AUTONOMY PROTECTIONS OR RELIGIOUS FOR-PROFITS: FORESEEABLE CONSEQUENCES

*Michael Henningsen**

INTRODUCTION

On May 4, 2017, recently elected President Trump released the "Presidential Executive Order Promoting Free Speech and Religious Liberty" ("Executive Order").[1] The Executive Order announced a broad commitment to religious freedom, claiming that its policy will protect religious liberty the way the founders intended.[2] The Executive Order also instructed Attorney General, at that time Jeff Sessions ("Attorney General"), to issue guidance to all executive departments and agencies interpreting these expanded ideals of religious liberty protections.[3]

On October 6, 2017, the Attorney General released a memorandum ("AG's Memo") to all of the executive departments and agencies in response to the Executive Order.[4] The AG's Memo set forth twenty principles to aid all of the executive departments and agencies to carry out President Trump's mission to a broadened commitment to religious freedom.[5] The AG's Memo recognized religion as a fundamental liberty that extends to churches, persons, and businesses.[6] The AG's Memo further recognized the demanding strict scrutiny standard in the Religious Freedom Restoration Act ("RFRA")[7] and that it is applicable to individuals, nonprofit organizations, and even some for-profit corporations.[8] In *Burwell v. Hobby Lobby Stores, Inc.*, RFRA was interpreted broadly; it deferred

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* Michael Henningsen, Esq., Practitioner of Law. The opinions expressed in this article are the author's own. The author graduated from Seton Hall University School of Law. The author offers a special thanks to Professor Angela Carmella for her inspiration, ideas, critiques, and editing. The author offers further thanks to Meredith Gramann, Esq., for her critiques and editing.

[1] Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017) [hereinafter Exec. Order].

[2] *Id.*

[3] *Id.*

[4] Memorandum from Jeffrey Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download [hereinafter Memorandum].

[5] *Id.* at 1.

[6] *Id.* at 2.

[7] *Id.* at 3; *see also* 42 U.S.C. § 2000bb-1 (1993).

[8] *See* Memorandum, *supra* note 4, at 3.

to the religious claimant's definition of burdensome regulations, thus extending RFRA to apply to at least some for-profit businesses.[9] The AG's Memo also acknowledges that the government may not interfere with the autonomy of a religious organization and that religious employers are entitled to make employment decisions in accordance with their religious tenets.[10]

The Executive Order and AG's Memo lead us to the topic of this article. On August 15, 2019, the Federal Register (The Daily Journal of the United States Government) published a notice of newly proposed regulations.[11] The United States Department of Labor's ("DOL") Office of Federal Contract Compliance Programs ("OFCCP") proposed regulations ("DOL Regulations") to clarify the scope of the religious exemptions under section 204(c) of Executive Order 11246.[12] Before discussing the DOL Regulations, it is important to note that in 2014 President Obama signed off on Executive Order 13672, amending Executive Order 11246 to include protections for employees of federal contractors on the basis of sexual orientation and gender identity.[13] In contrast, the DOL Regulations will allow federal contractors with religious beliefs to make employment decisions on the basis of those beliefs without losing their eligibility to be a federal contractor, which undoubtedly impacts President Obama's Executive Order 13627.[14] In clarifying the scope of the religious exemptions, the DOL Regulations seek to add definitions to the following terms: *Religion; Particular Religion; Religious corporation, association, educational institution, or society; Exercise of Religion;* and *Sincere*.[15]

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[9] *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
[10] *See* Memorandum, *supra* note 4, at 3.
[11] *See generally* Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41677 (proposed Aug. 15, 2019) (to be codified at 41 C.F.R. § 60-1) [hereinafter Implementing Legal Requirements].
[12] *Id.* One year after President Johnson signed the Civil Rights Act of 1964, he signed Executive Order 11246. This order required equal employment opportunities in federal government contracting. Two years later, President Johnson expanded Executive Order 11246 to coincide with Title VII in prohibiting discrimination on the basis of sex and religion. Around a decade later, the authority to enforce Executive Order 11246 was integrated into the DOL. Following that, in 2002, President Bush amended Executive Order 11246 to include Title VII's exemptions for religious organizations.
[13] *See generally* 41 C.F.R. § 60-1.1 (2014).
[14] *See generally* Implementing Legal Requirements, *supra* note 11.
[15] *Id.* at 41679.

These newly defined terms would provide broad religious exemptions to for-profit institutions that are federal contractors.[16] In articulating the DOL Regulations, the OFCCP, prompted by the administration's mandate under the Executive Order and AG's Memo, drew further influence from Title VII case law and recently decided United States Supreme Court cases as reminders of the federal government's duty to protect the freedom of religion.[17] When interpreting these regulations, one could pose two questions: 1. Are the DOL Regulations a necessary implication of *Hobby Lobby*? And 2. Are the DOL Regulations extending the autonomy doctrine, normally applied to churches and nonprofits to protect their internal operations from government intrusion, to for-profit organizations?

If our analysis concludes that the DOL Regulations are a necessary implication of *Hobby Lobby,* that means that the DOL is merely establishing a strict scrutiny standard at the executive level extending to religious for-profits.[18] However, if we reject that contention and instead conclude that the DOL Regulations are an extension of the autonomy doctrine, normally applied to churches and nonprofits, we have a much more problematic conclusion.[19] And this problematic conclusion is the correct conclusion. The DOL Regulations are not a necessary implication of *Hobby Lobby*. Rather, the DOL Regulations are an extension of the autonomy doctrine to for-profit institutions. If a business claims it is operated according to religious principles, then its employment decisions might be unreviewable under such a doctrine. Therefore, the DOL Regulations should be withdrawn because 1. They will dilute the autonomy doctrine as applied to churches and nonprofits, 2. They will harm members of the LGBTQ, women, and minority groups in the workforce, 3. This religious autonomy could extend to non-religious moral claims and even larger businesses, and 4. There is value in having a diversified workplace.

This article will proceed as follows: Part I addresses the impact that the *Hobby Lobby* decision has had on businesses, as well as the recently adopted Religious Exemption and Moral Exemption

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[16] *Id*.

[17] *Id*. at 41678.

[18] *See generally Hobby Lobby*, 573 U.S. at 682; s*ee also* 42 U.S.C. § 2000bb-1 (1993).

[19] *See generally* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981) (summarizing the significance of applying the autonomy doctrine to churches and nonprofits).

for certain businesses.[20] This part further addresses the role RFRA plays in these particular contexts. Part II explores the autonomy doctrine by providing examples of case law on how, in particular, the ministerial exception and Title VII exemption are distinct, yet relate to the common protection of institutional autonomy for churches and nonprofits. Part III examines the DOL Regulations and explores their potential real-life application. This part further demonstrates that these regulations are not an implication of *Hobby Lobby*, but rather, expanding institutional autonomy to for-profits. Part IV then assesses that the DOL Regulations should be withdrawn because the rules are, in fact, autonomous protections to for-profits. This part further analyzes how the reasoning for withdrawing the DOL Regulations is to avoid diluting the autonomy doctrine, to prevent harm to certain individuals of our society, to avoid the potential expansion of religious autonomy to non-religious moral claims and larger businesses, and the implications of future morals clauses in for-profit employer's employment contracts with employees. Furthermore, this part looks at the valuable policy of having a diversified workplace.

I. The Impact on Businesses Following *Hobby Lobby* and the Religious Exemption and Moral Exemption to Contraceptive Coverage Under the Religious Freedom Restoration Act

In 2014, the United States Supreme Court held in *Hobby Lobby* that RFRA applies to regulatory actions of closely held for-profit corporations.[21] This holding is derived from a challenge to regulations promulgated under the Affordable Care Act ("ACA"), through the guidance of the Obama administration.[22] Under these regulations, employer-provided health insurance plans were required to provide particular preventative services which included any contraceptive coverage approved by the Food and Drug Administration.[23] Plaintiffs, who were owners of closely held for-

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[20] *See infra* note 29; *see also infra* note 31 and accompanying text.
[21] *Hobby Lobby*, 573 U.S. at 683; *see also* § 2000bb-1 ("The purposes of [RFRA] are (1) to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim of defense to persons whose religious exercise is substantially burdened by the government").
[22] *Hobby Lobby,* 573 U.S. at 682.
[23] *Id.*

profits, successfully challenged this contraceptive coverage mandate, arguing that it was a violation of RFRA.[24] Hobby Lobby argued that the Health and Human Services' ("HHS") contraceptive mandate substantially burdened Hobby Lobby's religious beliefs.[25] The Court stated that if the HHS contraceptive mandate was to survive a RFRA challenge and overcome Hobby Lobby's substantial burden, a compelling government interest needed to be shown that HHS' mandate was the least restrictive alternative to requiring that certain closely held for-profits provide contraceptive coverage.[26] The Court concluded, limiting the holding to the facts, that the HHS mandate requiring employers to provide contraceptives violated RFRA in substantially burdening Hobby Lobby's free exercise of religion.[27]

On November 15, 2018, the Federal Register published two new final rules from HHS, the Department of the Treasury, and the DOL for Religious Exemption and Moral Exemption from providing coverage of certain preventative services under the ACA, such as contraceptive coverage.[28] The first rule, the Religious Exemption, provides that entities that have a sincerely held religious belief against providing contraceptive coverage are exempt from the original ACA mandate requiring them to provide such coverage.[29] Entities that fell under this rule included churches, nonprofits, and for-profit entities that are both not publicly traded and publicly traded.[30] The second rule, the Moral Exemption, provides that certain entities that have non-religious moral convictions against providing contraceptive coverage may also exempt themselves from

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[24] *Id.* at 701.
[25] *Id*. at 686.
[26] *Id*. at 726.
[27] *Id.* at 686–87.
[28] U.S. Dep't of Health & Human Services, Fact Sheet: Final Rules on Religious and Moral Exemptions and Accommodation for Coverage of Certain Preventive Services Under the Affordable Care Act (Nov. 7, 2018), https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html [hereinafter U.S. Dep't of Health & Human Services, Fact Sheet].
[29] 45 C.F.R. § 147.132 (2019); *see also* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592 at 57545 (Nov. 15, 2018) (codified at § 147.132) [hereinafter Religious Exemption].
[30] *See* §147.132; *see also* Religious Exemption, *supra* note 29.

the ACA mandate requiring them to provide such coverage.[31] Entities that fell under this rule included nonprofits and for-profit entities that are not publicly traded.[32] Although both rules allow the original ACA contraceptive accommodation to be available through the entity's insurer or a third party administrator, that option is left entirely to the entity.[33] Both of these rules were enacted in light of RFRA and were articulated by the Trump administration as the appropriate response to the substantial burden the Court found in *Hobby Lobby*.[34]

II. The Autonomy Doctrine

The autonomy doctrine, also known as the "church autonomy doctrine," "church autonomy principle," and the "ecclesiastical abstention doctrine," is derived from the Free Exercise Clause and the Establishment Clause of the First Amendment.[35] An essential theme of the autonomy doctrine is to protect churches and nonprofits from secular judicial interference in religious matters, particularly in the area of employment.[36] Courts will defer to churches in their relationships with clergy and other employees in ways not available to secular employers.[37] For instance, sometimes employees of churches and nonprofits are required to accept a morals clause in their employment agreements with their employer.[38] These clauses can seek to regulate the conduct of an

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[31] 45 C.F.R. § 147.133 (2019); *see also* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592 at 57604 (Nov. 15, 2018) (codified at § 147.133 (defining "moral convictions" based from Welsh v. United States, 398 U.S. 333 (1970), as those: "(1) that the individual 'deeply and sincerely holds'; (2) 'that are purely ethical and moral in source and content'; (3) 'but that nevertheless impose upon him a duty'; (4) and that 'certainly occupy in the life of that individual a place parallel to that filled by . . . God' in traditionally religious persons,' such that one could say 'his beliefs function as a religion in his life'") [hereinafter Moral Exemption].

[32] *See* § 147.133.

[33] *See* U.S. Dep't of Health & Human Services, Fact Sheet, *supra* note 28.

[34] *See* Religious Exemption, *supra* note 29.

[35] *See* Barbara J. Van Arsdale, J.D., *§11. Effect of First Amendment and Church Autonomy Doctrine on Internal Disputes of Religious Societies, Generally*, 45 FLA. JURIS. 2D RELIGIOUS SOCIETIES § 11, Westlaw (database updated Dec. 2020).

[36] *Id*.

[37] *See* Angela C. Carmella, *After Hobby Lobby: The "Religious For-Profit" and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381, 399–402 (2015).

[38] *See* Josh Scharff, *Morals Clauses: What They Mean for Employees Of Religious Institutions*, PEER GAN & GISLER, LLP, (July 31, 2014), http://peerganlaw.com/morals-clauses-what-they-mean-for-employees-of-religious-

employee based on an employer's religion, ethics, or morals.[39] Religious employers can seek to regulate not only an employee's professional life, but an employee's personal life as well, because of the protection of church autonomy.[40]

Other times, employees find themselves fired or demoted based on what they feel is discriminatory. In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Court recognized the ministerial exception and found that interfering with a church's decision to hire or fire a minister infringed on that church's internal governance violating the Free Exercise Clause.[41] Furthermore, the Court found that granting the state the power to determine which individuals will be ministers to a given faith violates the Establishment Clause by involving the government in ecclesiastical decisions and that this authority should be left to the church itself.[42] The Court noted *Hosanna-Tabor's* holding was limited in that the ministerial exception bars a minister's employment discrimination lawsuit in an attempt to legally challenge their church's decision to terminate them.[43] However, the term *minister* has been broadly interpreted by courts covering various occupations throughout a religious organization.[44] In essence, employees that are considered ministers for purposes of the ministerial exception are legally precluded from bringing any employment discrimination suit based on sex, race, pregnancy, national origin, and all other legally protected classes.[45]

In addition to the ministerial exception, Title VII provides an exemption for religious organizations under section 702.[46] Under this exemption, a religious employer can make decisions that discriminate on the basis of religion regardless of whether the

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institutions/ (summarizing what a "morals clause" within an employment contract is and the impacts that these provisions have had).

[39] *Id.*

[40] *Id.*

[41] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

[42] *Id.* at 188–89.

[43] *Id.* at 196 (declining to rule whether the ministerial exception would bar any other kind of employment action, such as a breach of contract or tort action).

[44] *See* Cannata v. Cath. Diocese of Austin, 700 F.3d 169 (5th Cir. 2012) (barring a former music director's employment discrimination lawsuit under the ministerial exception); *see also* Fratello v. Archdiocese of New York, 863 F.3d 190 (2nd Cir. 2017) (barring a former principal's employment discrimination and retaliation lawsuit under the ministerial exception).

[45] *Hosanna-Tabor,* 565 U.S. at 171; *see also* Carmella, *supra* note 37, at 400.

[46] *See* 42 U.S.C. § 2000e-1 (1991).

nature of the employment was religious or secular, providing no legal remedy for employees under religious discrimination doctrine.[47] In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, plaintiff's Title VII religious discrimination lawsuit against their religious employer for terminating them after the plaintiffs failed to qualify as church members was unsuccessful due to section 702.[48] The Court held that applying section 702's exemption to secular nonprofit activities of a religious organization did not violate the Establishment Clause.[49] Obviously grounded in the autonomy doctrine, the exemption gives a religious organization freedom to "define and carry out their [own] religious missions" without governmental interference.[50] The *Amos* decision displays the broad deference a church receives when it seeks to keep *only* its own members as employees, even for secular activities.[51] In considering this, also note that the exemption has been interpreted to include employees bound by morals clauses.[52] Such employees, regardless of faith, are required to comply with church teachings.

Although there are undoubtedly notable distinctions between the ministerial exception and the Title VII exemption, both clearly relate to the common protection of institutional autonomy.[53] Grounded in the Free Exercise and Establishment Clauses, the autonomy doctrine means that religious organizations have an interest in governing their own internal affairs such as selecting their own leaders, defining their own doctrines, and running their institutions, without interference from a secular court.[54] As previously discussed, the autonomy doctrine has gone as far as demonstrating that religious organizations should be protected from religious employment discrimination lawsuits so long as the organization's allegedly discriminatory conduct is for the

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[47] *Id.*; *see also* Carmella, *supra* note 37, at 402.
[48] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See* Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991) (holding that Title VII did not apply to the school's decision not to rehire a non-Catholic teacher because of her marriage).
[53] *See* Carmella *supra* note 37, at 399–404.
[54] *Amos*, 483 U.S. at 341 (Brennan, J., concurring); *see also*, Laycock, *supra* note 19, at 1389.

institution's own religious mission.[55] The autonomy doctrine, constitutionalized in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,* has had and continues to have recognized progeny since its inception in the early 1950's.[56] The autonomy doctrine, as embedded in both Title VII's religious employer exemption and in the ministerial exception, has always applied to churches and nonprofit organizations, rather than for-profits.[57] The idea was that nonprofit institutions have a colorable claim that its operations will not be secular in nature and that any earnings the institution makes will finance the continued purpose of the institution, as opposed to a for-profit distributing earnings to its owners.[58]

III. The Department of Labor's Office of Federal Contract Compliance Programs' Proposed Regulations Definitions

The DOL Regulation's purpose is to extend religious liberty to any federal contractor who wishes to exercise such liberty.[59] This purpose is in clear accordance with the Executive Order and the AG's Memo.[60] The DOL Regulations accord with the Executive Order and the AG's Memo is evident because each document highlights religion with paramount importance and makes clear that religious exercise deserves the utmost protection.[61] Each of these documents also expressly state that this religious protection applies not only to individuals, but to organizations as well.[62] What the DOL Regulations will do, in effect, is allow federal contractors to hold themselves out to the public as a religious employer and allow them to make any of their employment decisions in adherence to their alleged religious purpose.[63] The Federal Register expressly states that the DOL Regulation's intention is to make clear that Executive Order 11246 does not apply to just churches, but

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[55] *See Hosanna-Tabor*, 565 U.S. at 171.
[56] Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); *see also* Laycock, *supra* note 19, at 1395.
[57] *See generally* Laycock, *supra* note 19.
[58] *Amos*, 483 U.S. at 342 (Brennan, J., concurring).
[59] *See* Implementing Legal Requirements, *supra* note 11, at 41679.
[60] *See generally* Exec. Order *supra* note 1; *see also* Memorandum, *supra* note 4.
[61] *See* Exec. Order, *supra* note 1; *see generally* Memorandum, *supra* note 4; *see generally* Implementing Legal Requirements, *supra* note 11.
[62] *See* Exec. Order *supra* note 1; *see generally* Memorandum *supra* note 4; *see generally* Implementing Legal Requirements *supra* note 11.
[63] *See* Implementing Legal Requirements, *supra* note 11, at 41679.

employers with federal contracts as well.[64] The way the DOL accomplishes this is by expanding the definitions of certain terms, as noted above.[65] The DOL Regulations broad definition of *Religion* will allow *all* exercises of religion to fall within protection.[66] A potential issue in defining *Religion* so broadly, as this article will discuss, is how broadly defined will *all exercises* of religion be? Such a broadly defined term begs the question of whether these regulations implicate, not only strictly "religious" practices, but moral convictions as well. By defining *Particular religion* so broadly, any hiring or firing decision by the employer can be based on that employer's own religion.[67] This expansive definition leads to the potential morals clauses that could be drafted in future, or amended, employment contracts.[68] By defining *Religious corporation, association, educational institution, or society* so broadly, closely held for-profit corporations fall within the protection of these regulations.[69] This article contemplates if the DOL Regulations could ever be interpreted broadly enough to encompass larger businesses, such as for-profit publicly traded companies, which were included in the Religious Exemption for contraceptive insurance coverage.[70] Looking at the definitions of *Exercise of religion* and *Sincere* together, if a for-profit's employment-based actions were merely driven by the owner's

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[64] *Id.*

[65] *See infra* INTRODUCTION.

[66] *See* Implementing Legal Requirements, *supra* note 11, at 41679. The OFCCP defines *Religion* as including, but not limiting to, all aspects of religious beliefs, observance, and practice.

[67] *See id.* The OFCCP defines *Particular religion* as allowing "religious contractors not only to prefer in employment individuals who share their religion, but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor."

[68] *See* Scharff, *supra* note 38.

[69] The OFCCP defines *Religious corporation, association, educational institution, or society* by modifying the test set out in, Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011), where (1) "the contractor must be organized for a religious purpose, meaning that it was conceived with a self-identified religious purpose. This need not be the contractor's only purpose[,]" (2) "the contractor must hold itself out to the public as carrying out a religious purpose[,] . . . measured with reference to the particular religion identified by the contractor[,]" and (3) "the contractor must exercise religion consistent with, and in furtherance of, a religious purpose." It is important to note that the OFCCP left out the fourth factor of the test that "the entity seeking exemption 'not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.'" *See* Implementing Legal Requirements, *supra* note 11, at 41681–83.

[70] *See id.* and accompanying text; *see also* Religious Exemption, *supra* note 29.

personal religious beliefs then that conduct falls within the protection of the DOL Regulations as well.[71] The proposed definition of *Sincere* could make one contemplate if these religious missions will blend in moral precepts as well.[72] The OFCCP has also proposed a but-for standard of causation in evaluating discrimination claims which will require the OFCCP to find a violation of Executive Order 11246 *only* if it can be proven by a preponderance of the evidence that a protected class, other than religion, was the but-for cause of the discrimination claim.[73]

This brings us to our two original questions posed: 1. Are the DOL Regulations a necessary implication of *Hobby Lobby*? And 2. Are the DOL Regulations extending the autonomy doctrine to for-profit organizations?

A. The Department of Labor Regulations are Not a Necessary Implication of Hobby Lobby and the RFRA Progeny

What *Hobby Lobby* and the recently adopted Religious Exemption and Moral Exemption rules clearly relate to is an institution's choice on whether or not to provide contraceptive insurance coverage.[74] In contrast to the autonomy doctrine, which recognizes the autonomous decision making of certain topics within an institution, *Hobby Lobby* and the contraceptive regulations came to fruition through RFRA adjudication and differ because a substantial burden on religion needs to be shown in such context.[75] It may be argued that the DOL Regulations are a necessary implication of *Hobby Lobby* because the Court, in that decision, did not differentiate between nonprofits and for-profits in the exercise of religion.[76] Thus, the argument would be that since nonprofits and

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[71] The OFCCP used the definition for *Exercise of religion* from RFRA and the Religious Land Use and Institutionalized Persons Act defining it as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." The OFCCP went further stating that the *Exercise of religion* must be sincere, defining *Sincere* as ". . . whether a sincerely held religious belief actually motivated the institutions actions." *See* Implementing Legal Requirements, *supra* note 11, at 41684-85. (internal citations omitted).

[72] *Id.*

[73] *Id.*

[74] *See Hobby Lobby*, 573 U.S. at 682; *see also* 45 C.F.R. § 147.132 (2019); *see also* 45 C.F.R. § 147.133 (2019).

[75] *See* 42 U.S.C. § 2000bb-1 (1993); *see also Hobby Lobby*, 573 U.S. at 682; *see also* § 147.132; *see also* § 147.133.

[76] *See Hobby Lobby*, 573 U.S. at 682.

for-profits are treated as *persons*, both types of entities should be given the same treatment with respect to religious liberty.[77] The OFCCP even cites *Hobby Lobby*, among other cases, in support of the DOL Regulations.[78]

However, as previously mentioned, *Hobby Lobby* applied a strict scrutiny standard of review to determine whether a for-profit was substantially burdened by the contraceptive requirement.[79] The government needed to show a compelling interest that the HHS' mandate requiring certain closely held for-profits to provide contraceptive coverage was the least restrictive alternative.[80] In ruling in favor of Hobby Lobby, majority opinion author, Justice Alito, articulated that the Court's decision only covered the contraceptive mandate, meaning that it did not apply to *all* insurance-coverage mandates.[81] Furthermore, Justice Alito explicitly narrowed the *Hobby Lobby* holding to the facts, stating that the decision would not be treated as a shield for employers to discriminate on the basis of religion.[82]

The DOL Regulations are not driven by *Hobby Lobby*, or RFRA, in general. The DOL Regulations make no mention that they are applying a strict scrutiny standard or that even a substantial burden must be established. Perhaps it could be, and has already been, argued that the implications of *Hobby Lobby* would begin a slippery slope of discriminatory employment-based decisions protected by for-profit institutions' religious liberties.[83] But as will

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[77] *Id.* at 684 (suggesting that there was no Congressional intent that RFRA departed from the Dictionary Act, which does not differentiate between "persons" from "corporations").

[78] The OFCCP also cites to Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1721 (2018) (holding that a commission's hostility towards an individual's religious views violates the Free Exercise Clause), Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (holding that a government agency denying a church an otherwise available public benefit because of their religious status violates the Free Exercise Clause), and *Hosanna-Tabor*, 565 U.S. 171 (holding that the Free Exercise Clause and the Establishment Clause bar a minister's employment discrimination lawsuit against their church) in support of these regulations as well. *See* Implementing Legal Requirements, *supra* note 11, at 41679.

[79] *Hobby Lobby*, 573 U.S. at 691–92.

[80] *Id.* at 726.

[81] *Id.* at 686.

[82] *Id.*

[83] *See generally* Hannah Martin, Note, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. In Employment Discrimination,* 2016 CARDOZO L. REV. DE NOVO 1 (2016) (arguing that the *Hobby Lobby* decision has race

be discussed, institutional autonomy protections are much different, requiring no burden to be established for decisions solely pursuing religious missions.[84]

B. The Department of Labor Regulations are an Extension of the Autonomy Doctrine to For-Profit Institutions

The DOL Regulations are a way of extending the autonomy doctrine. The autonomy doctrine, as previously mentioned, has allowed churches and nonprofits to internally govern their institutions in the ways they see fit, as well as being allowed to discriminate on the basis of religion in the employment process because

> [f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the *autonomy of religious organizations* often furthers individual religious freedom as well.[85]

The DOL Regulations are, in effect, allowing for-profits to conduct themselves in the same manner that churches and nonprofits do through institutional autonomy. Examining the definition of *Particular religion*,[86] if an employee chose not to adhere to the religion of a business or chose to behave in a way that is unacceptable to that business because of its broadly defined religion, that employee may be terminated from their job. From this broader scenario, we can draw up a real-life hypothetical where an LGBTQ worker, who is married to an individual of the same sex, has been an apprentice for a federal contracting for-profit business

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discrimination implications to its holding and an employer can easily hide this racial discrimination under a federal or a state RFRA statute).

[84] *See generally* Laycock, *supra* note 19.

[85] *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

[86] *See supra* note 67 and accompanying text.

for several months. If the DOL Regulations go into effect and the owner of that company decides to announce that they have a *sincere belief* that all employees must adhere to the tenets of the owner's *exercise of religion*[87] which does not *sincerely*[88] believe in same sex marriage, the DOL Regulations would allow that company to terminate that employee for not adhering to the owner's religion.

In examining such a hypothetical, we can draw the conclusion that the DOL Regulations are an extension of the autonomy doctrine. The DOL Regulations do not flow from a balancing analysis like we would see in the RFRA context. Religious employers need not demonstrate any burden. Rather, the DOL Regulations would allow for-profits, like churches and nonprofits, to govern their institutions in ways they see fit, so long as they have a *sincere religious* belief. Harms that could arise from extending the autonomy doctrine to for-profits have dire consequences for the doctrine itself and certain groups of people. Thus, we will now examine the various consequences that may arise from extending autonomy-based protections.

IV. The Department of Labor Regulations Should be Withdrawn Because they are an Extension of the Autonomy Doctrine

We must lastly ask ourselves: Should the autonomy doctrine be extended to for-profit institutions by virtue of the DOL Regulations? We must answer that question in the negative. The autonomy doctrine should not be extended to for-profit institutions and the DOL Regulations should be withdrawn because: 1. They will dilute the autonomy doctrine as applied to churches and nonprofits, 2. They will harm members of the LGBTQ, women, and minority groups in the workforce, 3. This religious autonomy could extend to non-religious moral claims and even larger businesses, and 4. There is valuable policy in aspiring to have a diversified workplace.

A. The Department of Labor Regulations Will Dilute the Autonomy Doctrine

It can be observed that if we begin to view for-profits similarly as we do churches and nonprofits, with respect to religious liberty, we will be systemically placing for-profits on the same

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[87] *See supra* note 71 and accompanying text.
[88] *Id.*

pedestal as we do churches and nonprofits. First, we should look to the long history of respecting and protecting the boundaries of separation of church and state which stems from the founding of our nation.[89] Addressing the history of separating church and state demonstrates the importance of why we have the church autonomy doctrine. In adopting the First Amendment with its respective Religion Clauses, the founders wanted to ensure that, unlike the Church of England at that time, the government would not have a role in filling ecclesiastical positions and offices.[90] A driving purpose for this was to refrain from having a national church forcefully project its religious views onto its own citizens by allowing the federal government to choose who its ministers will be.[91] Following the principles of the Religion Clauses, the Establishment Clause was to prevent the government from appointing ministers, while the Free Exercise Clause was to prevent the government from interfering with a church's decision to select their own ministers.[92] Title VII's religious exemption, also based on church autonomy, further allows the hiring of co-religionists and those who will support the mission via a morals clause for any job, free from any religious discrimination concern.[93] The value in allowing church autonomy and this idea of separation of church and state was only reaffirmed in subsequent United States Supreme Court cases.[94] The significance in protecting the sanctity of a churches' and nonprofits' right to govern their own internal affairs is displayed even more so when these organizations seek to further their religious mission by

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[89] *Hosanna-Tabor*, 565 U.S. 171, 183–84.

[90] *Id.*; *see also* Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 223 (2014) ("The idea that religion operates outside the realm of politics can be traced back to James Madison's 1776 Virginia Declaration of Rights and his 1785 Memorial and Remonstrance Against Religious Assessments. In the Memorial, Madison stated that a just government 'will be best supported by protecting every citizen in the enjoyment of his Religious with the same equal hand which protects his person and property.'").

[91] *Hosanna-Tabor,* 565 U.S. at 183–84.

[92] *Id*. at 184.

[93] *See* 42 U.S.C. § 2000e-1 (1991); *see also* Scharff, *supra* note 38.

[94] *See Kedroff*, 344 U.S. at 94 (finding that the Russian Church of North America established and incorporated by a New York statute was "legislative fiat" violating the First Amendment. The Court further found that the designation of a clergyman to the St. Nicholas Cathedral rested with the church, as opposed to a secular judicial body); *see also* Serbian E. Orthodox Diocese for U.S. of America and Canada v. Milivojevich, 426 U.S. 696 (1976) (holding that the Illinois Supreme Court's ruling of setting aside the removal of a bishop from a church as "arbitrary" was improper judicial interference with that church's decision-making authority).

participating in activities such as building churches and schools, educating children, and teaching moral values.[95] By participating in such activities, individuals within that religious community get a robust sense of being apart of an even larger community.[96] "Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals"[97] and church autonomy deems it vital that such religious activities only be performed by members of that religious community.[98] It is vital because not only are these institutions achieving their religious purpose, but they are also able to provide an example of their way of life to others.[99] Seemingly, autonomy-based protections are not only important to larger religious communities as a whole, but also to individuals who already belong to them or those who would like to join them.[100]

A church's and nonprofit's purpose for espousing their religious views onto others and requiring others in their institutions to adopt such views may been seen in contrast to a for-profit's main purpose of financial gain and subsequently redistributing the profits.[101] This distinction demonstrates the dangers of expanding the doctrine and diluting its core purpose.[102] The way that the doctrine becomes diluted is that essentially we are equating each type of institutions primary purpose and saying that these messages deserve the same amount of protection, namely, autonomy. When we parallel these missions and allow these equivalent protections, that means these protections can just as easily be taken away from nonprofit institutions compared to for-profit institutions.[103]

Another way that the autonomy doctrine could become eroded by allowing for-profits such protection is that, in the case of a church or nonprofit, it is fairly clear to see what the institution's religious mission is.[104] The mission is displayed by how these institutions take advantage of their granted autonomy protections,

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[95] *See* Laycock, *supra* note 19, at 1388–89.
[96] *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).
[97] *Id*.
[98] *Id*.
[99] *Id*. at 344.
[100] *See* Carmella*, supra* note 37, at 384–385.
[101] *Amos*, 483 U.S. at 344 (Brennan, J., concurring).
[102] *See* Carmella*, supra* note 37, at 418.
[103] *Id*. at 387.
[104] *See generally* Laycock, *supra* note 19.

for example, a church only allowing ministers of a particular faith to preach at their institution.[105] However, in the for-profit context, it may not be so clear what the exact message of the institution is when, on one hand, the message could very well be to further their religious mission, while on the other hand, the mission could be to make a profit.[106] For example, if a for-profit company had a boss that did not follow the company's alleged *religion* but that boss brought in much business, that company would be very inclined to keep that boss, and perhaps would. One could only imagine more examples of how this doctrine becomes eroded by granting nonprofits and churches the same autonomy-based protections as entities whose primary purpose is to make money. Furthermore, for-profits are obviously economic actors that are central to our society.[107] Individuals often seek to these institutions just to make a living which is also in contrast to what can be said about churches and nonprofits.[108] However, it is important to acknowledge that some businesses can have a religious belief where the owners may seek to fulfill a religious mission.[109] But the fact that for-profits participate in the market means that their religious mission will be of a different nature than a church or nonprofit which is exclusively created for that mission.[110]

B. The Department of Labor Regulations Will be Harmful to Members of the LGBTQ, Women, and Minority Groups in the Workforce

The DOL Regulations will be unquestionably harmful to members of the LGBTQ, women, and minority groups. Although the DOL Regulations expressly address an employer's continuing obligation not to discriminate based on protected classes other than religion, the DOL Regulations ensure that conscience and religious

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[105] *Id.; see also Hosanna-Tabor*, 565 U.S. at 171.
[106] *Amos,* 483 U.S. at 349 (O'Connor, J., concurring).
[107] Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 391 (2013).
[108] *Id.* ("Churches, when viewed from the perch of state agnosticism, are option pursuits. They do not govern access to wide swaths of employment or essential goods and services, and to the extent that church affiliated organizations do govern such access, we become less comfortable treating those organizations as churches.").
[109] *See generally Hobby Lobby*, 573 U.S. at 682.
[110] *See Amos*, 483 U.S. 327, 340–42 (Brennan, J., concurring).

liberty will be given the broadest protection.[111] Consequently, the American Bar Association ("ABA") has urged the DOL to withdraw the DOL Regulations, arguing that the DOL Regulations will make it much more difficult for employees to prove employment discrimination on the basis of a protected class other than religion.[112] One difficulty for proving discrimination of a protected class that the ABA has cited is the new "but-for" standard that the DOL Regulations propose, as explained in Part III above.[113] This standard will be undoubtedly difficult to meet in trying to prove that an employer's grounds for termination based on religion was merely a pretext for discrimination based on another protected class. In opposing the adoption of the DOL Regulations, the American Civil Liberties Union ("ACLU") has also acknowledged the challenges that members of the LGBTQ and unmarried pregnant women would face.[114] An indication that the DOL Regulations will harm LGBT members and workers is the fact that the proposed rule cites to *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, a case where a bakery owner denied baking a cake for a gay couple, without providing any protections for sexual orientation.[115] For example, an employer would be able to terminate an employee on the basis of religion for merely being homosexual. The former employee would argue that religion was merely a pretext and that they were fired because of their sexual orientation. However, the employer could easily counter, citing that their *sincere religious beliefs* are only in heterosexuality. Since this belief is *sincere*, it is likely that the employer's argument would succeed because as an autonomy

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[111] *See generally* Implementing Legal Requirements, *supra* note 11; *see also* News Release, U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, U.S. Department of Labor Proposes A Rule Clarifying Civil Rights Protections For Religious Organizations (Aug. 14, 2019), https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814.

[112] Debra Cassens Weiss, *ABA urges withdrawal of proposed rule that would expand religious exemption for federal contracts*, ABA J. (Sept. 19, 2019, 10:16 AM), http://www.abajournal.com/news/article/aba-urges-withdrawal-or-proposed-rule-that-would-expand-religious-exemption-for-federal-contractors.

[113] *Id.*; *see supra* Part III.

[114] Catholic News Service Contributor, *Bishops Welcome Proposed Rule to Protect Rights of Religious Employers,* CRUX (Aug. 22, 2019), https://cruxnow.com/church-in-the-usa/2019/08/bishops-welcome-proposed-rule-to-protect-rights-of-religious-employers/.

[115] 138 S. Ct. at 1721; *see also* Mitchell et al., *OFCCP Proposes New Rule to "Ensure Religious Employers are Protected"*, JACKSON | LEWIS (Aug. 16, 2019), https://www.affirmativeactionlawadvisor.com/2019/08/ofccp-proposes-new-rule-to-ensure-religious-employers-are-protected/.

protection, it does not matter whether the person is fired because they are a bad employee or because they are gay. Autonomy protection means the court defers regardless of the employer's decision.[116] It is also important to note that because it is difficult to question sincerity, this also allows anti-gay businesses to claim religious exemption even if they are not actually religious. While the DOL Regulations seem to require at least some showing of a *sincere religious belief* – that is to put it on the same footing as a church and religious nonprofit – that is the same as giving for-profits autonomy.[117]

The DOL Regulations would work in the same manner against women who are unmarried and pregnant as well as people who are nonreligious.[118] Patricia Shiu ("Shiu"), former Director of the OFCCP under President Obama and now an advisor for the Berkeley Center on Comparative Equality & Anti-Discrimination Law, cautioned that the implementation of the DOL Regulations would "gut" anti-discrimination laws.[119] Although the DOL reasons that religion can not be used as an excuse to discriminate against other protected classes, Shiu warns that these regulations have the potential to go as far as creating a "loophole" for employers and institutions to discriminate against anyone.[120] Shiu provided an extreme loophole example where she believes that if an employer argued that their religion dictates that women cannot work outside of the home, the religious exemption would be justified to not hire women.[121]

Another group of individuals the DOL Regulations would negatively impact are minorities. In this context, a religious nonprofit, that has a federal government contract, could refuse to hire those who are Muslim or Jewish or who refuse to sign a morals contract because the employer only adheres to Catholicism.[122]

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[116] *See generally* Laycock, *supra* note 19.
[117] *See supra* note 71 and accompanying text.
[118] Emma Green, *How Trump Is Reversing Obama's Nondiscrimination Legacy*, THE ATL. (Aug. 14, 2019), https://www.theatlantic.com/politics/archive/2019/08/trump-lgbtq-rules/596116/.
[119] Alexia Fernández Campbell, *Trump's Plan to let Employers Discriminate Against LGBTQ Workers, Explained,* VOX (Aug. 16, 2019, 9:50 AM), https://www.vox.com/identities/2019/8/16/20806990/trump-religion-lgbtq-discrimination-rule.
[120] *Id.*
[121] *Id.*
[122] *Id.*

Under the DOL Regulations, this also seems to be an acceptable form of religious discrimination.[123]

As mentioned earlier, it is important to consider President Obama's signing off of Executive Order 13672, amending Executive Order 11246, to include protections for employees of federal contractors on the basis of sexual orientation and gender identity.[124] The DOL Regulations will lead to a systematic weakening of President Obama's Executive Order.[125] A poll released in late 2017 by NPR, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health found that at least 20% LGBTQ people experienced discrimination when applying for employment because of their sexual orientation or gender identity.[126] This statistic rose to 32% with respect to LGBTQ people of color.[127] Looking at these numbers and considering the implications of the DOL Regulations, it becomes apparent that these numbers will only increase if the DOL Regulations are enacted. And not only will these numbers increase but the employer will now be able to defend themselves from a discrimination lawsuit with a seemingly impenetrable shield.

i. The "Morals Clause Issue" in Employment Contracts with Current and Future Employees who are LGBTQ Members, Women, and Minorities

When we further consider morals clauses that are part of many church and religious nonprofit employment agreements, this issue becomes worse.[128] If the DOL Regulations are enacted, that could lead to many for-profit employers forcing their future employees, or trying to amend with their current employees, employment contracts that have morals clauses to conform the employee's conduct inside and outside of the workplace with the religious tenets of the employer. For example, a religious employer

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[123] *Id.*

[124] *See* 41 C.F.R. § 60 (2014); *see infra* INTRODUCTION.

[125] Frank J. Bewkes & Caitlin Rooney, *The Nondiscrimination Protections of Millions of Workers Are Under Threat*, CTR. FOR AM. PROGRESS (Sept, 3, 2019, 9:02 AM), https://www.americanprogress.org/issues/lgbt/reports/2019/09/03/473958/nondiscrimination-protections-millions-workers-threat/.

[126] *Discrimination in America: Experiences and Views of LGBTQ Americans*, NPR (Nov. 2017), https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf [hereinafter NPR].

[127] *Id.*

[128] *See* Scharff, *supra* note 38.

of a for-profit may be able to get any worker to agree to not engage in sexual activity and/or get pregnant out of wedlock. While this may seem like a pretext for sex discrimination and pregnancy discrimination, under the DOL Regulations, this seems completely reasonable on the end of the employer who is just abiding to the doctrine of their religious beliefs.

In 2014, in Catholic schools across the United States, it was seen that teachers were being required to agree to morality clauses forbidding conduct such as using birth control and marrying a member of the same sex.[129] An example from where this took place was in Oakland, California, at Bishop O'Dowd High School.[130] Teachers at this Catholic School were required to sign new contracts that included morality clauses.[131] A mother of students at this school viewed the teachers' new employment contracts online, including the morality clauses, and became worrisome of language that required teachers to follow the Catholic doctrine, not only in the classroom, but in their personal lives too.[132]

The reality that these morals clause agreements have been a prerequisite requirement in the nonprofit sector further exacerbates the negative impact that the DOL Regulations will have on LGBTQ workers, women, and minority groups in the for-profit sector. In a world where one in five LGBTQ workers felt that they were discriminated against when applying for employment based on sexual orientation or gender identity,[133] it is difficult to imagine that there will not be morals clauses drafted that are, at least, subtly discriminatory. However, even if these morals clauses are drafted in such a manner, the pretext of a religious conviction will trump the alleged discrimination, and the employer's morals clause provision will have to be adhered to.

C. The Department of Labor Regulations Could Extend Religious Autonomy to Moral Autonomy and Larger Businesses

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[129] Sandhya Dirks, *Morals Clauses Prove Controversial for Catholic School Teachers*, NPR (July 15, 2014, 4:58 PM), https://www.npr.org/2014/07/15/331751394/morals-clauses-prove-controversial-for-catholic-school-teachers.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See* NPR, *supra* note 126.

Earlier it was discussed that following the *Hobby Lobby* decision the Trump administration established both a Religious Exemption and a Moral Exemption for businesses that object to providing contraceptive coverage.[134] Although this article argues that the *Hobby Lobby* decision is not a necessary implication of the DOL Regulations, it could be argued that adopting the DOL Regulations could lead to a parallel situation in how the Religious Exemption and Moral Exemption for contraceptive coverage were adopted. *Hobby Lobby*, as discussed, was a religious exemption case and then years later the Trump administration adopted the Religious Exemption and Moral Exemption.[135] This part of the argument contemplates that the DOL Regulations actually regulate only what they explicitly say they will regulate, namely, *religion*. The argument here is that: Following the adoption of the DOL Regulations, could years later the DOL Regulations be expanded more broadly to include moral autonomy-based protections? I propose that this is a foreseeable consequence from the context just discussed. For example, if the DOL Regulations are enacted and President Trump is reelected, it is possible that his administration could broaden the DOL Regulations even further to include moral autonomy. The administration could accomplish this by expanding on the definitions from the DOL Regulations to include the "moral conviction" test, based from *Welsh* and utilized in the Moral Exemption, which parallels the protections provided to sincere religious beliefs with sincere ethical and moral beliefs.[136]

This potential slippery slope of expanding to autonomy on a religious and moral level would lead to further dilution of the doctrine and even further harm for certain individuals of our society. For example, if an employee was homosexual and an employer cited to some "*moral conviction*," as opposed to citing to a sincere religious belief against homosexuals, that would be enough for the employer to terminate that employee. Just from this simple example, one could draw up thousands of potential scenarios that could occur because of the implications of the DOL Regulations. This would also make the new "but-for" standard even more difficult to meet by essentially conflating religious discrimination decisions with moral claims by the employer.

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[134] *See* 45 C.F.R. § 147.132 (2019); *see also* 45 C.F.R. § 147.133 (2019).

[135] *See generally Hobby Lobby*, 573 U.S. at 682; *see also* § 147.132; *see also* § 147.133.

[136] *See Welsh,* 388 U.S. at 333; *see also* Moral Exemption, *supra* note 31 and accompanying text.

Additionally, the Religious Exemption for contraceptive coverage includes for-profits that are publicly traded.[137] In arguing that the Religious Exemption and Moral Exemption enactment could parallel the DOL Regulations, that potentially means that religious autonomy-based protections could expand to businesses larger than for-profit closely held companies. This argument comes to fruition even more so when we look at the definition of *Religious corporation, association, educational institution, or society* and further analyze that the drafters of the DOL Regulations left out the fourth factor of the Ninth Circuit *World Vision* test which states that an entity looking for a Title VII religious exemption may not substantially engage in money transactions for goods and services beyond nominal amounts.[138] This is markedly different from the DOL Regulations which evidently allows businesses to be involved in money transactions with no "nominal" cap, an ability to earn a profit, and still qualify as a religious entity.[139]

The consequences of enacting of the DOL Regulations could expand the autonomy doctrine further than we had ever realized leading to irreparable harm. The potential positive changes it could do for legitimate religious for-profits does not outweigh the extraordinary harm that would be done if the DOL Regulations are passed.

D. It is Beneficial Policy to Aspire to Have Diversity in the Workplace

Reasons for having diversity in the workplace go beyond political correctness.[140] Diversity in the workplace helps companies compete with other companies around the world that are already encouraging diversity.[141] For example, if an employer wants to engage in business in a country that is overseas, like many other businesses already do, having an employee who understands that country's language and culture, may be best to handle or at least consult on that particular work assignment. Encouraging a diversified employment environment can lead to less turnover because all employees will feel valued and the employer has the

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[137] *See* § 147.132.

[138] *See supra* note 69 and accompanying text.

[139] *See generally* Implementing Legal Requirements, *supra* note 11; *see also supra* note 69 and accompanying text.

[140] *See* Haynsworth Baldwin, Johnson & Greaves LLC, *Workforce Diversity: Maintaining Your Competitive Edge*, 12 No. 11 FLA. EMP. L. LETTER 6, Westlaw (database updated Jan. 2001) [hereinafter, Workforce Diversity].

[141] *Id*.

chance to engage in ideas with employees from all walks of life.[142] A diversified workplace can also lead to the employer increasing flexibility by recognizing the differences between people from different cultures.[143] For example, if an employer were requiring his current or future employee to sign a morals clause provision in their employment contract to adhere to that employer's faith or they will be terminated, that employee may be inclined to lie in signing that provision just to maintain or gain employment. However, this employee will likely feel valueless that they have to lie to their employer about who they are in order to maintain steady income or risk termination. That employee will feel especially undervalued if their religion or culture is a large part of their personal life. Furthermore, this employer has now officially lost out on some potentially new ideas that may come from this employee's different culture.

As was addressed in Part IV, minorities and women are groups of people that can be harmed by the implementation of the DOL Regulations. Different studies have suggested that a promotion of fairness and equality in the workplace can lead to positive outcomes for a business, such as low turnover[144], and may also alleviate workplace conflicts such as interpersonal bias.[145] In the upcoming decades, the United States has been projected to become "minority white" which means that minorities groups will become the majority.[146] The data shows that non-Hispanic whites will be just under 50% of the population by the year 2045.[147] This rise in the minority population only further increases by the time we get to the year 2060.[148] The increasing population of minorities further displays that it will be imperative to have a diversified

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[142] *Id*.
[143] *Id*. at 2.
[144] *See generally* E.H. Buttner et al., *Diversity Climate Impact on Employee of Color Outcomes: Does Justice Matter?*, 15 CAREER DEV. INT'L 239 (2010) (demonstrating through a study conducted on 182 professionals of color that diversity inclusion in the workplace resulted in lower turnover and higher job satisfaction).
[145] *See generally,* Lisa H. Nishii, *The Benefits of Climate for Inclusion for Gender-Diverse Groups*, 56 ACAD. MGMT. J. 1754 (2013) (demonstrating that an increase of "unit-level engagement," satisfaction of women employees, and lower levels of conflict was from an inclusive work environment).
[146] William H. Frey, *The US will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/.
[147] *Id.*
[148] *Id.*

workplace in the near future and that aspiring to such a policy now will only benefit businesses.

Recognizing the benefits of having a diversified workplace policy supports the conclusion that the DOL Regulations should be withdrawn. While it is imperative to recognize the importance of allowing certain entities to adhere to a religious belief in order to further their message,[149] in the for-profit sector it could be critical to not have a diversified workplace. A for-profit institution that recognizes only way one thinking and refuses to be open-minded to other cultures loses a competitive advantage[150] and may hurt the for-profit business in achieving at least one of its main goals - making a profit.

CONCLUSION

The importance of autonomy granted to churches and nonprofit institutions is undoubtedly clear and the doctrine's protections are undeniably significant. Allowing such protections to institutions of these types is critical to their growth because their development primarily relies on furthering the message of their religious mission.[151] The DOL Regulations seek to expand on this doctrine by including for-profit institutions.[152] This is not the case, as seen in *Hobby Lobby* and through RFRA adjudication, where there must be a substantial burden proven to show that a law or policy cannot survive strict scrutiny.[153] Nor are the DOL Regulations merely seeking to disallow a particular type of health insurance coverage, such as, contraceptive coverage.[154] As noted, the OFCCP chose to cite *Hobby Lobby* as support for the DOL Regulations in the same breath that it cited to *Hosanna*-Tabor.[155] As made evident by this article, *Hobby Lobby* was an explicitly narrow decision only covering contraceptive coverage,[156] as opposed to giving broad religious protection to all for-profits. *Hosanna-Tabor*, on the other hand, barred a minister's employment discrimination lawsuit protecting a church's internal self-

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[149] *See* Laycock, *supra* note 19.
[150] *See generally* Workforce Diversity, *supra* note 140.
[151] *See generally* Laycock, *supra* note 19.
[152] *See* Implementing Legal Requirements, *supra* note 11, at 41681–41683.
[153] *See* 42 U.S.C. § 2000bb-1 (1993); *see also Hobby Lobby*, 573 U.S. at 682.
[154] *Hobby Lobby*, 573 U.S. at 682.
[155] *See* discussion *supra* Part III.A.; *see also supra* note 78 and accompanying text.
[156] *Hobby Lobby*, 573 U.S. at 682.

governance, in general.[157] The DOL Regulations propose something much closer to the *Hosanna-Tabor* and *Amos* decisions which give for-profit institutions autonomy-based protections.[158]

"In short, the rule would serve as a devastating blow to religious freedom in the name of protecting it."[159] The DOL Regulations are not a necessary implication of *Hobby Lobby*. Rather, the DOL Regulations are an extension of the autonomy doctrine to for-profit institutions. Therefore, the DOL Regulations should be withdrawn because 1. They will dilute the autonomy doctrine as applied to churches and nonprofits, 2. They will harm members of the LGBTQ, women, and minority groups in the workforce, 3. This religious autonomy protection could extend to non-religious moral claims and even larger businesses, and 4. There is value in having a diversified workplace.

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[157] *Hosanna-Tabor*, 565 U.S. at 171.
[158] *See* Carmella, *supra* note 37, at 399-404.
[159] *See* Bewkes & Rooney, *supra* note 125.