to be reasonable at face value might be thrown out by a court or rejected in a quick summary judgment. No court would waste time hearing a case they felt was generally unreasonable or outlandish.
Perhaps this argument could mitigate the concerns of Carolina Mala Corbin who wrote that the Hobby Lobby ruling could potentially lead to protections like The Fair Labor Standards Act, The Federal Occupational Safety and Health Act, Title VII of the Civil Rights Act, and The Family and Medical Leave Act. This could also ease the concerns of those like Justice Ginsburg who fear that RFRA exemptions will make women and minorities especially vulnerable. If protections have been well-established, it would be hard to undue them— but this is not true for protecting workers with new legislation and regulations that companies seek exemption from like the Affordable Care Act.

**B. Preventing Increased Workloads: Milton v. Scrivner**

In terms of ADA accommodations, it is generally accepted that in order to lessen the workload on one employee, another employee must take on a heavier workload — whether that means harder or more intense labor, longer hours, or less desirable job functions. But, federal appeals courts have ruled in many cases\(^\text{34}\) that it is unreasonable to offer ADA accommodations that would put significantly increased workloads on other employees. Take, for example, the ruling by the US Court of Appeals for the Tenth Circuit in Milton v. Scrivner.\(^\text{35}\)

Charlie Milton and Gary Massey both worked in a grocery warehouse for Scrivner, Inc., where they had previously injured themselves on the job. In 1992, Scrivner implemented new warehouse protocols, requiring jobs to be completed faster— but Milton and Massey, given their disabilities, were unable to meet these new standards and were fired. The two sued Scrivner, claiming that under the ADA they should have been accommodated with, among other things, lighter standards or reduced workloads. They lost at trial and, in affirming the District Court’s


\(^{35}\) *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995).
decision, the Circuit Court established that it would be unreasonable to shift the extensive workload burden on other employees. The court explained, “An accommodation that would result in other employees having to work harder or longer hours is not required.”

The shifting of minimal job tasks, workloads, or hours from one employee to another is a necessary part of some ADA accommodations. If a disabled employee requires a small tweak to their job tasks to enable them effectively perform their jobs, it is a reasonable request. However, there is an undefined point where this becomes an undue burden on other employees. The ruling in Milton v. Scrivner was appropriate because a warehouse job is inherently physically taxing for all workers. It involves heavy lifting, standing for long periods of time and moving quickly. There is no feasible way for a physically disabled employee to take on a lighter workload without putting a serious burden on his or her coworkers. At the end of the day, a certain amount of work needs to be done.

Now suppose there was a case in which a company sought a RFRA accommodation to a federal regulation, which had the effect of causing employees to work significantly harder or longer hours. If this kind of extra work was considered such a heavy burden under ADA case law that it would be “unreasonable” to even consider, then we should say the same in a hypothetical RFRA case. Of course, as with the ADA case, there is a blurred line between what additional workload is acceptable and what is not. Still, we can conclude here that anything that is clearly more than a minimal work burden could invalidate a potential RFRA exemption.

C. Maintaining Employee Morale: Barth v. Gelb

There are certain cases under the ADA — and its predecessor, the Rehabilitation Act of 1973 — that provide for accommodations to maintain employee morale.
1973\textsuperscript{37} — where federal courts have considered negative effects of employee morale as contributing to “undue hardship” on employers. This is especially true for cases in which special accommodations for disabled employees can lead to less favorable working conditions for their coworkers.\textsuperscript{38}

In 1988, Donald Barth, an engineer for Voice of America (VOA) in Washington D.C., applied to join the broadcaster’s Foreign Service. He was denied acceptance because his severe diabetes required Barth to be located near advanced medical facilities. Barth sued VOA, arguing that the agency was required to make a reasonable accommodation under the Rehabilitation Act, and place him in an overseas location near a suitable medical facility. The District Court for the District of Columbia ruled in favor of VOA, explaining that with only 70 engineers across twelve locations, it would be unreasonable for Barth to expect that he would be placed at one of the few posts where he could feasibly serve. This is because the rest of the twelve locations were remote and relatively undesirable areas — which could impact the morale of the other engineers who were denied the better location only because the VOA had sought to accommodate Barth. The court explained, “Accepting applicants who could basically only work at a few non-hardship posts would be considered unfair to other Specialists and detrimental to morale and success of the program.”\textsuperscript{39}

Upon appealing the case, Barth argued — among other things — that the court had wrongly considered effects on employee morale as undue hardship given case precedents that animus cannot be used. The Court of Appeals affirmed the lower court’s ruling and reaffirmed the consideration of morale by citing an “extreme example” of a government agency being asked

\textsuperscript{37} Follows the same guidelines as ADA but for employees of the federal government and its contractors.

\textsuperscript{38} See, e.g., Lisa E. Key, Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act, 46 DePaul L. Rev. 1003-1042 (1997).

to accommodate an employee with very sensitive eyes by moving their offices deep underground. The court explained: “It seems clear that in considering this request, the agency could not properly take into account the other workers' animus against the handicapped or their resentment over the handicapped's protected legal status. But this does not mean the agency must ignore the probable effects of subterranean working conditions on the morale of other employees, however pure of heart.” 40 This explanation appropriately shows the distinction between animus and morale. The court was correct to say that a significant impact on employee morale must be considered. In the example they provide, if offices could easily be moved underground it wouldn’t affect the job functions of agency employees or impose any financial cost on them. But, it would make working at the agency very undesirable for employees. Who would want to work a desk job in an underground bunker with no sunlight? And in Barth’s case it is easy to imagine how detrimental it would be to VOA engineers to be limited to only remote locations overseas. In fact, it could cause them to be less motivated in their jobs or even quit.

If a company can cite decreased employee morale as an undue hardship preventing them from accommodating a disabled employee, shouldn’t employees be able to consider their own decreased morale as an undue hardship preventing a religious accommodation for the company they work for? It would seem counterintuitive for a company to be able to consider decreased employee morale as an undue hardship on the business while decreased morale cannot be considered an undue hardship on the very employees it affects.

One could argue that when the owners of Hobby Lobby sought an exemption to the contraceptive mandate of the ACA, they significantly impacted employee morale. Female employees might have felt discouraged that their employer did not care about their reproductive

40 Barth v. Gelb, 2 F. 3d 1180, 1190 (D.C. Cir. 1993).
health. They might have been anxious about potentially losing such coverage and not knowing if or when they would get the government alternative. Other minorities at the firm could have become worried that Hobby Lobby would seek further exemptions, invoking individual religious beliefs in the workplace and potentially stripping away other worker protections in the future. Therefore, it might be necessary to consider this impact on employee morale as a part of the third-party burdens imposed on Hobby Lobby employees.\(^{41}\)

D. Summary

Given the three cases above, we can establish some general principles they imply for future ADA-related cases. First, in US Airways vs. Barnett, the Supreme Court established that it was “unreasonable” to violate a longstanding seniority system for an accommodation because employees had come to rely on it for expectations of fair and equal treatment and job security. In other words, the US Airways seniority system was a well-established structure that led employees to invest time and effort into their job. The ruling in this case could be extended to any related ADA accommodation that undermines well-established systems of job assignments, pay and benefits, job security, etc. — and especially threatens the employees who have invested in these systems. Of course, in many cases companies have the freedom to change such systems as they wish for business reasons, but the Supreme Court has established that doing so to accommodate someone else is “unreasonable.”

Extending this to RFRA cases, the Barnett rule would similarly be appropriate any time a

\(^{41}\) A court might not be entirely willing to apply the standard set in Barth to cases like Hobby Lobby because the loss of morale isn’t directly related to work. That is, Barth’s exemption would make his fellow VOA engineers have to actually work in undesirable places, making the actual job itself less attractive. However, a morale issue in Hobby Lobby wouldn’t be related to the job functions of female employees, but concerns of the benefits related to the job. That said, if the controversy surrounding Hobby Lobby’s requested RFRA exemption spilled into the workplace, that might add a feeling of hostility, thus making the actual job less desirable and further hurting morale.
company seeks a religious exemption to an existing federal regulation or law that has led to a well-established system of employee protections or benefits. Take, for example, the Family and Medical Leave Act of 1993. An employee might have chose to work at a specific company covered under this law, and continued to invest in his or her job there for over twenty years, knowing that they would have the flexibility of receiving leave to care for an ailing family member in the future. But what if the covered employer were to seek a RFRA exemption to the law in the wake of Hobby Lobby for a legitimate religious conviction? If the company were then exempted from this law, the employee who chose to work at the firm because it was covered would be put at an enormous disadvantage. After spending many years working hard at the firm, he or she would have developed the expectation that they can take time off to care for a family member and maintain their job security. With a RFRA exemption for their employer, that system which they relied on would be pulled out from under them.

In Milton v. Scrivner and related cases, the federal courts ruled that it is “unreasonable” to offer one worker an ADA accommodation that would impose anything more than a minimal work burden (in terms of time, labor required, or desirability of actual work) on other employees. This is a common issue with in ADA case law because accommodations for one employee can often make the jobs of their coworkers more difficult. This idea has been clear in most ADA cases where a worker seeks some kind of alteration to his or her work schedule or job functions. However, the debate often becomes case-specific, as it is difficult to determine the exact line between what is an acceptable work burden to impose on other employees and what is not.

The parallel between Milton-type cases to RFRA is a little less clear than in Barnett-type cases. In Milton v. Scrivner, the accommodation Milton and Massey sought would have exempted them from doing certain work in the warehouse. This would directly cause their peers
to have to work significantly harder or longer hours to get the job done. In a potential RFRA case, a company’s owner would have to seek a religious exemption from some federal law or regulation, such as those from the Labor Department designed to make jobs safer and less onerous. Thus, the exemption would lead to labor practices at the firm that significantly increase the work burden for employees — for no other reason other than the religious conviction of their employer. While this connection is admittedly less direct than in the Barnett example, the principles from Milton-type cases can certainly be extended. That is, if a RFRA accommodation in these type of cases would have to eliminate some federal protection for employees and drastically change the nature of their work or make their jobs significantly more difficult (in terms of time, effort, or desirability), then the burden would be unacceptable to impose.

Finally in Barth v. Gelb, the federal court ruled that an accommodation that decreases morale would have an undue hardship on a business and should not be granted. This is applicable to any ADA case where an accommodation for one employee lowers the morale of others by making their jobs less enjoyable in some way. This could be related to Milton-type cases because the effects on employee morale can magnify the burden of increased workloads. However, it might be more useful to consider the types of cases where lower employee morale is the most significant burden on a business, such as the underground office example explained above.

In terms of RFRA, the Barth rule would best work in cases where a religious exemption for employers makes employees' jobs less enjoyable. This would lower employee morale and decrease their motivation to work hard and succeed at their jobs. Beyond the personal burden, it would have an effect on the firm as a whole as the entire operation would be less productive if some people have less motivation.

All in all, the general rules extracted from the ADA-related cases show that there is
certainly precedent to protect employees from the third-party costs of RFRA exemptions. This should ease concerns of those who fear that future exemptions could lead to the unwinding of longstanding federal worker protections and make women and minorities more vulnerable in the workplace. Additionally, there is precedent that RFRA accommodations, or accommodations of any kind under the law, should not make jobs harder or less enjoyable for third parties. All of this assumes that in these RFRA cases employers have successfully proved that they have a sincere belief that is being substantially impaired by the government. However, it is important to remember that the government has one more tool to protect workers against the third-party costs of RFRA exemptions that does not exist for ADA-related cases. Even if a closely-held company can successfully argue that the government is substantially infringing on a sincere religious belief and the burdens on employees are not enough to prevent an accommodation, the federal government can still argue against the granting of an exemption. That is, under RFRA the government would need to prove that the action infringing on one’s religious belief serves a compelling government interest, and is the least restrictive means of doing so.

IV. Possible Objections and Responses

In this final section, I will note and respond to potential objections readers may have to the framework established in this paper. More specifically, I will address arguments against the parallels drawn between case law under ADA and RFRA that lead to this framework.

A. Should Religious Burdens and Disabilities be Given the Same Consideration?

One valid question that readers might ask is if it is appropriate to treat religious burdens and disabilities in a similar matter when considering accommodations. This question arises for those who view religious beliefs as a choice, and therefore believe that religious burdens are not as
substantial as the burdens of living with a disability. That is, someone who is blind cannot at some point decide to see and be freed of the burden of his or her physical impairment. But, theoretically, a devoutly religious person who feels burdened by their beliefs could chose to change their beliefs.

However, as Amy Sepinwall explained, in Hobby Lobby, “the Supreme Court took the corporate owners at their word: the mere fact that Hobby Lobby believed that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption.” In seeking RFRA accommodations, religious objectors are required to show that they have sincere religious beliefs that are being burdened by the government. But Sepinwall and others believe that this was not the case in Hobby Lobby. If this is true, then by taking a religious objection at face value, we are treating it in a similar way as we do when we accept that a disabled person is incapable of completing a certain task.

Furthermore, those who are skeptical about the parallel between religious burdens and disabilities can rest easy because this paper merely is examining what would constitute an unacceptable third-party cost in either case. That is, if one believes that a religious accommodation should be given less consideration than an ADA accommodation, the boundaries set for third-party costs under ADA case law becomes even stronger for RFRA case law. If we are less willing to accept a religious accommodation, then we should be even more confident that an unacceptable third party burden imposed on an employee because of an ADA accommodation should be even less acceptable when it is imposed because of a RFRA accommodation.

B. RFRA Accommodations are Limited to Federal Laws and Regulations but ADA

Accommodations are Not.

The scope of potential RFRA accommodations is much narrower than potential ADA accommodations. In fact, the ADA even lists out a non-exhaustive list of the many types of accommodations that disabled individuals can expect under the law. RFRA accommodations are confined to exemptions to federal laws and regulations that conflict with an individual’s religious beliefs. Some might argue that the accommodations under ADA (commonly things like say, access ramps that have no equivalent to RFRA) are disanalogous to RFRA accommodations.

However, if we think more generally, an important subset of ADA accommodations are those that ease the requirements and expectations on employees because of their disabilities. We can draw parallels to potential RFRA accommodations that excuse employers from certain requirement and expectations imposed by federal laws and regulations. The fact that the scope of RFRA accommodations can be considered almost a subset of all potential ADA accommodations would be troubling if this paper was reversed and we were using RFRA case law to draw conclusions for ADA case law. But since we are trying to gauge guidelines for RFRA case law using ADA case law as an example, it should not be at all concerning that general religious accommodations might only be a subset of potential disability accommodations.

Conclusion

Since the Supreme Court’s landmark ruling in Hobby Lobby, there has been much discussion of third party costs and whether or not they were properly evaluated in this case. Some have raised concerns that Hobby Lobby will open the door for more corporate RFRA accommodations and roll back federal protections for American workers. With Hobby Lobby being the first corporate RFRA case of its kind, there is no additional case precedent to help us

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better understand how third party costs should be evaluated. However, building off of the framework established by Kara Lowentheil and drawing parallels to ADA related case law, we are able to establish some general boundaries for unacceptable burdens in corporate RFRA cases. Based on ADA case law, it is clear that employees are not as vulnerable as Hobby Lobby critics contend as there is precedent for protecting established systems in the workplace, limiting excess workload and maintaining employee morale. Since this list is not exhaustive, a future study examining other areas of related case law could perhaps provide us with even more general boundaries for determining unacceptable burdens in corporate RFRA cases.