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Conscientious Objection, Complicity, and Accommodation

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Abstract

*Burwell v. Hobby Lobby Stores, Inc.*¹ inaugurated an unprecedented deference to religious challenges to secular laws,² which *Zubik v. Burwell* neither retrenched nor replace.³ On the Court's highly deferential stance, complicity claims seem to know no bounds: just so long as the objector thinks himself complicit in an act his religion opposes, the Court will conclude that the challenged legal requirement substantially burdens his religious exercise.⁴ The result is a set of exemptions of Court-imposed negotiations based on assertions of complicity that many courts and commentators find far-fetched, and perhaps even fantastical.⁵

Disciplines

Business Law, Public Responsibility, and Ethics | Civil Rights and Discrimination | Courts | First Amendment | Law | Legal Theory | Religion Law

Conscientious Objection, Complicity, and Accommodation

Amy J. Sepinwall

*Burwell v. Hobby Lobby Stores, Inc.*¹ inaugurated an unprecedented deference to religious challenges to secular laws,² which *Zubik v. Burwell* neither retrenched nor replaced.³ On the Court's highly deferential stance, complicity claims seem to know no bounds: just so long as the objector thinks himself complicit in an act his religion opposes, the Court will conclude that the challenged legal requirement substantially burdens his religious exercise.⁴ The result is a set of exemptions or Court-imposed negotiations based on assertions of complicity that many courts and commentators find far-fetched, and perhaps even fantastical.⁵

¹ 134 S Ct 2751 (2014).

² See, e.g., Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The New Law of Religion*, Slate (July 3, 2014), available at www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html [<https://perma.cc/S7GV-CWDC>].

³ *Zubik v. Burwell*, 578 U.S. ____ (2016). See, e.g., Amy J. Sepinwall, *Burdening "Substantial Burdens,"* 2016 U. Ill. L. Rev. Online 43, 44 & n. 4, available at <https://illinoislawreview.org/wp-content/uploads/2016/05/Sepinwall.pdf> [<https://perma.cc/39QQ-MQHF>] (explaining why it is fair to think that a majority of the Justices would have found a substantial burden).

⁴ Cf. Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. Ill. L. Rev. Online 61, available at <https://illinoislawreview.org/wp-content/uploads/2016/05/Sepper.pdf> [<https://perma.cc/RC4C-ZJ3J>].

⁵ See, e.g., *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014) (referring to the burden the contraceptive mandate's accommodation process imposed as "de minimis"); Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. Ill. U.L.J. 475, 508–509 (2015). Cf. *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 629 n. 3, cert. granted, judgment vacated sub nom. *Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014). Some commentators consider the religious nonprofits' claims to be not earnest fantasy so much as disingenuous moves in the current round of the culture

I am grateful to Elizabeth Sepper for extremely helpful comments, and to the Wharton Dean's Office for research funding supporting this work. Parts of the chapter – indicated below – reproduce with permission portions of Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897 (2015) and Amy J. Sepinwall, *Burdening "Substantial Burdens,"* 2016 U. Ill. L. Rev. Online 43.

Nonetheless, I think these complicity claims justifiable, and I seek to defend them in Section 1. But I also urge a more extensive inquiry into the burdens of an exemption than what doctrine currently requires. In particular, I argue that courts should balance the burden to the religious adherent (RA) of complying with the law against the burdens third parties would incur were the RA to be granted an exemption. Although some jurists and scholars condemn *Hobby Lobby* precisely because it ignores third-party costs,⁶ the doctrine does not currently require courts to attend to these costs. RFRA weighs the *government's* interest in compliance with the challenged legal requirement. But the government's interest need not coincide with the interests of third parties, as I argue in Section 2. And, where their interests do not coincide, RFRA's test might permit an exemption that nonetheless has significant costs for third parties. In Section 3, I propose a test that would provide the requisite balancing.

1. THE CONTRACEPTIVE MANDATE'S SUBSTANTIAL BURDENS

The complicity claims in *Hobby Lobby* and *Zubik* are not obvious. We do not think employers are implicated in the goods or services employees purchase with their salaries. So why think, as the *Hobby Lobby* owners contend, that they are implicated in goods or services their employees access through other parts of their compensation packages? The *Zubik* challenges are perhaps even more difficult to appreciate. How can employers become complicit in contraceptive use through the process of registering their *objections* to the contraceptive mandate? Nonetheless, I think that, with some elucidation, these claims have merit. I seek to supply that elucidation here.

The first thing to note is that accurately assessing the merits and strength of a complicity claim necessarily requires appeal to the objector's felt sense of implication. I do not claim that the inquiry should begin and end with this subjective element. It is but one input courts should consider in determining whether the burden the objector adduces is "substantial."⁷ The remaining elements, I explain, are objective and within a court's purview to measure. But unlike other theorists who argue that, in determining the substantiality of a religious burden, courts should eschew

wars. See, e.g., Mary Anne Case, *Why "Live-and-Let-Live" Is Not A Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. Cal. L. Rev. 463, 471-2 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L. J. 2516, 2542-54 (2015). While I find their concerns convincing – and deeply troubling – I bracket them here.

⁶ See *infra* Section 2.

⁷ Amy J. Sepinwall, *Complicitous Compliance* (manuscript on file with author).

any appeal to the objector's own sense of complicity,⁸ I think we cannot escape that appeal if we are to track the meaning and relevance of conscientious objection in the first place.

Doctrine and professional codes of ethics allow for conscientious exemptions because of the connection between conscience and our sense of self.⁹ These sources recognize the importance of protecting individuals from the confrontation with conscience that arises when one is made to act contrary to one's most foundational, identity-defining convictions. Thus we allow physicians who oppose the death penalty to abstain not only from administering lethal drugs but even from doing something that "would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned."¹⁰ By the same token, in the event of a military draft, we exempt pacifists not only from combat but also from military service that would be far-removed from the theater of war. Our rationale for affording these exemptions is a recognition that it would be deeply violative of a person's sense of self were she to be compelled to do something that she believes contrary to her conscience, *even if the causal difference she were to make is quite minor* (as it would be, for example, if the pacifist were put on kitchen duty on a military base that trained soldiers for combat, but was not housing actual combatants in the war).

Moreover, even if the objector operates with a more capacious sense of implication than we find in law or our own moral lives, we typically see this as cause for admiration. For example, we praise the person who cares greatly about not contributing to environmental degradation and so goes above the call of duty when it comes to reducing their carbon footprint. Or we laud the person who worries about sweatshop labor and so chooses to buy clothing only from stores adhering to fair labor standards. Even if we are not so conscientious – indeed, even if we believe that we are not morally required to reduce our carbon footprint or practice enlightened consumerism to the extent that these conscientious individuals do – we do not respond to their efforts by trying to convince them that they have misapprehended their moral responsibility. We do not say to them, "you know, you play so little a causal role in pollution/sweatshop labor, that you really aren't complicit in the practices you abhor so there's no reason for you to impose on yourself the limits you do."

⁸ See, e.g., Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 Ill. L. Rev. 34, 36, available at <https://illinoislawreview.org/wp-content/uploads/2016/05/Greene.pdf> [<https://perma.cc/TD6X-W7ZC>].

⁹ Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897 (2015).

¹⁰ American Medical Association, Opinion 2.06, AMA Code of Ethics (last updated June 2000), available at www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page [<https://perma.cc/BX16-5VQN>].

Instead, we respect and honor the fact that they embrace and act on such rigorous standards, oftentimes at a material cost to themselves.

The point here is twofold: first, it is generally a good thing that people take themselves to be implicated in wrongs to which they bear only a tenuous causal connection. Their felt sense of implication prompts them to live their lives with greater care for the effects of their actions on others. Second, in matters of conscience, we generally allow each individual to determine for himself what acts, and what relationship to those acts, will put her conscience on the line. Each of us has to live with our conscience, so it is up to each of us to determine for ourselves when our conscience will be implicated or injured as a result of our own or others' acts. In other words, the very meaning and role of conscience for us is subjective. If we care that the law protects conscience, then we should care that the law tracks a subjective sense of complicity.

Now, the foregoing argument turns on a blanket approval of heightened conscientiousness. But one might think matters are more complicated. In particular, one might think that we should distinguish between (1) conscientious conduct that goes *above and beyond* the call of duty (for example, more care for the environment than duty requires) and (2) conscientious conduct that would have the RA do *less* than his legal duty requires (for example, by declining to fulfill the statutory obligation to subsidize contraception).¹¹ The former might well be praiseworthy. But why should we admire the latter, let alone think it justifies an exemption from the legal obligation in question?

In response, notice that all conscientious exemptions function to release the objector from a legal duty he would otherwise bear. In other words, all conscientious exemptions would have the RA do less than his legal duty requires. Perhaps, then, the distinction between exceeding one's duty and not living up to one's duty is meant to be relevant only in the special case where we face a tenuous complicity claim. The worry would then be better cashed out in this way: "We don't care how attenuated your complicity claim if you are going to do at least as much as you should. But if heeding your conscience requires that you do less than what you should, then you had better be *significantly* implicated in the conduct you deem wrong; otherwise, no exemption for you." But phrased in that way, the worry seems to do no more than restate the claim that strength of causal connection matters. I have argued, by contrast, that strength of causal connection should not matter. Again, we do and should care about how complicity will feel to the objector, and the objector's subjective sense of complicity need not take proximity into account.

Applying these insights to *Hobby Lobby*, we can see a reason to reject the view that the owners' connection to their employees' contraceptive use is too attenuated

¹¹ I am grateful to Elizabeth Sepper for raising this objection.

to make the owners complicit.¹² Instead, we should recognize that whether the contraceptive mandate renders an employer complicit turns only on whether the employer feels strongly that subsidizing contraception would deeply offend their conscience.

But what about the *Zubik* petitioners? One might reasonably contend that their concern about complicity is so off the mark as to not warrant any credence at all.¹³ Indeed, I have raised what I take to be knock-down objections to each of the petitioners' arguments.¹⁴ In particular, I rebut the petitioners' arguments that the accommodation process has them facilitate contraceptive use.

But I do think there is a convincing justification for their position (albeit not one they articulate): the accommodation process involves the petitioners in the *ratification* of a wrong, which is a wrong in itself. One ratifies a wrong when one fails to condemn that wrong. Mere extrication is not enough to avoid ratification; instead, one must make clear that the whole scheme to which one objects is morally flawed. To see this, consider two different ways pacifists responded to the draft during the Vietnam War. The military allowed for conscientious objection, so some pacifists who did not want to fight simply availed themselves of the military's opt-out process. But other protestors took the further – and illegal – step of burning their draft cards. Why? Because registering as a conscientious objector in the established way would have legitimated the overall scheme; it would have had the pacifist treat the war in Vietnam as a matter over which reasonable minds could disagree and not as the morally repugnant affair these protestors took it to be. In short, burning a draft card was, for them, an effort to avoid the wrong of ratification.

In refusing to go along with the government's process for opting out of the contraceptive mandate, the *Zubik* petitioners might be seen in a similar vein. For them, contraceptive use is so grave a moral wrong that they cannot simply allow the government to release them from the mandate but then have the government go on, business as usual, to supply contraception. The *Zubik* petitioners "object to objecting"¹⁵ because, were they not to do so, they would be legitimating the overall contraceptive delivery scheme; they would be guilty of the wrong of ratification. Understood in this way, the *Zubik* petitioners' concern might well count as a substantial burden.

Now, to be perfectly clear, these sympathetic reconstructions of the complicity claims in *Hobby Lobby* and *Zubik* do not in and of themselves entail that the objectors in those cases ought to have prevailed on the merits. Even where a substantial

¹² See, e.g., Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, 115 Colum. L. Rev. Sidebar 153, 168 (2015); Greene, *supra* note 7.

¹³ See *supra* note 6.

¹⁴ Sepinwall, *supra* note 2.

¹⁵ Transcript of Oral Argument at 13, line 13, *Zubik v. Burwell*, 578 U.S. ____ (2016) (No. 14–1418) (argued March 23, 2016).

burden exists, RFRA compels courts to weigh the burden on the religious adherent against interests in compliance with the challenged legal requirement. I turn now to an interrogation of RFRA's strict scrutiny test to see if it is sufficiently protective of the interests at stake.

2. MISSING THIRD PARTIES: A TROUBLING OVERSIGHT

In her *Hobby Lobby* dissent, Justice Ginsburg rails against the majority's position in significant part because, according to her, the Court impermissibly overlooks the costs of an accommodation to third parties¹⁶ – there, the “thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.”¹⁷ Many scholars agree that the doctrine requires courts to take third parties' interests into account, and they contend that *Hobby Lobby* went wrong in failing to do so.¹⁸

I share the view that third-party interests should factor into a court's decision to grant or deny a religious exemption. But, as I argue here, I do not believe that the doctrine does in fact attend to third-party interests in the ways it should. In particular, the doctrine gestures to third parties only in dicta. Further, whatever the doctrine does say in support of third-party interests gives little clue about *how* these interests should figure in, as well as about *how much* they should figure in.¹⁹ To establish these claims, I address three doctrines and one procedural mechanism that *appear* to protect third-party interests. I argue that none is ultimately up to the task.

A. The Compelling-Interest Prong of RFRA

Under RFRA, once the challenger has established a substantial burden, the government is asked to adduce the compelling interest that the challenged requirement is designed to serve.²⁰ Sometimes, the government's interest aligns or overlaps with the

¹⁶ See *Hobby Lobby*, 134 S Ct at 2787 (Ginsburg dissenting). In *Conscience and Complicity*, I offer a lengthy analysis of the cases Justice Ginsburg invokes in support of her proposition that the Court is required to weigh third-party burdens. I argue that the case law does not in fact support that proposition. See *supra* note 8 at 168–72.

¹⁷ *Hobby Lobby*, 134 S Ct at 2787 (Ginsburg dissenting).

¹⁸ See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv CR–CL L. Rev. 343, 356–72 (2014); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, Slate (November 25, 2013, 2:32 PM), available at www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html [<https://perma.cc/C9XW-67UP>]. But see Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 Drake L. Rev. 433, 438.

¹⁹ See Loewentheil, *supra* note 17 at 474; *id.* at 438 (making a similar claim).

²⁰ See 42 USC § 2000bb-1.

interests of third parties who will be affected by an exemption from the challenged legal requirement. This was largely true in the contraceptive mandate cases, where the government's aim was to promote women's health, and it was women who risked being burdened if courts released religious employers from having to comply with the mandate. But in other cases, the government's interest diverges from that of third parties and, when it does, the government need not press both its own interest as well as the interests of the affected third parties. For example, consider a religious adherent who objects to a military draft because he believes homosexuality is evil and, in the wake of the Don't Ask, Don't Tell Repeal Act of 2010,²¹ would find it too offensive to his values to serve alongside individuals who are openly gay. The legal requirement he challenges – his conscription – is motivated by an interest in national security. This may be compelling enough in its own right to deny the objector an exemption. But if it is not (if, say, there are enough potential conscripts without drafting the objecting religious adherent), the government cannot defend conscripting him on the ground that his exemption denigrates gays and lesbians. For ensuring the dignity of gays and lesbians is not the interest the conscription program is designed to serve. It is in this sense, then, that the compelling interest test does not necessarily position the government to defend third-party interests. Instead, that test may leave third parties out in the cold.

B. *The Establishment Clause*

Some commentators look to the Establishment Clause to protect third parties from a religious exemption that would otherwise burden them. Thus, for example, Frederick Gedicks and Rebecca Van Tassell contend that “the Court condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated practice.”²² Even assuming that their contention is correct,²³ it does not guarantee third-party protection in all cases. For example, there may be cases in which an exemption does not result in an Establishment Clause violation, and yet third parties do have genuine cause to feel that their interests have been

²¹ Pub L. No. 111–321, 124 Stat 3515, codified as 10 USC § 654.

²² Gedicks & Van Tassell, *supra* note 17. See also Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, Yale L.J. Forum, 433–7 (March 16, 2016); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 Vand. L. Rev. En Banc 51, 54 (2014); *Hobby Lobby*, 134 S Ct at 2802 n 25 (Ginsburg dissenting).

²³ I offer a close reading of the relevant caselaw in *Conscience and Complicity*, *supra* note 8 at 1968 & n. 259, in an effort to argue that the cases do not in fact support an interpretation of the Establishment Clause that would offer robust protection to third parties in their own right.

sacrificed. One of *Hobby Lobby's* progeny bears out just this problem: in *March for Life v. Burwell*,²⁴ a federal district court granted an exemption from the contraceptive mandate on secular moral grounds. The court found that the Equal Protection Clause could not countenance treating religious and secular objections to the contraceptive mandate separately. *March for Life* did not then involve government support of religion, and so there could not have been an Establishment Clause violation. But the concerns for the women covered by *March for Life's* insurance plan stand independent of whether the exemption conflicts with the Establishment Clause. More generally, the Establishment Clause will be of no avail in any case where an exemption is granted on secular moral grounds.

C. Cutter's Accounting for Third-Party Costs

Cutter v. Wilkinson,²⁵ a case involving prison inmates who challenged the prison's denial of religious accommodations, contains what is perhaps the most succinct statement that third-party harms matter: "[p]roperly applying [federal religious freedom laws], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."²⁶ This is powerful language, all the more so because Justice Alito quoted it in a footnote in the *Hobby Lobby* majority opinion.²⁷ One might then think, contrary to what I have argued, that the settled view of the Court is that third-party costs matter.²⁸

Yet, even if the Court has adopted the view that it must "take adequate account" of third-party costs, this would hardly establish that the Court is committed to protecting third parties. What will count as having taken "adequate account" of third-party interests? How much weight must these interests be given for a court's accounting to have been "adequate"? And what does giving them their due weight entail? Is it enough for a court merely to note that the exemption will impose burdens on third parties? Or does the statement mean that, when courts do recognize that third parties will be burdened, they should seek to arrive at an alternative accommodation? Or should they deny the accommodation altogether? *Cutter* itself provides no answers to these questions, because the Court found that "nonbeneficiaries" would not be harmed by the requested accommodation.

²⁴ 128 F.Supp.3d 116 (2015).

²⁵ 544 US 709 (2005).

²⁶ *Cutter*, 544 US at 720.

²⁷ See *Hobby Lobby*, 134 S. Ct. at 2781 n 37.

²⁸ I am grateful to Professors Koppelman and Schwartzman, each of whom urged this language upon me.

The *Hobby Lobby* majority arrived at the same conclusion with respect to the third parties there, given the availability of alternative arrangements for providing contraception.²⁹ Third parties should not have to rely on so precarious a statement of what the law requires.

D. Third-Party Intervention

Even if one agrees that neither RFRA nor the Establishment Clause straightforwardly contemplates third-party interests, one might think that the concern about overlooking third parties is mitigated by the possibility that they will seek to intervene in the case and bring their interests before the court in that way.³⁰ But it would be foolhardy to rely on this mechanism alone. For one thing, possibly affected third parties must seek a court's permission to be heard, and the court has discretion to grant or deny the intervention.³¹ For another, while the contraceptive-mandate cases received a lot of publicity – and so readily put third parties on notice that their rights were subject to abrogation – other cases seeking religious exemptions may not be so prominent. Third parties cannot be counted on to know that their interests are at stake. Finally, it is unfair for third parties to incur litigation costs to protect their interests when they are not specially responsible for the law the RAs challenge.

E. Summary

In short, the doctrine does not require courts to attend to third-party interests; nor does it facilitate third parties in getting their interests before the court. This oversight is deeply troubling because every complicity claim stands to affect third parties. By its nature, complicity arises only in light of one party's contribution to another's conduct.³² To avoid complicity, the would-be contributor might seek an exemption from having to make the contribution. (For example, a religious employer might seek an exemption from having to subsidize his employees' contraception.) But if a court grants the exemption, then the putative beneficiary is left without a contribution that she may have been expecting (and, in the contraceptive-mandate cases, correctly believes is her statutory right). Given that a complicity claim pits the interests of a religious adherent against those of the third parties in whose conduct the RA claims he will be complicit, it is crucial that courts attend to third-party interests.

²⁹ *Hobby Lobby*, 134 S Ct at 2781 n 37.

³⁰ See, e.g., *University of Notre Dame v. Sebelius*, 743 F3d 547, 558–9 (7th Cir 2014).

³¹ See FRCP 24(b).

³² See NeJaime & Siegel, *supra* note 4 at 2566.

3. BALANCING CONCERNS FOR COMPLICITY AGAINST THIRD-PARTY COSTS

We have seen that claims of complicity should be treated with great deference. At the same time, whether these claims should yield an exemption should depend, in significant part, on whether third parties would incur an undue burden as a result. Current doctrine does not mandate rigorous consideration of third-party burdens. In this section, I articulate a test that stands to correct this oversight.³³ The elements of this test aim not to replace but to add to RFRA's current strict scrutiny test, which contemplates the government's own interests.

So: how should courts weigh deference to religion against third-party costs? Assume that a court has determined that the challenged law imposes a substantial burden on the objector. And assume further that the government has failed to meet its burden under strict scrutiny: it cannot establish that the challenged law protects a compelling interest in the least restrictive way. Under the current doctrine, the religious objector would then prevail in his bid for an exemption. The element I add here, however, blocks that automatic outcome. Instead, on my proposal, the court must then consider the costs of an exemption on third parties.

To that end, courts should conceive of a spectrum of costs that an exemption could impose on third parties, and that spectrum should contain a threshold. The threshold marks the boundary between permissible and impermissible third-party costs; costs beyond the boundary impose an unjust burden on third parties. But just where should this threshold be located on the spectrum? I submit that this is a matter for democratic deliberation. As a society, we must decide how important respect for religion is and, correspondingly, how great the costs we should be willing to impose on third parties for the sake of respecting religious observance.

Although we have yet to undertake those deliberations, we can already note a couple of ancillary considerations. First, the government should seek to minimize occasions for conflict between religious beliefs and third-party interests. Second, when granting an exemption would implicate third-party interests, courts and the government must work to ensure that these interests are raised and adequately defended.

This brings us to a piece of doctrinal revision, which provides a means for third parties to have their interests represented in court. The government bears an obligation to assess whether a requested exemption would impose costs on third parties. When the government determines that it would, the government must make a good-faith effort to alert the relevant third parties to the proceedings. For example,

³³ Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va. L. Rev. 317, 346-54 (2011) (also advocating a balancing test in cases of conscientious objection but including only the objector's and the government's interests in the test, not those of third parties).

the government might take out advertisements in national news sources (paper and electronic) or contact a representative advocacy group (for example, National Abortion and Reproductive Rights Action League, in the case of the contraceptive mandate).

Further, the government – which is to say, taxpayers – should fund the third parties' legal representation. As a society, we should be willing to incur some costs in exchange for protecting religious freedom. But these costs should be shared equally among us. We would impermissibly chill requests for religious exemptions were we to require the objectors to pay for third parties' legal representation. And requiring third parties to fully fund their efforts to protect themselves would expose them to a disproportionate burden even if they were to prevail. Accordingly, the government should have to subsidize third parties' legal costs on behalf of us all.³⁴

It is important to note that third parties should be given an opportunity to represent their own interests, even if these appear fully to overlap with the government's interest in the legal requirement. In *Zubik*, for example, the government defended the existing accommodation process as being the least restrictive way to ensure “seamless” contraceptive coverage at no cost to the women covered by the religious nonprofits' insurance plans.³⁵ One would think that the government's arguments capture what is at stake for the plans' female beneficiaries. But the government sometimes uses paternalistic – even demeaning – language to justify the need to make contraceptive access easy for women.³⁶ Allowing women to voice the need in their own words would likely obviate this concern.

Finally, it will not be sufficient to contact only the third parties most immediately affected by the case – for example, the beneficiaries of the insurance scheme who would be impacted by an exemption. If the religious objectors succeed, then other employers with the same objection may well be permitted to deny their beneficiaries the challenged coverage. As such, the government should bear an obligation to contact one or more organizations that can represent the interests of all potentially affected third parties. And there is a separate reason to notify an advocacy organization, rather than the potentially affected employees themselves: as Professors Micah Schwartzman and Nelson Tebbe have compellingly argued with respect to *Hobby Lobby*, “employees are (understandably) reluctant to come forward against their employers, even though their constitutional claim is strong and even though they

³⁴ For that matter, we might decide that parties who succeed in securing a conscientious exemption should have their legal fees reimbursed, too, or at least that we should offer reimbursement to those plaintiffs who can show financial hardship. If conscience is worth protecting, then we might not want the ability to pay to stand as a barrier to those with legitimate claims.

³⁵ Brief for Respondents at 27–8, *Zubik v. Burwell*, 2135 S. Ct. 1544 (2016) (No. 14–1418).

³⁶ I elaborate on this point in Sepinwall, *supra* note 2 at 51–2.

have a lot to lose if the case goes the wrong way.”³⁷ Their concerns would arise in any employer’s challenge to some workplace regulation.

CONCLUSION

Many scholars oppose the deferential stance I advocate here on the ground that too much deference will require the government to defend any and every challenged law under a test that is strict in theory and, all too often, fatal in fact.³⁸ I agree that deference might well increase the government’s burden. But it need not increase the government’s failure rate. Requiring courts to balance a religious exemption against not only the government’s interest but also the relevant third parties’ interests lends heft – necessary and significant heft – to the secular side of the scale. We can afford deference to religion, but only because and to the extent that we attend to third parties’ interests too.

³⁷ Schwartzman & Tebbe, *supra* note 17.

³⁸ For the view that *Hobby Lobby* significantly ratcheted up the government’s burden, see, for example, Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens of Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 149 n.241 (2017) Sepper, *supra* note 3 at 61. Cf. Lederman, *supra* note 21 at 440–1 (arguing that *Hobby Lobby* opened the door to this revolutionary reconstruction of RFRA but that it did not compel that result).