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Dedicated to Our Lady, Mirror of Justice

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PRACTITIONER COMMENT

THE FAILURE OF ANTI–MONEY LAUNDERING REGULATION: WHERE IS THE COST-BENEFIT ANALYSIS?

*Lanier Saperstein, Geoffrey Sant & Michelle Ng**

INTRODUCTION

By investigating customer identities and reporting suspicious transactions to regulators, banks play an important role in helping regulators fight financial crimes such as money laundering and terrorist financing. Yet, in a strange twist, regulators have recently been punishing banks where no financial crime has been identified.

As discussed in this Practitioner Comment, the regulators[1] have been punishing the banks not because of any actual money laundering, but rather because the banks did not meet the regulators' own subjective vision of the ideal anti–money laundering or counter–terrorist financing program. However, no one has attempted to show that the supposedly ideal vision of an anti–money laundering or counter–terrorist financing program would actually be more effective than the programs the banks have in place.

Even if the regulators' ideal vision of an anti–money laundering and counter–terrorist financing program would in fact be more effective than what exists now, it is unclear if the benefits of such a program would outweigh the very serious costs. The optimal level of banking regulation necessarily requires some sort of cost-benefit analysis.

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1 Unless otherwise specified, the term "regulators" used throughout this Practitioner Comment generally refers to all federal and state bank regulators.

Indeed, legal scholars, Congress, and the courts have long advocated for agencies to conduct qualitative and quantitative assessment of all consequences of their regulatory actions. Under most circumstances, regulators should undertake an action only if its benefits outweigh its costs. Thus, banking regulators' utter silence regarding the costs and benefits of their subjective vision is troubling, and results in bad public policy.

I. THE PROBLEM

In July 2015, Citigroup agreed to pay $140 million in penalties to federal and California regulators for purported anti–money laundering weaknesses at its Banamex USA subsidiary.[2] On the same day, Citigroup announced it would close Banamex USA.[3] The two events are almost certainly linked, as the fine imposed on Banamex USA equaled roughly one-sixth of the bank's assets.[4] The closure of Banamex USA's three branches, which were located in Houston, San Antonio, and Los Angeles, put an end to one of the oldest banks serving the U.S.-Mexican border, with roots stretching back to the 1800s.[5]

One would assume that, for such a long-standing bank to close, the regulators must have caught serious instances of money laundering at Banamex USA. In fact, the regulators did not identify a single instance of money laundering. Rather, the regulators stated in a press release that they had "reason to believe" that "weaknesses" existed in Banamex USA's overall compliance program.[6] These weaknesses were a lack of sufficient staff and insufficient internal controls for preventing money laundering.[7]

One year earlier, the New York Department of Financial Services—the New York state bank regulator—imposed a $300 million fine on

2 Press Release, Citigroup, Citigroup Statement on Banamex USA (July 22, 2015), http://www.citigroup.com/citi/news/2015/150722a.htm.

3 *Id.*

4 *See id.*; *see also* Jude Joffe-Block, *Banamex USA Bank to Pay $140 Million Fine and Shut Down*, KJZZ (July 23, 2015), http://kjzz.org/content/169775/banamex-usa-bank-pay-140-million-fine-and-shut-down.

5 *Meet Banamex*, BANAMEX, http://www.banamex.com/en/conoce_banamex/quienes_somos/grupo_financiero_banamex.htm?icid=Texto-ConoceBanamex-Footer-Hojadeproducto-05222013-Int-EN (last visited Oct. 24, 2015).

6 Press Release, Cal. Dep't of Bus. Oversight, DBO Announces Record $40 Million Settlement with Citi Subsidiary Banamex USA, Resolves Allegations of Money Laundering Rule Violations (July 22, 2015), http://www.dbo.ca.gov/Press/press_releases/2015/Settlement_Announcement_07-22-15.pdf.

7 Written Agreement Between Banamex USA and Federal Deposit Insurance Corporation, No. FDIC-14-0259k (Aug. 2, 2012), http://www.dbo.ca.gov/Press/press_releases/2015/FDIC_DFI_Consent_Order%2008-02-12.pdf (consent order issued by the Federal Deposit Insurance Corporation and the California Department of Financial Institutions).

Standard Chartered for supposed weakness in its New York branch's anti–money laundering monitoring system.[8] Despite imposing a massive fine—more than double the amount that caused Banamex USA to close—the regulator did not identify any actual money laundering activity. Rather, the regulator claimed that the bank's monitoring system failed to flag "potentially high-risk transactions."[9]

II. THE CURRENT REGULATORY CLIMATE

Banamex USA and Standard Chartered are examples of a troubling trend in which regulators levy massive fines on banks even though the regulators do not identify any missed instances of money laundering or financial crimes. In so doing, the regulators effectively are punishing banks for not meeting the regulators' own subjective vision of the ideal anti–money laundering program.

There is no indication that "higher" standards and the massive costs imposed on banks are actually effective in reducing money laundering and other financial crimes. The regulators are incentivized to quickly and firmly address any potential money-laundering and terrorist-financing risk. An increased regulatory response equals greater job security for regulators, and more recognition and adulation from elected officials and the public. Yet, regulators do not bear any of the compliance costs imposed by their vision. The regulators' vision is untethered to the economic costs of implementing the supposedly ideal anti–money laundering program, and (understandably) the regulators have no incentive to determine whether the benefits obtained, if any, justify the increased costs imposed.

Banamex USA and Standard Chartered represent just two of the many banks criticized or punished where no financial crimes were identified. In 2013, the Federal Reserve criticized the Bank of Montreal's compliance program, asserting that it lacked "effective systems of governance and internal controls to adequately oversee" anti–money laundering compliance.[10] Also in 2013, a federal regulator savaged Royal Bank of

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8 Written Agreement Between Standard Chartered Bank and New York State Department of Financial Services, Consent Order Under New York Banking Law §§ 39 and 44 (Aug. 19, 2014), http://www.dfs.ny.gov/about/ea/ea140819.pdf.

9 *Id.* at 2.

10 Written Agreement Between Bank of Montreal and Federal Reserve Bank of Chicago, Nos. 13-055-WA/RB-FB, 13-005-WA/RB-HC, 13-005-WA/RB-FBR, at 3 (Apr. 29, 2013), http://www.federalreserve.gov/newsevents/press/enforcement/enf20130517a1.pdf; CANADIAN PRESS, *U.S. Fed Warns Bank of Montreal on Anti–Money Laundering Controls*, FIN. POST (May 17, 2013, 12:00 PM), http://business.financialpost.com/news/fp-street/u-s-fed-warns-bank-of-montreal-on-anti-money-laundering-controls. For an additional example, see Written Agreement Between BMO Harris Bank, N.A. and The Comptroller of the Currency, No. 2013-056 (Apr. 29, 2013), http://www.occ.gov/static/enforcement-

Canada for anti–money laundering controls that the regulator called "unsafe and unsound."[11] In each of these instances, the regulators reserved the right to penalize the banks, despite not identifying any actual money laundering or financial crime.

In fact, considering the difficulty of uncovering complex money laundering schemes, a bank's failure to discover a financial crime does not necessarily mean that the bank has a weak anti–money laundering program. The Under Secretary of the Treasury Department acknowledged that "it is not possible or practical for a financial institution to detect and report every single potentially illicit transaction that flows through the institution."[12] Likewise, the Financial Action Task Force stated that it does not expect "a 'zero failure' approach,"[13] and the director of the Financial Crimes Enforcement Network stated, "I think we can all agree that it is not possible for financial institutions to eliminate all risk."[14] Considering that it is impossible to eliminate financial crime, and regulators do not expect "zero failure," it is problematic that regulators are nonetheless punishing banks where no financial crime has been identified.

III. THE COST OF COMPLIANCE IS SKY-ROCKETING

International banks spend enormous amounts on anti–money laundering compliance. HSBC recently estimated it now devotes $750 million to $800 million per year on compliance—an amount equivalent to one quarter of the operating budget of its entire U.S. operations—to fight

actions/ea2013-056.pdf (requiring assessment of anti–money laundering risk and controls). *See also* Robert Anello, *Financial Institutions: How Much More Will You Have to Spend on Anti–Money Laundering Programs to Avoid Criminal Prosecution?* FORBES (Oct. 24, 2012, 10:36 AM), http://www.forbes.com/sites/insider/2012/10/24/financial-institutions-how-much-more-will-you-have-to-spend-on-anti-money-laundering-programs-to-avoid-criminal-prosecution/ ("Rather than focusing on money laundering that results from substantive criminal violations . . . federal prosecutors are looking instead at weaknesses in the internal procedures employed by financial institutions to prevent laundering.").

11 *See* Rita Trichur & Alistair MacDonald, *Canadian Regulators Increase Pressure on Banks to Snuff Out Money Laundering*, WALL ST. J. (Feb. 3, 2015, 5:31 PM), http://www.wsj.com/articles/canadian-regulators-increase-pressure-on-banks-to-snuff-out-money-laundering-1423002679.

12 David. S. Cohen, Under Sec'y, U.S. Dep't of the Treasury, Remarks at the ABA/ABA Money Laundering Enforcement Conference (Nov. 10, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx.

13 *FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale De-Risking*, FATF (Oct. 23, 2014), http://www.fatf-gafi.org/documents/news/rba-and-de-risking.html.

14 Jennifer Shasky Calvery, Dir., U.S. Dep't of the Treasury Fin. Crimes Enf't Network, Remarks at the 2014 Mid-Atlantic AML Conference (Aug. 12, 2014), http://www.fincen.gov/news_room/speech/html/20140812.html.

against financial crime.[15] Between 2012 and 2015, the bank added around 5000 additional staff—about $300 million in salary—to work in compliance alone.[16]

To a large extent, the fight against financial crimes has swallowed up the core business of banking, such as providing loans and banking services. Regulators appear to have shifted their focus to how much banks spend on compliance, as opposed to the effectiveness of compliance efforts. The Office of the Comptroller of the Currency recently described it as a "hopeful sign[]" and "impressive" that many of the "largest banks are increasing spending by significant amounts and adding substantial numbers of employees" in anti–money laundering compliance, a "trend we want to encourage."[17]

IV. DE-RISKING

Considering the massive sums involved, one would expect the regulatory actions to be based on scientific studies and empirical research weighing the costs and benefits of their regulations and enforcement actions. Instead, regulators appear to have simply assumed that higher standards, more employees, and increased spending from banks will necessarily reduce the number of financial crimes. They may turn out to be right. However, evidence to date indicates the opposite.

Regulatory punishments and compliance costs have contributed to banks retreating from high-risk regions and businesses.[18] This "de-risking" has made financial activity less transparent and more susceptible to misuse by criminals. For example, all major banks in the United States and the

15 Martin Arnold, *HSBC Wrestles with Soaring Costs of Compliance*, FIN. TIMES (Aug. 4, 2014, 8:02 PM), http://www.ft.com/cms/s/0/0e3f0760-1bef-11e4-9666-00144feabdc0.html#axzz3iT0u5kXA (identifying HSBC's anti–money laundering compliance spending as $750 million to $800 million for 2014); HSBC USA, Inc., Annual Report (Form 10-K), 37 (Feb. 23, 2015) (showing that the total amount of operating budget for HSBC USA in 2014 was $3,424 million).

16 *See* Laura Noonan, *Banks Face Pushback over Surging Compliance and Regulatory Costs*, FIN. TIMES (May 28, 2015, 1:46 PM), http://www.ft.com/intl/cms/s/0/e1323e18-0478-11e5-95ad-00144feabdc0.html#axzz3qGQrrBik (estimating that the average salary for a compliance staff employee is $60,000); Gregory J. Millman & Samuel Rubenfeld, *Compliance Officer: Dream Career?*, WALL ST. J. (Jan. 15, 2014, 8:13 PM), http://www.wsj.com/articles/SB10001424052702303330204579250722114538750 (noting that HSBC Holdings added 1600 compliance employees in a single year).

17 Thomas J. Curry, Comptroller of the Currency, U.S. Dep't of the Treasury, Remarks Before the Association of Certified Anti–Money Laundering Specialists 3 (Mar. 17, 2014), http://www.occ.gov/news-issuances/speeches/2014/pub-speech-2014-39.pdf.

18 Patrick Jenkins, *Banks Pull Back from Risky Regions*, FIN. TIMES (Apr. 21, 2013, 5:24 PM), http://www.ft.com/intl/cms/s/0/47c3432a-aa5d-11e2-9a38-00144feabdc0.html#axzz3iW2MHlj4.

United Kingdom have abandoned wire transfers to Somalia in order to avoid the risk that a money transfer ends up in the hands of terrorist groups.[19] This abandonment of Somalia by major banks has caused a humanitarian tragedy. Many families in Somalia depend upon relatives working abroad to send money home in order to pay for food and medicine. Somalis living in the United States now hire third-party agents to physically carry the money in cash in suitcases on flights to Somalia.[20] The money still flowing to Somalia has thus become unregulated, untraceable, and more expensive for Somalis living hand-to-mouth. The end result is not only tragic for individual Somalis, it is also riskier for money laundering than if banks had continued to provide wire transfer services.

Along the Mexican border, banks fearful of money laundering linked to drugs and smuggling have closed customer accounts and bank branches—and in one recent case, the bank itself.[21] When Citigroup shuttered its Banamex USA subsidiary, it eliminated a banking group that once had eleven branches in the southwest.[22] The closing of Banamex USA came mere months after Arizona Senators John McCain and Jeff Flake demanded a hearing in response to the rapid-fire closing of four bank branches in one Arizona border city.[23] Banks have also closed long-term accounts of cash-intensive businesses, like ranchers and farmers, due to cash being risky for money laundering.[24] The ironic result of closing the bank accounts of cash-intensive businesses, of course, is to force these clients to move even more heavily into cash transactions. After all, if these businesses are unable to deposit cash in a bank account, then they must necessarily pay others in cash as well. The move to cash has a ripple effect

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19 *See* Jessica Hatcher, *Ending Somali-U.S. Money Transfers Will Be Devastating, Merchants Bank Warned*, GUARDIAN (Feb. 6, 2015, 5:06 PM), http://www.theguardian.com/global-development/2015/feb/06/somali-us-money-transfers-merchants-bank-remittances.

20 Jamila Trindle, *Money Keeps Moving Toward Somalia, Sometimes in Suitcases*, FOREIGN POL'Y (May 15, 2015), http://foreignpolicy.com/2015/05/15/money-keeps-moving-toward-somalia-sometimes-in-suitcases/.

21 Emily Glazer, *Big Banks Shut Border Branches in Effort to Avoid Dirty Money*, WALL ST. J. (May 25, 2015, 8:07 PM), http://www.wsj.com/articles/big-banks-shut-border-branches-in-effort-to-avoid-dirty-money-1432598865.

22 Joffe-Block, *supra* note 4.

23 Letter from Senator John McCain and Senator Jeff Flake to Senator Richard Shelby, Chairman, U.S. Senate Comm. on Banking, Housing, and Urban Affairs (Feb. 10, 2015), http://www.flake.senate.gov/public/_cache/files/9423e710-dde4-4440-b682-7964a0e8d6c8/2-10-15-mccain-flake-letter-to-chairman-shelby-re-border-banking-1-.pdf.

24 *See* Press Release, Senator John McCain, Senator John McCain Submits Statement to Arizona State Senate Committee on Financial Institutions Hearing on Bank Closures Along Southern Border (Feb. 4, 2015), http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=80be396d-0964-460d-a870-123ca0efe94b.

upon other businesses and individuals, spreading the risk of money laundering.

Overseas banks worry about having too many cash-intensive business clients.[25] For example, for fear of losing their connections to the U.S. banking industry, Mexican banks have sharply limited the amount of cash deposits they will accept from customers.[26] If customers are depositing too much money in cash, the bank itself is seen as high-risk for money laundering and loses its access to the global financial system.[27]

Mexico has seen an epidemic of cash-heavy businesses losing their bank accounts.[28] Some businesses in Mexico described opening strings of accounts at different banks in order to disguise cash deposits.[29] One business owner told the Associated Press that he scattered dollar deposits among "something like 10 banks" after Bank of America closed his original account.[30] By forcing legitimate businesses to structure holdings and disguise cash flows, it becomes far harder to spot criminal networks doing the same thing.

Regulatory pressure leads to serious unintended consequences, including forcing banks out of high-risk regions, forcing businesses to disguise cash holdings, and causing an overall increase in cash transactions and the use of underground networks to transfer funds. In this way, regulators have unintentionally made it harder to catch financial crimes, increased opportunities for money laundering, and strengthened criminal networks.

V. WHERE'S THE COST-BENEFIT ANALYSIS?

To achieve an optimal regulatory regime, legal scholars have advocated that regulators conduct cost-benefit analyses of the purported benefits of regulations against alternative options. Without such an analysis, regulations are at risk of being "unsuitable" and "burdensome."[31]

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25 *See id.* (noting banks' comments that "cash-intensive accounts receive more scrutiny due to their perceived risk").

26 Elliot Spagat, *Dollars Can Be a Dirty Word at Banks on US-Mexico Border*, HOUS. CHRON. (Mar. 7, 2015), http://www.houstonchronicle.com/news/nation-world/world/article/Dollars-can-be-a-dirty-word-at-banks-on-US-Mexico-6121482.php.

27 *See id.*

28 *Id.*; Jude Joffe-Block, *Border Businesses Lose Bank Accounts Amid Money-Laundering Fears*, NPR (Jan. 4, 2015, 7:46 AM), http://www.npr.org/2015/01/04/374582727/border-businesses-lose-bank-accounts-amid-money-laundering-fears.

29 *See* Spagat, *supra* note 26.

30 *Id.*

31 Mahmood Bagheri & Chizu Nakajima, *Optimal Level of Financial Regulation Under the GATS: A Regulatory Competition and Cooperation Framework for Capital*

As Justice Stephen Breyer once warned, when agencies "carr[y] single-minded pursuit of a single goal too far" their actions tend to "bring about more harm than good."[32]

Here, the goals of the regulators are undeniably noble: to prevent criminals from committing crimes through financial institutions. But as regulators continue to rely on punishing banks for not meeting their standards and constricting access to banking as a quick solution to the money-laundering and terrorist-financing problems, their actions actually result in more harm than good.[33]

Legal scholars have long advocated the use of a cost-benefit analysis to prevent this absurd situation. By requiring regulators to perform a qualitative and quantitative assessment of the costs and benefits of their action, regulators can objectively view the impact of their action and "develop a more individualized assessment of whether the regulation" actually helps or hurts the public.[34] A regulatory action should not be undertaken "unless the potential benefits to society for the regulation outweigh the potential costs to the society."[35]

When banks spend an enormous portion of their budget on compliance, this money is no longer available for the core business of banking—providing loans and services to customers. The cost of compliance is passed on to customers in higher fees and more onerous loan rates, which in turn hampers economic growth and hinders the creation and growth of new businesses. Ironically, the most at-risk communities—places like Somalia and the Mexican border—are the ones that find access to banking and the ability to grow a business cut off.[36] *The Los Angeles*

Adequacy and Disclosure of Information, 5 J. INT'L ECON. L. 507, 510 (2002). *See generally id.* (discussing methods to achieve optimal level of financial regulation).

32 STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993).

33 For an additional example of regulatory overreach resulting in harmful consequences, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 702–03 (1999) (new extensive safeguards against terrorism imposed after the 1996 crash of TWA flight 800—hastily proposed and implemented despite no indication that the crash resulted from terrorism—resulted in direct costs of $400 million to taxpayers and actually cost, rather than saved, more lives).

34 Robert W. Hahn, *The Economic Analysis of Regulation: A Response to Critics*, 71 U. CHI. L. REV. 1021, 1031 (2004); *see also id.* at 1031–41 (responding to criticisms of cost-benefit studies on government Regulatory Impact Analyses). *See generally* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002) (arguing in favor of cost-benefit analyses of regulations).

35 Exec. Order No. 12,291, 3 C.F.R. 127 (1982), revoked by Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1994), reprinted as amended in 5 U.S.C. § 601 (2012).

36 Lanier Saperstein & Geoffrey Sant, *Account Closed: How Bank 'De-Risking' Hurts Legitimate Customers*, WALL ST. J. (Aug. 12, 2015, 6:38 PM), http://www.wsj.com/articles/account-closed-how-bank-de-risking-hurts-legitimate-customers-1439419093.

Times quoted an aid worker for Somali immigrants as stating that "people are not going to eat" due to the ending of bank transfers to Somalia.[37] Oxfam International stated in a press release earlier this year that three million Somalis may starve, blaming "bank account closures that have been largely driven by government regulation."[38]

Last year, a report by the House Committee on Oversight and Government Reform revealed that the Department of Justice was attempting to "choke[] off" legitimate companies and businesses considered "high-risk" or otherwise objectionable, despite the fact that they are legal businesses.[39] The report noted that senior government officials pressured banks to deny services to money-service businesses because the money-service industry was considered "high-risk."[40] The staff report noted that the regulators' delineation of high-risk businesses "had no articulated rationale" and was based on "spurious claims."[41] Even fellow regulators recognized that Operation Choke Point incentivized banks to act on "perceived regulatory risk, rather than in response to an assessment of the actual risk of illicit activity."[42]

The regulatory crackdown also propels the trend towards "too-big-to-fail" banks. After all, smaller banks lack the economy of scale needed to implement massive anti–money laundering programs. In addition, increased regulation fragments the global financial system by denying banks in some regions access to other regions.

U.S. regulators appear to assume that a massive increase in compliance spending by banks will reduce financial crime without any negative side effects. In fact, spending on safety always involves trade-offs. To fight underage drinking, one could force bars to spend a large portion of their operating budget on checking customer IDs. Yet the trade-offs would be increased prices and enormous financial barriers to entry for new businesses. It is also unclear whether underage drinking would

37 E. Scott Reckard & Ronald D. White, *Money Transfers Cut Off to Somalia*, L.A. TIMES (Feb. 5, 2015, 6:27 PM), http://www.latimes.com/business/la-fi-merchants-bank-somalia-20150206-story.html.

38 Press Release, Oxfam Int'l, As the Cycle of Crisis Continues in Somalia, Vital Remittance Pipelines Risk Being Cut (Feb. 19, 2015), https://www.oxfam.org/en/pressroom/pressreleases/2015-02-19/cycle-crisis-continues-somalia-vital-remittance-pipelines-risk.

39 *See* STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., FEDERAL DEPOSIT INSURANCE CORPORATION'S INVOLVEMENT IN "OPERATION CHOKE POINT" 3–4 (Comm. Print 2014), https://oversight.house.gov/wp-content/uploads/2014/12/Staff-Report-FDIC-and-Operation-Choke-Point-12-8-2014.pdf (describing the standards used by FDIC to identify high-risk merchants).

40 *Id.* at 12–17.

41 *Id.* at 6–7.

42 *Id.* at 20.

actually be curbed. The same trade-offs occur when regulators require banks to spend massive amounts on investigating customers.

There is only one sure way to completely eliminate the risk of banks being misused for money laundering or terrorist financing activity: end banking activity. Somewhere between the two extremes of closing banks and giving banks free reign is the optimal level of banking regulation. Yet regulators have not yet pinned down this optimal point, and as the Banamex USA example illustrates, the regulators appear to have drifted too far to one extreme.

CONCLUSION

Banks are subject to new rules and ever-increasing compliance standards, including new benchmarks to evaluate the "adequacy and robustness" of their monitoring systems.[43] Bank executives have even been held personally liable for compliance failures.[44] Yet, as the massive new compliance costs continue to pile upon banks, no analysis has been done to determine whether their efforts are effective, and whether the benefits, if any, are worth the cost.

It is natural for bank regulators—who focus almost exclusively on fighting financial crimes—to overvalue this fight and to undervalue the resulting financial and humanitarian harms. It is also natural for them to assume that increased bank spending on compliance must always be a good thing. Their perspective is understandable. Yet before regulators impose policy choices upon banks, they should have a valid basis for doing so. Before regulators push "higher" standards and increased spending upon banks, they should analyze whether those efforts actually reduce financial crime, and if so, whether that benefit justifies the costs.

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43 Benjamin M. Lawsky, Superintendent of Fin. Servs., N.Y. Dep't of Fin. Servs., Financial Federalism: The Catalytic Role of State Regulators in a Post-Financial Crisis World (Feb. 25, 2015), http://www.dfs.ny.gov/about/speeches/sp150225.htm.

44 *See, e.g.*, Assessment of Civil Money Penalty, Thomas E. Haider, No. 2014-08 (Dep't of the Treasury Dec. 18, 2014) (assessment of civil money penalty by the Financial Crimes Enforcement Network (FinCEN)), https://www.fincen.gov/news_room/ea/files/Haider_Assessment.pdf (federal regulators imposed a $1 million fine on the Chief Compliance Officer of MoneyGram for his failure to establish and implement an effective anti–money laundering program and to report suspicious activity as required under the Bank Secrecy Act); Complaint, U.S. Dep't of the Treasury v. Haider, No. 14 CV 9987 (S.D.N.Y. Dec. 18, 2014) (seeking to enforce the civil money penalty and to enjoin Mr. Haider from employment in the financial industry); *see also* Written Agreement Between Fin. Indus. Regulatory Auth. (FINRA) and Brown Brothers Harriman & Co., No. 2013035821404 (Feb. 4, 2014) (letter of acceptance, waiver, and consent), http://www.frank-cs.org/cms/pdfs/FINRA/FINRA_BBH_Action_5.2.14.pdf (Chief Compliance Officer of a broker-dealer institution was penalized for failing to adequately implement a monitoring program to detect and flag suspicious penny stock transactions).

CASE COMMENT

CONFUSING CLARITY: THE PREGNANCY DISCRIMINATION ACT AFTER *YOUNG V. UPS, INC.*

*Jessica M. Bretl**

"Our task is to clarify the law—not to muddy the waters . . . ."
—Justice Antonin Scalia[1]

INTRODUCTION

On March 25, 2015, the Supreme Court issued an opinion in *Young v. UPS, Inc.*[2]—the most recent case in the Court's pregnancy discrimination jurisprudence. *Young* focused on an interpretation of one clause of the Pregnancy Discrimination Act (PDA) and how that interpretation would shape claims of employment discrimination by pregnant employees seeking work accommodations. This Comment argues that the majority opinion in *Young* did not clarify, but only muddied the waters: the *Young* framework presents challenges for the lower courts tasked with applying the framework and creates uncertainty for future pregnancy discrimination litigation.

Part I of this Comment provides background on the PDA and describes the Court's approach to pregnancy discrimination prior to *Young*. Part II summarizes the facts and procedural history of the case, and Part III explains the majority opinion by Justice Breyer. Part IV analyzes three main weaknesses in the majority's argument: (i) the uncertainty and problems resulting from the Court's new framework, (ii) the uncertainty surrounding how to handle Equal Employment Opportunity Commission (EEOC) guidelines, and (iii) the confusion that will result from the Court's failure to address new statutory changes. Part IV then concedes the major strengths of the Court's argument: (i) consistency with respect to "most-favored-nation" status for employee accommodations, and (ii) the Court's clear application of rules of statutory interpretation.

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1 United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting).

2 135 S. Ct. 1338 (2015).

I. BACKGROUND: *GENERAL ELECTRIC CO. V. GILBERT* AND THE PDA

In 1964, Congress passed the Civil Rights Act,[3] and in Title VII addressed employment discrimination. Section 703(a)(1) states that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin."[4] Thus, Title VII did not expressly mention pregnancy, and there was extensive controversy in the 1970s over whether sex discrimination included pregnancy discrimination.[5]

In *General Electric Co. v. Gilbert*,[6] the Supreme Court held that discrimination based on pregnancy does not necessarily constitute unlawful sex discrimination and is not sex discrimination on its face.[7] At issue in *Gilbert* was General Electric's disability plan for its employees, which paid weekly non-occupational sickness and accident benefits, but excluded disabilities arising from pregnancy.[8] A class of female employees from a General Electric plant in Virginia argued that the exclusion of pregnancy from the disability plan constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[9] Each employee presented a claim for disability benefits under the plan to cover the employee's absence from work due to pregnancy.[10] These claims were denied on the ground that the plan did not provide disability-benefit payments for any absence due to pregnancy.[11] The women filed complaints with the Equal Employment Opportunity Commission and then filed suit.[12]

In *Gilbert*, the Court overturned the district court and the Fourth Circuit, who had both reasoned that Title VII required equal opportunities for men and women and that the cost-differential resulting from adding pregnancy to the disabilities plan was not a defense to sex discrimination.[13] The *Gilbert* Court also said that pregnancy discrimination was not per se discrimination based on sex.[14] While acknowledging that pregnancy was, of course, applicable only to women, the Court stated that pregnancy was

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3 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2012)).

4 *Id.* § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)) (emphasis added).

5 P. DANIEL WILLIAMS, THE PREGNANCY DISCRIMINATION ACT: A GUIDE FOR PLAINTIFF EMPLOYMENT LAWYERS 3 (2011).

6 429 U.S. 125 (1976).

7 *Id.* at 127–28.

8 *Id.* at 127.

9 *Id.* at 127–28.

10 *Id.* at 128–29.

11 *Id.* at 129.

12 *Id.*

13 *Id.* at 130–32.

14 *Id.* at 136.

still significantly different than the diseases the plan typically covered.[15] The Court even emphasized the district court's finding that pregnancy "is not a 'disease' at all" but "a voluntarily undertaken and desired condition."[16] Therefore, the Court found that there was no reason to conclude the exclusion of pregnancy was simply a pretext for sex-based discrimination.[17] The majority opinion further concluded that the concept of "discrimination" was recognized at the time Title VII was enacted as being associated with the Fourteenth Amendment, so when Congress made it unlawful for an employer to "discriminate . . . because of . . . sex . . . ," the Court would "not readily infer that it meant something different from what the concept of discrimination has traditionally meant."[18]

Then in 1978, Congress, spurred on by the controversy surrounding *Gilbert*,[19] amended Title VII with the Pregnancy Discrimination Act.[20] The PDA added new language to the definitions section of Title VII.[21] The first clause of the PDA states that Title VII's prohibition against sex discrimination applies to discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[22] The second clause says that employers must treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[23] In *Young v. UPS, Inc.*,[24] the Court addressed the issue of how to interpret this second clause of the PDA. The issue was whether the second clause of the PDA applies when an employer's policy "accommodates many, but not all, workers with nonpregnancy-related disabilities."[25]

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15 *Id.*

16 *Id.* (quoting Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 377 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 421 U.S. 125 (1976)).

17 *Id.*

18 *Id.* at 145 (citing Morton v. Mancari, 417 U.S. 535 (1974); then citing Ozawa v. United States, 260 U.S. 178 (1922)).

19 WILLIAMS, *supra* note 5, at v.

20 Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000 (2012)).

21 The definitions section of Title VII now states, in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (2012).

22 *Id.*

23 *Id.*

24 135 S. Ct. 1338 (2015).

25 *Id.* at 1344.

II. *YOUNG V. UPS, INC.*: SUMMARY OF THE FACTS AND PROCEDURAL HISTORY

The plaintiff, Peggy Young, was a part-time driver for defendant United Parcel Service, Inc. (UPS).[26] Her job was to pick up and deliver packages.[27] In 2006, Young became pregnant, and her doctor advised her that she should not lift certain weights: anything over twenty pounds during the first twenty weeks of pregnancy and anything over ten pounds thereafter.[28] UPS, however, required drivers to be able to lift packages weighing up to seventy pounds.[29] When informed of Young's restriction, UPS told Young that she could not work while under the lifting restriction.[30] Young was therefore forced to stay home without pay during her pregnancy, eventually losing her employee medical coverage.[31]

Young alleged that UPS accommodated other drivers "similar in their . . . inability to work."[32] UPS responded that the other accommodated drivers were "(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990."[33] UPS claimed that Young was not accommodated during her lifting restriction because she did not fall within those categories, and it treated her just like it would all other relevant persons.[34]

In 2007, Young filed a pregnancy discrimination charge with the EEOC.[35] The EEOC provided her with a right-to-sue letter, and she subsequently brought a federal lawsuit.[36] Young alleged "that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy" and also could establish a case of disparate treatment.[37] For her intentional discrimination claim, Young pointed to a statement made by a UPS manager saying while she was pregnant she was "too much of a liability" and could "not come back" until she "was no

26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.* (quoting Petitioner's Brief at 31, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4441528, at *31).
33 *Id.* These categories were referred to in general as the facially neutral category of "off-the-job injuries." *See id.* at 1349.
34 *Id.* (citing Brief for Respondent at 34, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 5464086, at *34).
35 *Id.* at 1346.
36 *Id.*
37 *Id.*

longer pregnant."[38] For her disparate treatment claim, Young pointed to the fact that UPS had a light-duty-for-injury policy with respect to several other persons (including the three categories described above) but not for pregnant workers.[39]

After discovery, UPS filed a motion for summary judgment.[40] The district court granted UPS's motion for summary judgment,[41] citing mainly that the people Young had compared herself to were too different to qualify as "similarly situated comparator[s]."[42] The Fourth Circuit affirmed, writing that UPS's policy was "pregnancy-blind," that the policy was "at least facially a 'neutral and legitimate business practice,' and was not motivated by animus toward pregnant women.[43] Interestingly, the Fourth Circuit noted that Young was more like an employee who had injured his back while lifting up his young child, or injured himself during off-the-job work as a volunteer firefighter, neither of whom would have been eligible for accommodations for lift restrictions at UPS.[44]

III. THE COURT'S INTERPRETATION OF THE SECOND CLAUSE

Justice Breyer's majority opinion focused almost entirely on how to interpret the second clause of the PDA, which provides that women affected by pregnancy shall be treated the same for employment purposes "as *other persons* not so affected but *similar in their ability or inability to work*."[45] The policy at issue in *Young* distinguished between pregnant and nonpregnant employees based on characteristics *not related* to pregnancy, specifically in this case, categorizing accommodated employees in a facially neutral category of "off-the-job injuries."[46]

Each side presented very different theories on how to interpret the second clause of the PDA. Young argued that the second clause of the PDA means that when an employer "accommodates only a subset of workers with disabling conditions," a court should find them in violation of Title VII if "'pregnant workers who are similar in the ability to work' do

38 *Id.* (quoting Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 20, Young v. UPS, Inc., No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011) (No. DKC 08 CV 2586), 2010 WL 10839226).

39 *Id.* at 1347 (citing Plaintiff's Memorandum, *supra* note 38, at 29).

40 *Id.* at 1346.

41 *Id.* at 1347.

42 *Id.* (alteration in original) (quoting *Young*, 2011 WL 665321, at *14).

43 *Id.* at 1347–48 (quoting Young v. UPS, Inc., 707 F.3d 437, 446 (4th Cir. 2013)). This argument sounds very similar to the argument Justice Alito espoused in his test, which would simply require employers to assert a neutral business reason for treating employees differently. *Id.* at 1359 (Alito, J., concurring).

44 *Id.* at 1348 (majority opinion) (quoting *Young*, 707 F. 3d at 448).

45 *Id.* (quoting 42 U.S.C. § 2000e(k) (2012)).

46 *Id.* at 1349.

not 'receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.'"[47] UPS argued that the second clause of the PDA does not add an additional requirement of employers other than to simply define sex discrimination to include pregnancy discrimination.[48] Under this interpretation, courts simply have to compare the accommodations provided to pregnant employees with the accommodations provided to others within a facially neutral category, like "off-the-job injuries."[49]

The Court found both Young's and UPS's arguments unpersuasive. The Court first argued that Young's approach was too broad and literal.[50] Young's interpretation turned solely on evidence that pregnant and nonpregnant workers were not treated the same, and the Court said such an interpretation could not stand.[51] The Court's main problem with Young's argument was that it reads the statute to grant to all pregnant employees a most-favored-nation status.[52] This means that if an employer provided any worker with an accommodation—including, for example, employees with particularly hazardous jobs—then the employer would have to give accommodations to all pregnant workers.[53] Furthermore, the Court

47 *Id.* at 1349 (alteration in original) (quoting Petitioner's Brief, *supra* note 32, at 28).

48 *Id.* (citing Brief for Respondent, *supra* note 34, at 25).

49 *Id.*

50 *Id.*

51 *Id.* Earlier in the Court's opinion, the Court laid out the framework for how to prove a disparate treatment claim. The Court said that a plaintiff could prove disparate treatment by showing "either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*." *Id.* at 1345. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court said the plaintiff must carry the initial burden of establishing a prima facie case of discrimination by showing:

> (i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Young, 135 S. Ct. at 1349 (quoting *McDonnell Douglas*, 411 U.S. at 802). The Court in *McDonnell Douglas* also stated that if a plaintiff makes the requisite showing, then the employer must have an opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class. *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). If the employer is able to articulate such a reason, the plaintiff then has the "opportunity to prove by preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination." *Id.* (alteration in original) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Therefore, the *McDonnell Douglas* framework governs disparate treatment claims.

52 *Young*, 135 S. Ct. at 1349; *see also infra* notes 97–101 and accompanying text.

53 *Young*, 135 S. Ct. at 1349–50.

doubted that Congress intended to grant such an unconditional preferred status to pregnant workers, because the second clause uses the open-ended term "other persons" and does not specify that employers treat pregnant women the "same" as "*any* other persons."[54]

The Court also rejected UPS's interpretation of the second clause. UPS simply read the second clause to define sex discrimination to include pregnancy discrimination.[55] The Court found that conclusion incorrect, as the first clause of the PDA already expressly amends Title VII's definitional provision to clarify that pregnancy discrimination counts as sex discrimination.[56] The Court used two arguments to debunk UPS's theory. First, the Court reasoned that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause' is rendered 'superfluous, void, or insignificant.'"[57] However, under UPS's interpretation, the second clause simply reiterates exactly what the first clause said, in contravention of this common canon of statutory interpretation. Second, the Court argued that UPS's interpretation would also fail to carry out an important congressional objective: overturning *Gilbert*.[58] In *California Federal Savings & Loan Ass'n v. Guerra*, the Court reasoned that the first clause of the PDA reflected congressional disapproval of the Court's reasoning in *Gilbert*, and the second clause was intended to overrule it by "illustrat[ing] how discrimination against pregnancy is to be remedied."[59] *Guerra* established that both clauses are needed to overrule *Gilbert*, and to read the second clause as merely a repetition of the first would ignore precedent and defeat the congressional objective of the PDA.

After dismissing both Young's and UPS's interpretations of the second clause of the PDA, the Court set forth its own interpretation. The Court laid out a framework for how a pregnant worker can succeed on a disparate treatment theory through direct evidence. The Court followed the *McDonnell Douglas* framework,[60] which requires a plaintiff to make a prima facie case of discrimination by "'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under' Title VII."[61] The Court noted that this showing is not onerous or burdensome, and does not require a showing

54 *Id.* at 1350.

55 *Id.* at 1352 (citing Brief for Respondent, *supra* note 34, at 25).

56 *Id.*

57 *Id.* (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

58 *Id.* at 1353. For an explanation of the Court's approach in *Gilbert*, see notes 6–18 and accompanying text.

59 479 U.S. 272, 285 (1987).

60 *See supra* note 51.

61 *Young*, 135 S. Ct. at 1354 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978)).

that those whom the employer favored and disfavored were similar in all but the protected ways.[62]

Thus, the Court suggested the following framework: First, a plaintiff must show she belongs to a protected class, then show she applied for an accommodation from her employer.[63] Next, she must show that the employer did not accommodate her, but did accommodate others "similar in their ability or inability to work."[64] Then, the employer has the burden of showing its refusal of an accommodation was justified because the employer relied "on 'legitimate, nondiscriminatory' reasons" for denying the accommodation.[65] If the employer succeeds, then the burden shifts back to the plaintiff to show that the employer's stated reasons are, in fact, pretextual.[66] This is the point in the framework at which the Court proposed a new standard. The Court said that, regarding the employer's stated reasons, a plaintiff could reach a jury by simply providing

> sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.
>
> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.[67]

This last part of the Court's framework, and the standards it sets forth, are what this Comment will focus on.

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The Court also noted that the employer's reason for rejection cannot be that it was simply more expensive or less convenient to add pregnant women to the class the employer accommodates. *Id.* The Court explained that, if such reasoning justified rejecting accommodations for pregnant women, then the employer in *Gilbert* could have succeeded. *Id.*

66 *Id.*

67 *Id.*

IV. ANALYSIS OF THE COURT'S OPINION IN *YOUNG*

A. Weaknesses

1. An Uncertain Framework

The framework set out by the Court directly above initially reads fairly clearly. However, when the Court applies this framework, the seeming clarity obscures into a vague and potentially subjective application. First, the Court initially states that Young could use the evidence that UPS had multiple policies for accommodating certain nonpregnant employees with lifting restrictions as evidence that UPS's reason not to similarly accommodate pregnant workers are "not sufficiently strong." [68] This reasoning is consistent with the Court's framework. However, the Court goes on to state that it will not consider whether UPS's reasons were sufficiently strong, but remands to the Fourth Circuit to make that determination.[69] This seems to contradict the Court's earlier statement that the three accommodations policies would show that UPS's reasons were "not sufficiently strong."[70] The Court's lack of clarity regarding what would qualify as "sufficiently strong" might cause problems for the lower court in determining what constitutes a sufficiently strong justification for the burden.

Second, the Court stated, "[t]he plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates *a large percentage* of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[71] However, the Court did not cite this language again when it applied its new framework to Young's case. The Court simply said that it would leave the lower court to determine if UPS's reasons were pretextual. This leaves open the question of whether the lower court should simply make a judgment call as to what constitutes "a large percentage" to create a burden. Does large percentage mean 51% or 75%? What is sufficiently large for the plaintiff to establish an issue of material fact? Such an ambiguous standard could lead to subjective calls by lower courts when deciding whether the percentage is large enough to tip the scales in the plaintiff's direction. The Court does not provide enough guidance to lead the lower courts to determine what the Court means when it says "large percentage."

An additional problem with the Court's test is that it seems to come out of thin air: there is no clear basis for these new standards that the Court

68 *Id.*
69 *Id.* at 1356.
70 *Id.* at 1354.
71 *Id.* (emphasis added).

creates. Justice Rehnquist once famously analyzed another standard apparently self-created by the Court by saying: "The Court's conclusion . . . apparently comes out of thin air. . . . [T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices . . . ."[72] Subjective application of the new phrases the Court proposes in *Young* could lead to confusion, not clarity, when lower courts interpret future pregnancy discrimination cases under the PDA.

2. What To Do with the EEOC Guidelines

Young began her claim in July 2007 by filing a pregnancy discrimination charge with the EEOC, and in September 2008 they provided her with a right-to-sue letter.[73] Young's actions were consistent with her obligation, under Title VII, to exhaust administrative routes before filing suit against her employer.[74] Under Title VII, claimants must file with the EEOC within 180 days from the act of discrimination.[75] The EEOC is then responsible for investigating the alleged act of discrimination.[76] Then, the claimant must wait for at least six months before receiving a ninety-day notice of a right to sue, and then must file suit within ninety days.[77] The EEOC also issues general guidelines, which the Court in *Young* declined to follow.[78]

The EEOC issued guidance before Congress passed the PDA, stating that, "'[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities' and . . . 'benefits and privileges . . . shall be applied to disability due to pregnancy . . . on the same . . . conditions as they are applied to other temporary disabilities.'"[79] After the PDA was passed, the EEOC issued guidance consistent with earlier statements saying, "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."[80] Even recently, in July 2014, the EEOC put out another guideline clarifying any ambiguity in its position, saying, "[a]n employer may not refuse to treat a pregnant worker the same

72 Craig v. Boren, 429 U.S. 190, 220–21 (1976) (Rehnquist, J., dissenting).

73 *Young*, 135 S. Ct. at 1346.

74 Under Title VII, an employer is defined as a person or entity engaged in an industry affecting commerce that has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year. 42 U.S.C. § 2000e-5 (2012). For more information on the procedural requirements for filing a pregnancy discrimination claim, see WILLIAMS, *supra* note 5, at 4–5.

75 42 U.S.C. § 2000e-5(e)(1).

76 *Id.* § 2000e-5(b).

77 *Id.* § 2000e–5(f)(1).

78 *Young*, 135 S. Ct. at 1352.

79 *Id.* at 1351 (alteration in original) (quoting 29 C.F.R. § 1604.10(b) (1975)).

80 *Id.* (alteration in original) (quoting 29 C.F.R. app. § 1604 (1979)).

as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations . . . ."[81] All of these guidelines were noted by the majority opinion in *Young*. However, the Court went on to reject the EEOC guidelines.[82]

The Solicitor General pointed out that the Court has long held that "'the rulings, interpretations and opinions' of an agency charged with the mission of enforcing a particular statute, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[83] However, the Court ignored this precedent and disregarded the EEOC's clear guidance on this issue. The Court cited timing, consistency, and thoroughness of consideration as reasons to deny the EEOC guidelines.[84] The majority claimed that the 2014 guideline had been put forth only after the Court had granted certiorari in *Young*.[85] The Court seemed to take this timing issue as dispositive, and claimed that the 2014 guideline takes a position on which the EEOC had previously been silent.[86]

The EEOC guidelines seem perfectly clear: treating pregnant workers less favorably than other similar disabled workers is impermissible. It is hard to see why the Court thought the most specific recent guideline was suspect, just because it was recent. What better explains the Court's dismissal of the EEOC guidelines is that the guidelines do not address the most-favored-nation status.[87] The main focus of the majority opinion is to reject the most-favored-nation status and—without any prior guidance from the EEOC to the contrary—the Court was assuming the EEOC guidelines would support most-favored-nation status for pregnant employees. However, the Solicitor General's point about precedent cautions the Court against dismissing the EEOC guidelines too quickly. The agency charged with enforcing a statute should get to weigh in on how that statute is interpreted, and the content of the EEOC guidelines should be carefully considered by the Court—not quickly dismissed simply because of their release date.

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81 *Id.* (alteration in original) (quoting 2 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 626-I(A)(5), p. 626:0009 (July 2014)). This 2014 guideline especially seems to favor Young's claim.

82 *Id.* at 1351–52.

83 *Id.* at 1351 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Young*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536939, at *26).

84 *Id.* at 1352.

85 *Id.*

86 *Id.*

87 *Id.*

Another reason that the Court should not have rejected the EEOC guidelines in *Young* is that the PDA was widely accepted as overruling *Gilbert*, and *Gilbert* also ignored the EEOC guidelines. In *Gilbert*, the Court rejected the plaintiff's reliance on EEOC guidelines that stated (i) it was unlawful to discriminate between men and women with regard to fringe benefits, and (ii) pregnancy related conditions must be covered.[88] In his dissent, Justice Brennan focused on the majority's inattention to the 1972 EEOC guidelines.[89] He argued that it is prudent for Congress to leave complex economic and social matters of interpreting Title VII to the EEOC.[90] He cited prior Title VII decisions that regarded EEOC guidelines as persuasive, and urged that the guidelines should be given great deference.[91] Justice Brennan even noted that the EEOC guidelines were consistent with holdings made by "every other Western industrial country."[92]

Thus the majority in *Young* dismissed the EEOC guidelines too quickly and followed the same track as the majority in *Gilbert*. As Justice Brennan pointed out in his *Gilbert* dissent, the Court should have given the EEOC guidelines more deference.

3. Uncertainty Looking Forward

By its own admittance, the Court was concerned about uncertainty created by other legal authority, especially a statutory change that occurred after Young's case first began: "In 2008, Congress expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities."[93] The Court mentioned that it was aware of this change, but stated it would express no view on this statutory change in this opinion.[94] The Court seems to have simply punted this issue to decide later.

However, the statutory change may be quite significant for future pregnancy discrimination jurisprudence; the expanded definition now

88 Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140–41 (1976) (quoting 29 C.F.R. § 1604.10(b) (1975)); *id.* at 141 n.19 (quoting 29 C.F.R. § 1604.9(b)).

89 *Id.* at 155–56 (Brennan, J., dissenting).

90 *Id.* at 155.

91 *Id.* at 155–56 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring)).

92 *Id.* at 158 (citing OFFICE OF RESEARCH & STATISTICS, SOC. SEC. ADMIN., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD, 1971, at ix, xviii, xix (1971)).

93 Young v. UPS, Inc., 135 S. Ct. 1338, 1348 (2015) (alteration in original) (quoting 42 U.S.C. §§ 12101(1)–(2) (2012)).

94 *Id.*

makes Young's claim covered not only by the PDA, but also the Americans with Disabilities Act (ADA). Before, the ADA did not consider normal pregnancies disabilities.[95] Therefore, only if there were something unusual about the pregnancy would a plaintiff be allowed to take advantage of the ADA.[96] As a result of the expanded definition of "disability," not only will abnormal pregnancy-related ailments be covered by the ADA, but so too will ailments related to normal pregnancy. By choosing not to address the implications of the expanded ADA, the Court's approach in *Young* could lead to more litigation, as plaintiffs attempt to apply the Court's new standard in an ADA case.

B. Strengths

1. "Most-Favored-Nation" Status Consistency and Clarity

A major strength of the majority opinion is its clear approach to the issue of "most-favored-nation" status for pregnant workers. The majority opinion is consistent and clear in its holding that no possible reading of the second clause of the Pregnancy Discrimination Act will lead to a most-favored-nation status for pregnant employees. The majority, concurrence, and dissent all agreed on this point. In his concurrence, Justice Alito stated that he "cannot accept this 'most favored employee' interpretation."[97] Justice Scalia, in his dissent, gave an excellent description of what it would mean if the second clause were interpreted as granting a most-favored-nation status to pregnant workers:

> If Boeing offered chauffeurs to injured directors, it would have to offer chauffeurs to pregnant mechanics. And if Disney paid pensions to workers who can no longer work because of old age, it would have to pay pensions to workers who can no longer work because of childbirth. It is implausible that Title VII, which elsewhere creates guarantees of *equal* treatment, here alone creates a guarantee of *favored* treatment.[98]

Justice Scalia concluded that the clause prohibits employers from distinguishing between pregnant women and others of similar ability or inability *because of pregnancy*, and that means that pregnant women are simply entitled to accommodations on the same terms as other workers.[99] He used UPS's accommodation for drivers who have lost their certifications as an example and said that a pregnant woman who lost her certification gets the benefit, just like any other worker who lost their

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95 *See e.g.*, Tysinger v. Police Dep't, 463 F.3d 569, 578 (6th Cir. 2006) (stating that pregnancy alone is not a disability).

96 *See* WILLIAMS, *supra* note 5, at 340.

97 *Young*, 135 S. Ct. at 1358 (Alito, J., concurring).

98 *Id.* at 1362 (Scalia, J., dissenting).

99 *Id.*

certification, which certainly looks like treating those who are pregnant the *same*.[100] He therefore concluded that the clause prohibits treating a worker differently because of a protected trait, and does not prohibit employers from treating workers differently for reasons that have nothing to do with protected traits, just as UPS did here.[101]

2. Clarity in Statutory Interpretation

Another strength of the majority opinion is its use of canons of statutory interpretation. The majority reasons that the second clause of the PDA cannot simply be read to be restating its first clause. The first clause expressly states that when Title VII prohibits discrimination "because of sex," that statutory phrase includes pregnancy. If the second clause were simply repeating that prohibition, the second clause would be superfluous. The Court has long held that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause . . . shall be superfluous, void, or insignificant."[102] Justice Scalia's dissent argued that the second clause is not superfluous, but clarifying.[103] The dissent seemed to think that the second clause simply makes "plain" that it would be unlawful to disfavor pregnant women relative to other workers of similar inability to work.[104] However, as the majority pointed out, *McDonnell Douglas* already made clear that courts should consider how a plaintiff was treated relative to other persons of the same qualifications.[105] In short, the dissent's interpretation of the second clause is superfluous, given the Court's approach in *McDonnell Douglas*. Thus, in interpreting the second clause, the dissent is searching for clarification where none is needed. The majority is more persuasive in arguing that lack of superfluous meaning is the better approach to interpreting the second clause. This reading is clearer for future courts to apply and thus turns out to be more clarifying than the "clarifying" interpretation proffered by the dissent.

CONCLUSION

The Court's approach in *Young* creates uncertainty about the application of the PDA, which will obscure future pregnancy discrimination litigation in lower courts. It is still unclear how the Fourth Circuit will evaluate standards like "sufficiently strong" justifications by

100 *Id.*

101 *Id.* at 1363.

102 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)).

103 *Young*, 135 S. Ct. at 1363 (Scalia, J., dissenting).

104 *Id.*

105 *Id.* at 1352 (majority opinion) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

the state and accommodations for "a large percentage" of pregnant and nonpregnant workers. These two new phrases might lead to subjective interpretations by lower courts, resulting in varying sets of rules among the circuits. The Court was also too dismissive of the EEOC guidelines, and a more careful consideration of those guidelines would have helped the Court maintain consistency with precedent. Finally, the Court's opinion sidestepped the possible confusion that new statutory changes will have on future pregnancy discrimination cases. In short, the new rule proposed by the Court in *Young* confuses, rather than clarifies. With its remand to the Fourth Circuit, time will soon tell if lower courts will be confused by the Court's new rule, or if it will clarify, rather than obscure, application of the Pregnancy Discrimination Act to this and future cases.

ESSAYS

A CRITIQUE OF *HOBBY LOBBY* AND THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGION

Samuel J. Levine∗

INTRODUCTION

Over the past several decades, the United States Supreme Court has demonstrated an increasing refusal to engage in a close evaluation of the religious nature of Free Exercise and Establishment Clause[1] claims, instead deferring to adherents' characterizations of the substance and significance of a religious practice or belief.[2] The Supreme Court's hands-off approach, which it has justified on both constitutional and practical grounds, has

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1 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (stating that interpreting the propriety of certain religious beliefs puts the Court "in a role that [it was] never intended to play"); United States v. Lee, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976) (noting the "error" of "delv[ing] into . . . church constitutional provisions"); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451 (1969) (refusing to "engage in the forbidden process of interpreting . . . church doctrine"); United States v. Ballard, 322 U.S. 78, 87 (1944) (avoiding the "forbidden domain" of evaluating religious doctrine). *See generally* Symposium, *The Supreme Court's Hands-Off Approach to Religious Doctrine*, 84 NOTRE DAME L. REV. 793 (2009).

attracted considerable scholarly attention, producing a substantial and growing body of literature assessing and, at times, critiquing the Court's approach.[3]

3 *See, e.g.*, Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807 (2009); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009) [hereinafter Garnett, *A Hands-Off Approach to Religious Doctrine*]; Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004) [hereinafter Garnett, *Development of Religious Doctrine*]; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998) [hereinafter Greenawalt, *Religious Property*]; Kent Greenawalt, *Hands Off: When and About What*, 84 NOTRE DAME L. REV. 913 (2009) [hereinafter Greenawalt, *Hands Off*]; Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141 (2015); Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) [hereinafter Helfand, *Litigating Religion*]; Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865 (2009); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 391; Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998); Samuel J. Levine, Hosanna-Tabor *and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court's Hands-Off Approach to Religious Doctrine*, 106 NW. U. L. REV. COLLOQUY 120 (2011) [hereinafter Levine, Hosanna-Tabor]; Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997) [hereinafter Levine, *Rethinking the Supreme Court's Hands-Off Approach*]; Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009) [hereinafter Levine, *The Supreme Court's Hands-Off Approach: An Introduction*]; Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 PEPP. L. REV. 1013 (2014); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Edward C. Lyons, *Causation and Complicity: The HHS Contraceptive Mandate and Asymmetrical Burdens on Free Exercise*, 55 S. TEX. L. REV. 229 (2013); William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71 [hereinafter Marshall, *Bad Statutes*]; William P. Marshall, Smith, Ballard, *and the Religious Inquiry Exception to the Criminal Law*, 44 TEXAS TECH L. REV. 239 (2011) [hereinafter Marshall, *Religious Inquiry*]; Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887 (2009); Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2010); Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381 (2008); Alex Tallchief Skibine, *Culture Talk or Culture War in*

Although *Burwell v. Hobby Lobby Stores, Inc.*,[4] is widely viewed as a landmark case on a number of grounds,[5] an important but somewhat overlooked point of contention between the majority opinion and the primary dissenting opinion in *Hobby Lobby* revolves around the application of the hands-off approach.[6] Specifically, writing for the majority, Justice Alito insisted that the Court must defer to the plaintiffs' characterization of both the nature and the degree of the burden that would be placed on their religious exercise if they were required, under the Affordable Care Act

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Federal Indian Law?, 45 TULSA L. REV. 89 (2009); Priscilla J. Smith, *Who Decides Conscience? RFRA's Catch-22*, 22 J.L. & POL'Y 727 (2014); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011); Mayu Miyashita, Comment, City of Boerne v. Flores *and Its Impact on Prisoners' Religious Freedom*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 519 (1999); *see also* Nat'l Spiritual Assembly of the Bahá'ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Bahá'ís of the U.S., Inc., 628 F.3d 837, 846 n.2 (7th Cir. 2010) (referring to "the so-called 'hands-off' doctrine in disputes over religious property"); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) (referring to "[t]he ministerial exception, and the hands-off approach more generally").

4 134 S. Ct. 2751 (2014).

5 *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); Trevor Burrus, *From Status to Contract to Status:* Burwell v. Hobby Lobby *and the Primitivism of Politics*, 9 N.Y.U. J.L. & LIBERTY 60 (2015); Leslie C. Griffin, Hobby Lobby*: The Crafty Case that Threatens Women's Rights and Religious Freedom*, 42 HASTINGS CONST. L.Q. 641 (2015); Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47 (2015); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1 (2014); Lupu, *supra* note 3; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Eric Rassbach, *Is* Hobby Lobby *Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625 (2015); David B. Schwartz, *The NLRA's Religious Exemption in a Post-*Hobby Lobby *World: Current Status, Future Difficulties, and a Proposed Solution*, 30 A.B.A. J. LAB. & EMP. L. 227 (2015); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions After* Hobby Lobby, 82 U. CHI. L. REV. (forthcoming 2015), http://ssrn.com/abstract=2496218; Amy J. Sepinwall, *Corporate Piety and Impropriety:* Hobby Lobby*'s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015); Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015); Symposium, *Issues of Reproductive Rights: Life, Liberty & the Pursuit of Policy*, 28 J.L. & HEALTH 1 (2015); Symposium, *Religious Accommodation in the Age of Civil Rights*, 38 HARV. J.L. & GENDER vii (2015); Symposium, *Religious Accommodation in the Age of Civil Rights*, 9 HARV. L. & POL'Y REV. 1 (2015); Thad Eagles, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589 (2015).

6 For examples of scholarship that have discussed the relevance of the Court's hands-off approach in the context of the *Hobby Lobby* case, see, for example, Lupu, *supra* note 3; Lyons, *supra* note 3; Marshall, *Bad Statutes*, *supra* note 3; Smith, *supra* note 3.

(ACA),[7] to provide employees with health insurance that includes access to certain forms of contraception.[8] According to Justice Alito, the hands-off approach precludes the Court from inquiring into the accuracy or plausibility of the plaintiffs' contention that complying with the ACA would impose a substantial burden on their religious practice.[9] Writing for the dissenters, Justice Ginsburg offered a sharply contrasting view, concluding that Court need not accept the plaintiffs' assertion that providing such coverage would place a substantial burden on their exercise of religion.[10] Instead, Justice Ginsburg concluded that Hobby Lobby's connection to the use of contraceptives by its employees is too attenuated to trigger an exemption from the requirement that it provide such coverage.[11]

A close look at the majority and dissenting opinions seems to suggest that Justice Alito and Justice Ginsburg both relied on a hands-off approach to religion, but at the same time they reached very different conclusions. The sharp differences between Justices Alito and Ginsburg may thus be a further indication that, in addition to its other drawbacks,[12] the Court's hands-off approach is unwise and unworkable on its own terms, as its

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7 Patient Protection and Affordable Care Act of 2010 § 1001(5), 42 U.S.C. § 300gg-13(a)(4) (2012).

8 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2777–79 (2014).

9 *See id.* at 2778–79.

10 *See id.* at 2798–99 (Ginsburg, J., dissenting).

11 *See id.* at 2799.

12 *See, e.g.*, Garnett, *A Hands-Off Approach to Religious Doctrine*, *supra* note 3 (examining the scope of the hands-off approach); Garnett, *Development of Religious Doctrine*, *supra* note 3 (arguing that governments are necessarily interested in and involved with religious claims and content); Goldstein, *supra* note 3, at 501 ("[I]t is incoherent to speak of a general prohibition on judicial examination of religious questions."); Greenawalt, *Religious Property*, *supra* note 3 (examining problems resulting from the Court's hands-off approach to conflicts over religious property); Greenawalt, *Hands Off*, *supra* note 3, at 913 (noting the breadth of issues affected by the Court's hands-off approach); Helfand, *Litigating Religion*, *supra* note 3 (arguing that the Court's hands-off approach may unjustly deprive litigants of a forum for adjudicating religious claims); Levine, Hosanna-Tabor, *supra* note 3 (examining *Hosanna-Tabor* as an opportunity for the Court to revise the hands-off approach); Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3, at 86 (arguing that the hands-off approach "may lead to a number of disturbing results, some of which have already evidenced themselves in Supreme Court decisions in both Free Exercise and Establishment Clause cases"); Levine, *The Supreme Court's Hands-Off Approach: An Introduction*, *supra* note 3 (describing critiques of the hands-off approach); Lund, *supra* note 3 (arguing that religious-question cases often involve the kinds of temporal and empirical issues that courts typically adjudicate); Marshall, *Religious Inquiry*, *supra* note 3 (describing difficulties with the hands-off approach when considered in the context of the Court's First Amendment jurisprudence); Smith, *supra* note 3 (arguing that the Court's hands-off approach will lead to inconsistent outcomes in religious exercise cases).

meaning and application remain far from clear. Moreover, the continued implementation of a hands-off approach will be particularly challenging with the increasing emergence of new health care technologies and the continuing diversity of religious practice in the United States. Thus, as *Hobby Lobby* demonstrates, rather than providing a mechanism for judges to resolve cases involving complex issues of law and religion, the hands-off approach serves to exacerbate the difficulties and differences that divide judges in adjudicating religious claims.

Part I of this Essay provides a brief overview for analyzing the Supreme Court's hands-off approach to religious doctrine. Specifically, this Part presents a summary of problems posed by the hands-off approach, followed by a brief taxonomy of different forms of judicial inquiry into religion. This Part aims to clarify which forms of inquiry are permissible—and typically necessary—for adjudication of a case involving a religious claim, and which forms of inquiry are precluded under the hands-off doctrine. Part II of this Essay applies the hands-off framework to the *Hobby Lobby* decision, considering the taxonomy of forms of judicial inquiry into religion in the context of both Justice Alito's majority opinion and Justice Ginsburg's dissenting opinion. This Part finds that while Justice Alito closely followed Supreme Court precedent regarding the hands-off doctrine, Justice Ginsburg seems to have departed significantly from central aspects of the Court's previous decisions.

Accordingly, Part III of this Essay takes a closer look at Justice Ginsburg's dissenting opinion, finding that her analysis may suggest a reformulated hands-off approach that, in some ways, extends the degree of deference afforded to the claims of religious adherents. Specifically, Justice Ginsburg seems to revive the view of Justice Robert Jackson, who argued, in a 1944 dissenting opinion, that judges should not question the sincerity of a religious claim.[13] At the same time, however, Justice Ginsburg's approach likewise departs from Supreme Court precedent in allowing judges to question a claimant's characterization of a law or regulation as placing a substantial burden on the claimant's religious exercise. As a result, Justice Ginsburg's approach would appear to place additional limitations on the exercise of religious freedoms, beyond those presented by the Court's current hands-off approach. Thus, building on my previous work critiquing the Court's hands-off approach,[14] this Essay calls upon the Court to reassess and rethink the scope and contours of the hands-off approach, both to remedy the problems inherent in the current approach and to prevent the additional concerns raised by the opinions in *Hobby Lobby*.

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13 *See* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

14 *See* Levine, Hosanna-Tabor, *supra* note 3; Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3; Levine, *The Supreme Court's Hands-Off Approach: An Introduction*, *supra* note 3.

I. THE SUPREME COURT'S HANDS-OFF APPROACH TO RELIGIOUS PRACTICE AND BELIEF: A BRIEF OVERVIEW

Over the course of developing its Religion Clause jurisprudence, the Supreme Court has adopted and expanded a hands-off approach to evaluating religious practice and belief. Relying on principles grounded in conceptions of both constitutional law and the role of judges, the Court has proscribed judicial determination of a wide range of questions related to religious doctrine.[15] Notwithstanding some of the sound policy considerations underlying the Supreme Court's attempts to prevent judges from evaluating the substance of religious doctrine, the Court's hands-off approach produces additional problems of its own.

First, as an analytical matter, the precise contours and application of the Court's hands-off approach raise a variety of both descriptive and normative issues.[16] Second, as a practical matter, requiring that judges defer to a religious claimant's characterizations of the nature of a religious claim may have the effect of broadening the range of religious rights in a way that proves unworkable for the government, courts, and society as a whole.[17] Conversely, as a corollary to this problem, religious adherents who, under the hands-off approach, are granted broad religious freedoms, may face a backlash among the government, judges, and the public, resulting in the imposition of significant limitations on the range of claims recognized as worthy of constitutional or statutory protection.[18]

This dynamic seems to have led directly to the Supreme Court's landmark decision in the 1990 case, *Employment Division v. Smith*,[19] which sharply curtailed the reach of Free Exercise protections.[20] The *Smith* case prompted Congress to enact the Religious Freedom Restoration Act

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15 *See supra* note 2.

16 *See* sources cited *supra* note 12.

17 *See* Goldstein, *supra* note 3, at 502, 525–33 (arguing that "contrary to the Court's language, an absolute prohibition on judicial examination of religious questions is neither possible nor advisable"); Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3, at 92–123 (collecting Free Exercise cases and examining the effects of the Court's hands-off approach); Marshall, *Religious Inquiry*, *supra* note 3, at 251.

18 *See* Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3, at 134.

19 494 U.S. 872 (1990).

20 *See* Greenawalt, *Religious Property*, *supra* note 3, at 1906 (stating that the "major basis for the decision [in *Employment Division v. Smith*] is that courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption"); Levine, *Rethinking the Supreme Court's Hands-Off Approach*, *supra* note 3, at 88 ("[T]he Court's decision in *Employment Division v. Smith* was, in part, a result of the Court's increasing reluctance to decide questions involving religious interpretation."); Marshall, *Religious Inquiry*, *supra* note 3, at 255 n.124.

(RFRA),[21] which the Court, in turn, declared unconstitutional as applied to state laws,[22] further prompting Congress to enact the Religious Land Use and Institutionalized Persons Act (RLUIPA).[23] The proper interpretation and application of these statutes remain the subject of considerable debate and confusion.[24]

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21 *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429–30 (2006) ("Here the burden is placed squarely on the Government by RFRA rather than the First Amendment, but the consequences are the same. Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test . . . ." (citing 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3))). The text of RFRA provides, in relevant part:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000bb-1(a)–(b) (2012).

22 *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

23 *See* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015). The text of RLUIPA provides, in relevant part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. §§ 2000cc-1(a)–(b).

24 *See, e.g.*, Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806, 834–36 (2006); Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach About Specific*

The contentious nature of these statutes arguably stems, in part, from more general confusion over the Supreme Court's hands-off approach and may likewise account, in part, for the debate and confusion among the Justices in *Hobby Lobby*. After all, the necessity to adjudicate cases under the Religion Clauses, as well as under RFRA, RLUIPA, and state RFRAs,[25] requires consideration of religious claims, and thus, at times, may entail careful judicial examination of the substance and nature of religious doctrine. The challenge of reconciling the dual goals of adjudicating cases involving religion and maintaining appropriate deference to the beliefs of religious adherents stands at the center of the dispute among the Justices in *Hobby Lobby*. In an effort to clarify these issues, it may be helpful first to identify different categories of inquiry that arise in the course of adjudicating Religion Clause cases, and to explore Supreme Court precedent with respect to each category.[26]

The following analysis will consider a brief taxonomy of four related but conceptually distinct forms of inquiry that may arise in the context of adjudicating a religious claim. The analysis will apply each of these questions to a hypothetical religious claim: An inmate in federal prison claims to belong to the Church of the One True Religion (COTR), requiring adherents to have a meal with steak and sherry every Friday afternoon. Another inmate, in the same prison, also claims to belong to the Church of

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Exemptions, 48 U.C. DAVIS L. REV. 703, 714 (2014) ("[T]he public is unable to predict how courts will apply RFRA to particular disputes, causing confusion about when a legal duty applies to a religious believer and when it does not . . . ."); Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191 (2008); Jonathan Knapp, Note, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259, 278–92 (2009) ("RFRA and RLUIPA: Conflict and Confusion Abound . . ."); Tokufumi Noda, Note, *The Role of Economics in the Discourse on RLUIPA and Nondiscrimination in Religious Land Use*, 53 B.C. L. REV. 1089, 1093 (2012) (noting the "confusion as to how to apply RLUIPA consistently"); Jaron A. Robinson, Comment, *Land, Libations, and Liberty: RLUIPA and the Specter of Liquor Control Laws*, 49 IDAHO L. REV. 157, 159 (2012) ("[S]ince its passage in 2000, RLUIPA has generated confusion among the federal courts of appeals."); Emily Urch, Comment, *Shields and Kirpans: How RFRA Promotes "Irrational-Basis" Review as For-Profit Companies Challenge the Affordable Care Act's Women's Health Amendment*, 39 U. DAYTON L. REV. 173, 198 (2013) ("Since the Supreme Court has not defined what amounts to a 'substantial burden' when analyzing a RFRA claim, confusion is bound to continue.").

25 *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425 (2010); *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 5, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

26 It should be noted that, although the Court developed the hands-off approach in the context of interpreting the Free Exercise Clause, both the majority and dissent in *Hobby Lobby* applied the hands-off approach—albeit in different ways—in the context of the statutory interpretation of RFRA and RLUIPA as well.

the One True Religion, but asserts that adherents to the COTR are prohibited from having either steak or sherry, and are instead required to have a Friday afternoon meal consisting of brie and chardonnay.[27]

1. Sincerity of a Religious Claim

By definition, the Free Exercise Clause, RFRA, and RLUIPA apply only to claims that are premised upon religious practice or belief. Although the Court has never mapped out the precise elements necessary for a system of belief to qualify as a religion,[28] as a threshold matter, a court must first conclude that a religious claim is sincere before affording Free Exercise, RFRA, or RLUIPA protections to the claimant. Thus, if a court determines, as a factual matter, that a claimant is not sincere in basing a

27 This hypothetical is based on modified facts from actual cases involving the Church of the New Song. *See, e.g.*, Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Fed. Bureau of Prisons, 620 F.2d 648, 652 (7th Cir. 1980); Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974) (per curiam); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated*, 495 F.2d 390 (5th Cir. 1974).

28 *See, e.g.*, Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1 (1991); Barbra Barnett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 131–38 (2007); A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 587–91; James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23, 29–70 (1995); Eisgruber & Sager, *supra* note 3, at 812–16, 834; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1524–28 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 759–61 (1984); John O. Hayward, *Religious Pretenders in the Courts: Unmasking the Imposters*, TRINITY L. REV. (forthcoming 2015), http://works.bepress.com/john_hayward/15/; Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); John C. Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521 (2003); L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 91–103 (2004); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 123–88 (2007); Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 536–39 (1989); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 141–52 (1982); Jeffrey L. Oldham, Note, *Constitutional "Religion": A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 125–37 (2001); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 795–99 (1997); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1057–66 (1978).

claim in a religious practice or belief, the court will not apply these protections.[29]

Applied to the case of inmates who claim to require particular religious diets based on the asserted beliefs of the COTR, a court would have to undertake a threshold determination of the factual sincerity of each inmate's assertion.[30] Similar to other forms of factual inquiry, the court would weigh the available evidence, including such factors as whether the inmate has adhered to this religion and this diet in the past, whether the religion has other adherents, and whether the inmate might have ulterior motives for the claim. Although none of these factors would, by itself, necessarily prove to be dispositive, together, these and other considerations will provide the grounds for the court's factual findings. If, on the basis of these findings, the court concludes that the inmate sincerely adheres to a religion with practices that include the specified diet, the inmate's claim will qualify for legal protections as an exercise of religion.[31]

2. Metaphysical Truth of a Religious Claim

Although courts may—presumably must—evaluate the sincerity of a religious claim before applying the Free Exercise Clause, RFRA, or RLUIPA, courts are precluded from evaluating the metaphysical truth of a religious claim. As the Supreme Court has repeatedly explained, as a basic tenet of the Court's hands-off approach to religious doctrine, the American legal system does not recognize or reject the metaphysical truth or validity of a particular religion or religious belief.[32]

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29 *See, e.g.*, United States v. Ballard, 322 U.S. 78, 84 (1944); *see also* John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (describing the Court's approach in *Ballard*); Kent Greenawalt, Book Review, 70 COLUM. L. REV. 1133 (1970) (reviewing MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY (1968)); Ben Adams & Cynthia Barmore, Essay, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59 (2014) (arguing that courts use objective criteria to inquire into the sincerity of religious beliefs); Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431 (2011) (arguing that sincerity of religious beliefs is the determinative inquiry for claims by prisoners who fail to take advantage of religious accommodations).

30 *See* Brady, *supra* note 29, at 1442–63.

31 *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) ("[O]f course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014))).

32 *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); United States v. Lee, 455 U.S. 252, 257 (1982) (refusing to assess the "proper interpretation of the Amish faith"); Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be

Applied to the COTR, an inmate's claim to require a Friday afternoon meal of steak and sherry or brie and chardonnay may appear to most observers to be highly unusual, if not downright suspect. Indeed, a court might find, on the basis of evidence presented, that as a factual matter, the inmate is not sincere in this claim, but instead is fabricating a religious belief as a pretext to try to compel prison authorities to provide a meal well beyond the quality ordinarily available as part of a prison diet. Nevertheless, to the extent that a court finds the inmate to be sincere in the claimed adherence to a religion that requires or expects its adherents to partake of such a meal, the court has no authority to reject the claim on the grounds that it seems to represent an unlikely or even bizarre form of religious practice.

3. Accuracy or Consistency of a Religious Claim

A similar but somewhat more expansive form of the Court's hands-off approach involves a scenario in which individuals who claim to adhere to the same religion assert different views of that religion's beliefs or practices. In such scenarios, the Supreme Court has likewise repeatedly emphasized that judges have no role in adjudicating intrafaith differences of belief, whether they relate to property disputes, personnel issues, or other matters of doctrine.[33]

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acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."). In Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court elaborated:

> This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy*, and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Id. at 449–50 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987)). In *Ballard*, 322 U.S. 78, the Court also stated:

> Heresy trials are foreign to our Constitution. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Id. at 86–87.

33 *See, e.g.*, *Holt*, 135 S. Ct. at 863 ("[T]he protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (quoting *Thomas*, 450 U.S. at 715–16); *Lyng*, 485 U.S. at 457–58 ("[T]he dissent's approach would require us to rule that some religious adherents

It should be emphasized that the issue of accuracy or consistency, like the question of metaphysical truth, is conceptually distinct from the issue of sincerity. For example, a sincerely asserted claim would qualify as religious in nature even if the claim appears mistaken or irrational in the view of others, including other adherents to the same religion. Conversely, as a threshold matter, a claim would fail if the plaintiff were insincere, even if others consider the claim to be an accurate, plausible, or eminently rational religious belief.

To be sure, there remains a degree of complexity—and potentially, confusion—within the Court's hands-off approach in the context of these questions. In practice, courts and others may find it difficult to disaggregate the issue of sincerity from issues of metaphysical truth or accuracy, and may tend to question a claimant's sincerity if, in the eyes of the beholder, including the eyes of other adherents to the same religion, the claimant's belief seems mistaken, insubstantial, or irrational.

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misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play."); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976) (noting the "error" of "delv[ing] into . . . church constitutional provisions"). In *Thomas*, 450 U.S. 707, the Court stated:

> Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

450 U.S. at 715–16. Also, in Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969), the Court further elaborated on the role of the courts:

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. . . . The Georgia courts have violated the command of the First Amendment . . . . [T]he departure-from-doctrine element . . . requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. . . . To reach those questions would require the civil courts to engage in the forbidden process of interpreting and weighing church doctrine.

Id. at 449–51.

Nevertheless, once a court has found that a religious adherent is sincere in asserting a claim as religious in nature, the court must afford Free Exercise, RFRA, or RLUIPA protections, regardless of how unpopular, unusual, or even bizarre the belief may appear in the view of outside observers, including the judge adjudicating the case, the public, or others. Accordingly, the Court has held that for the purposes of Free Exercise protection, the validity of an adherent's religious claim does not turn on whether other adherents share a similar belief. Instead, the claimant has the autonomy and authority to maintain an individualistic form of belief, entitled to protection as religious in nature, independent of whether the belief is shared—or repudiated—by others asserting adherence to the same religion.

In the context of the COTR, the two inmates have very different views of the diet their religion requires for a Friday afternoon meal. Indeed, their views are not only inconsistent with one another but incompatible, such that one inmate's asserted compliance with a requirement of the COTR would, according to the other inmate, constitute a violation of COTR doctrine. Once again, as a factual matter, in theory, a court might find one—or both—of the inmates to be insincere in asserting a particular form of belief. For example, in addition to general concerns that inmates might try to use insincere religious claims as a pretext to obtain special meals, perhaps the court will find that one or more of these inmates has the ulterior motive of sabotaging the other inmate's efforts to obtain a preferred meal or, more broadly, of undermining the other inmate's interests or credibility. Otherwise, under the Supreme Court's hands-off approach, to the extent that the court finds both inmates to be sincere in their beliefs, both are entitled to Free Exercise protections—even though the two forms of conduct are in conflict with each other and are asserted as being requested and required pursuant to the same religion.

4. Substantial Burden/Compelling Governmental Interest

RFRA provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[34] RLUIPA consists of similar provisions, applied in the context of land use and prisons.[35]

Under the terms of these statutes and pursuant to Supreme Court precedent, judges have the authority to evaluate whether the government's restriction on religion stands as the least restrictive means of furthering a

34 42 U.S.C. § 2000bb-1(b) (2012).

35 *See* 42 U.S.C. § 2000cc-1(b).

compelling governmental interest.[36] Is it less clear, however, whether the Court's hands-off approach to religion mandates not only that judges accept a religious adherent's sincere claim that a law burdens the exercise of religion, but also that judges defer to the adherent's characterization of the burden as substantial, thereby triggering the balancing tests in RFRA and RLUIPA. To be sure, the Court has declared that judges are precluded from determining the centrality of a practice or belief within a religious system,[37] but it has not ruled on whether this deference extends to the designation of a religious burden as substantial.[38]

The distinction may prove significant in the context of the COTR if the inmates claim that the prison's failure to provide their respective diets, of sherry and steak or brie and chardonnay, would work a substantial

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36 *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006); Cutter v. Wilkinson, 544 U.S. 709 (2005).

37 See Employment Division v. Smith, 494 U.S. 872 (1990), in which the Court stated:

> Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Id. at 886–87 (alteration in original) (first quoting *Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring); then quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)) (first citing *Lyng*, 485 U.S. at 474–76 (Brennan, J., dissenting); then citing *Thomas*, 450 U.S. at 716; then citing *Presbyterian Church*, 393 U.S. at 450; then citing Jones v. Wolf, 443 U.S. 595, 602–06 (1979); and then citing *Ballard*, 322 U.S. at 85–87). In *Lyng*, the Court stated:

> We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. . . . [This] offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

485 U.S. at 457–58 (internal citations omitted).

38 *See, e.g.*, Lupu, *supra* note 3, at 80–82.

burden on their religious exercise. If courts have the authority to evaluate whether a burden is substantial, a judge might engage in various forms of inquiry before requiring that the government satisfy the least restrictive/compelling interest standard. For example: a judge might look to whether the inmate engages in other forms of religious exercise, including a religious diet, throughout the rest of the week; a judge might find that the prison can substitute similar foods for those requested by the inmate; or a judge might order prison officials to provide the requested diet but only if the inmate pays for the additional costs involved.

If, however, the Supreme Court's hands-off approach precludes judges from inquiring into the nature of a law's effect on religion, a court would presumably have to accept the inmate's assertion that the prison's failure to provide the requested meal resulted in a substantial burden on the inmate's exercise of religion. In turn, the government would have to provide the meal, as requested, unless it can show that refusal to do so represents the least restrictive means of furthering a compelling governmental interest.

II. APPLYING THE HANDS-OFF APPROACH TO *HOBBY LOBBY*

In an effort to understand and clarify some of the precise points of contention between Justice Alito's majority opinion and Justice Ginsburg's dissenting opinion in *Hobby Lobby*, it might prove instructive to consider each opinion in light of the four forms of inquiry, outlined above, that compose Supreme Court precedent with respect to evaluating questions of religious practice and belief.

A. Justice Alito's Majority Opinion

The majority opinion in *Hobby Lobby*, authored by Justice Alito, relies heavily on the Supreme Court's hands-off approach to questions of religious doctrine. Indeed, the majority's formulation of the facts of the case fits squarely within the Court's deferential approach to religious adherents' characterizations of the nature of religious claims: "The Hahns and Greens believe that providing the coverage demanded by the HHS [Health and Human Services] regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage."[39] Accordingly, the majority applied Supreme Court precedent to conclude that the HHS regulations violated the plaintiffs' religious rights under RFRA.[40] In fact, Justice Alito's opinion provides a somewhat systematic application of the Court's hands-off approach in the context of different forms of judicial inquiry into religious claims.

39 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014).

40 *Id.* at 2785.

1. Sincerity of a Religious Claim

Addressing the threshold question of the sincerity of the plaintiffs' religious claim, the majority noted that:

> [T]he Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.[41]

As the opinion further observed, "the plaintiffs . . . assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity."[42] Thus, under Supreme Court precedent, the factual determination of the sincerity of the plaintiffs' religious beliefs would prove sufficient to satisfy the legal determination that the plaintiffs' claim is religious in nature.[43]

2/3. Metaphysical Truth/Accuracy and Consistency of a Religious Claim

Having accepted the sincerity of the plaintiffs' claim, the majority applied well-settled elements of the hands-off approach to reject any argument that, in abiding by the HHS regulations, the plaintiffs would not, in fact, violate their religious beliefs. As the opinion put it:

> [T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.[44]

Indeed, the majority noted, the claimants' belief "implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[45] Thus, according to the majority, "[a]rrogating the authority to provide a binding national answer to this religious and philosophical question" would "in effect tell the plaintiffs

41 *Id.* at 2775 (citing Brief for the Petitioners at 9 n.4, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *9 n.4).

42 *Id.* at 2779.

43 *See* United States v. Ballard, 322 U.S. 78 (1944).

44 *Hobby Lobby*, 134 S. Ct. at 2779 (quoting Thomas v. Review Bd., 450 U.S. 707, 716 (1981)).

45 *Id.* at 2778.

that their beliefs are flawed."[46] Not surprisingly, therefore, affirming basic principles set forth as part of the Court's hands-off approach, the majority declared that "[f]or good reason, we have repeatedly refused to take such a step."[47]

4. Substantial Burden/Compelling Governmental Interest

After thereby accepting both the sincerity and the substance of the plaintiffs' religious claim, the majority turned to the provisions of RFRA, which prohibit the government from placing a substantial burden on the exercise of religion unless necessary as the least restrictive means of furthering a compelling governmental interest.[48] The majority found that, "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."[49] Finally, the majority concluded[50]—as Justice Kennedy's concurrence further elaborated[51]—that the restriction did not constitute the least restrictive means of furthering a compelling governmental interest.

B. Justice Ginsburg's Dissenting Opinion

While Justice Alito's majority opinion provided a fairly systematic—if not somewhat formalistic[52]—application of the different categories of judicial inquiry into questions of religious practice and belief, in a manner largely consistent with Supreme Court precedent, Justice Ginsburg's dissenting opinion focused, in part, on broader policy considerations. In so doing, the opinion may reflect the dissenters' more general concerns about—and potential objections to—aspects of Supreme Court precedent in this area, including elements of the Court's hands-off approach to questions of religious doctrine.

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46 *Id.*

47 *Id.* (citing Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."); *see* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969)).

48 *See* 42 U.S.C. § 2000bb (2012).

49 *Hobby Lobby*, 134 S. Ct. at 2779.

50 *Id.* at 2779–85.

51 *Id.* at 2785–87 (Kennedy, J., concurring).

52 *See* Kent Greenawalt, *The* Hobby Lobby *Case: Controversial Interpretive Techniques and Standards of Application* 4–5 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-421, 2014), http://ssrn.com/abstract=2512906.

1. Sincerity of a Religious Claim

In responding to the majority's analysis, Justice Ginsburg first asserted that "I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held."[53] As such, consistent with the Court's hands-off approach to questions of religious doctrine, Justice Ginsburg might have been expected to likewise accept the plaintiffs' claims that following the mandate would entail a violation of their religious beliefs and, accordingly, that the law placed a substantial burden on their exercise of religion.

2/3. Metaphysical Truth/Accuracy and Consistency of a Religious Claim

Indeed, again like the majority, Justice Ginsburg cited Supreme Court precedent for the proposition that "courts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs."[54] Having thus declared the need for judicial deference to the plaintiffs' characterizations of their religious obligations, the dissent appeared poised to likewise adopt and apply the Court's hands-off approach in the context of the plaintiffs' claim that adhering to the HHS regulation would work a substantial burden on their exercise of religion.

4. Substantial Burden/Compelling Governmental Interest

Somewhat surprisingly, however, Justice Ginsburg instead proceeded to question whether the law placed a substantial burden on the plaintiffs' religious exercise.[55] Justice Ginsburg declared that the plaintiffs' beliefs,

> however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.[56]

Whatever the merits of this distinction, Justice Ginsburg's ensuing evaluation of the plaintiffs' claim comes perilously close to—and, according to the majority, crosses the line into—the kind of judicial inquiry precluded by the Court's hands-off approach.[57]

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53 *Id.* at 2798 (Ginsburg, J., dissenting) (citing Thomas v. Review Bd., 450 U.S. 707, 715 (1981)).

54 *Id.* at 2798 (alteration in original) (quoting *Thomas*, 450 U.S. at 715).

55 *Id.* at 2798.

56 *Id.* at 2798 (alterations in original) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).

57 *See id.* at 2778 n.35 (majority opinion) ("The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.");

Indeed, Justice Ginsburg expressly rejected the applicability of the hands-off approach to the question of whether the plaintiffs faced a substantial burden on their religion. Instead, "[u]ndertaking the inquiry that the Court forgoes," Justice Ginsburg "conclude[d] that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."[58] Specifically, she wrote, "[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults."[59]

Finally, and again somewhat surprisingly, Justice Ginsburg critiqued not only the majority's conclusion, but the methodology it employed in applying the least restrictive/compelling governmental interest test required under the provisions of RFRA.[60] In particular, Justice Ginsburg raised a number of largely hypothetical scenarios in which, she was concerned, the majority's approach would require the government to demonstrate that a law was the least restrictive means for furthering a compelling governmental interest, and in turn, would require individualized judicial consideration of each of these cases.[61] Rejecting the response that "each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test,"[62] Justice Ginsburg

see also Lupu, *supra* note 3, at 82 ("The [*Hobby Lobby*] majority preferred the *Thomas* rule of judicial abstention; [Justice Ginsburg's] dissent preferred active judicial involvement in the question of the religious substantiality of the burden."); Lyons, *supra* note 3, at 262 ("[T]he legal guidance that does exist explicitly discourages courts from entering into the various types of considerations that might otherwise be thought relevant [to the substantial-burden issue]."); Marshall, *Bad Statutes*, *supra* note 3, at 113–16 (examining "Justice Alito's decision to construe RFRA in a way that avoids the need for courts to inquire into burden"); Smith, *supra* note 3, at 748 (noting that Establishment Clause principles preclude judicial inquiries into "the 'substantiality' of a burden on religious exercise" and "the 'centrality' of a practice to religious belief").

58 *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

59 *Id.*

60 *See* 42 U.S.C. § 2000bb–1(b) (2012).

61 *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) ("Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?").

62 *Id.* (alteration in original) (quoting Transcript of Oral Argument at 6, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf).

argued that an application of RFRA that entailed such a judicial undertaking would constitute an "immoderate reading of RFRA."[63]

III. ANOTHER LOOK AT JUSTICE GINSBURG'S DISSENT: A REFORMULATED HANDS-OFF APPROACH?

A closer look at Justice Ginsburg's opinion may suggest a reformulation of the Supreme Court's hands-off approach to questions of religious practice and belief. As the majority noted in *Hobby Lobby*, in apparent contrast to Supreme Court precedent, Justice Ginsburg seems willing to allow—or require—a degree of judicial inquiry into the accuracy of a religious adherent's claim, to the extent that such inquiry is relevant to the determination of whether the government has placed a substantial burden on the adherent's exercise of religion.[64] At the same time, as she put it near the end of her dissent, Justice Ginsburg sees "an overriding interest . . . in keeping the courts 'out of the business of evaluating' . . . the sincerity with which an asserted religious belief is held."[65] Thus, again in contrast to Supreme Court precedent, Justice Ginsburg seems to promote a hands-off approach that would disfavor judicial evaluation of the sincerity of an adherent's asserted religious belief.[66]

Justice Ginsburg's apparent reformulation of Supreme Court precedent may account, in part, for the impression that the majority and dissenting opinions in *Hobby Lobby* are talking past each other. Perhaps, then, the divide in *Hobby Lobby* is rooted in a more basic division among the Justices regarding the wisdom, and the appropriate contours, of the Supreme Court's hands-off approach to religion.

Indeed, one of the basic elements of the Supreme Court's hands-off approach was established in the 1944 case *United States v. Ballard*,[67] in which the Court held that judges have the authority to evaluate the sincerity of an adherent's belief in a religious principle, but not to question the inherent truth or validity of that principle.[68] On the grounds of this distinction, the majority affirmed a conviction of fraud, based on the factual conclusion that the defendants did not sincerely believe the truthfulness of the religious representations they made to others.[69] At the same time, the

63 *Id.*

64 *See supra* notes 55–59 and accompanying text.

65 *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982)).

66 *See* Adams & Barmore, *supra* note 29, at 59.

67 322 U.S. 78 (1944).

68 *Id.* at 86–88; *see* discussion *supra* note 29 and accompanying text.

69 *Ballard*, 322 U.S. at 83–84.

majority insisted that a court may not evaluate the inherent truth or falsity of a religious belief or doctrine.[70]

Notably, Justice Jackson dissented in *Ballard*, rejecting the analytical distinction that would allow judicial inquiry into the sincerity of a religious belief while precluding the evaluation of the truth or accuracy of the belief.[71] Instead, he argued that courts should likewise be prohibited from evaluating the sincerity of a religious belief, concluding that "I would dismiss the indictment and have done with this business of judicially examining other people's faiths."[72]

Without citing *Ballard*—in fact, without resort to any citation—Justice Ginsburg's concluding remarks in the *Hobby Lobby* dissent, decrying judicial inquiry into religious sincerity, seem to echo Justice Jackson's concerns and may constitute an attempt to revive his approach, in the face of more than seventy years of precedent to the contrary. In this reading, Justice Ginsburg's concerns about RFRA become more pronounced and, therefore, more understandable, and likewise, her rejection of other elements of the Court's hands-off approach becomes more significant. Moreover, this reading of Justice Ginsburg's jurisprudence may also account for the stark divide between the majority and the dissent in *Hobby Lobby*.

Ballard and its progeny established one of the safeguards against the unfettered reliance on religious claims as a defense to prosecution for otherwise illegal conduct, or as a basis for an exemption from an otherwise valid law. Under *Ballard*, a court has the authority to inquire whether an individual is expressing a sincerely held religious belief. If the court concludes that the individual is sincere, the claim will qualify as religious in nature for the purpose of the Free Exercise Clause or, more recently, RFRA and RLUIPA. Alternatively, if the court concludes that the individual is insincere, the claim will not qualify as based in religion.

Notwithstanding considerable merit to Justice Jackson's argument, as a practical matter, his position would remove this safeguard and would permit any individual to conjure up and assert a religious justification for any form of otherwise illegal conduct.[73] Coupled with other elements of the Court's hands-off approach, which additionally preclude judicial inquiry into the validity or consistency of a religious claim, Justice Jackson's position would then allow any individual to assert a claim of any belief, however insincere or farfetched, and have that claim qualify as religious in nature under the Free Exercise Clause, RFRA, or RLUIPA.

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70 *Id.* at 86–88.

71 *Id.* at 92–93 (Jackson, J., dissenting); *see* Marshall, *Religious Inquiry*, *supra* note 3, at 254–55.

72 *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).

73 *See supra* note 28; *see also* Marshall, *Religious Inquiry*, *supra* note 3, at 254–57.

To the extent that Justice Ginsburg seems to have echoed and adopted Justice Jackson's position, her concerns over an expansive application of RFRA are better understood and appreciated. Under the terms of RFRA, a law that places a substantial burden on religion must be shown to constitute the least restrictive means of furthering a compelling governmental interest.[74] If any asserted religious claim must be accepted as sincere—as Justice Ginsburg seems to advocate—and if a court must accept the adherent's characterization of a religious claim as a substantial burden on religion—as both the *Hobby Lobby* majority and Supreme Court precedent seem to require[75]—then any individual can challenge any law through the assertion that it poses a substantial burden on the exercise of religion. Once the claimant simply asserts a religious belief that directly contradicts the law, courts would be precluded from inquiring into the validity of the claim on the basis of evaluating either the sincerity or the accuracy of the claim.

Of course, categorizing a claim as religious in nature, or subject to the RFRA balancing test, does not mean that the claim will necessarily succeed. No court has ever suggested that a murder conviction would be overturned because of an assertion that laws against murder substantially burden a religious belief that requires committing murder. Nevertheless, under the expansive protections of RFRA/RLUIPA, precluding judicial inquiry into both the sincerity of a religious claim and the characterization of the burden as substantial would place the government in a position of having to respond to any such assertions by demonstrating that the law was the least restrictive means of furthering a compelling governmental interest. Though laws against murder are an easy case, other laws and regulations, such as prison rules, zoning laws, and the ACA, would be closer calls. Indeed, Justice Ginsburg seems particularly wary of such a result, as illustrated by the parade of horribles she hypothesizes, representing scenarios that, she argues, would be difficult for courts to decide, and to decide appropriately, based on the majority's analysis.[76]

As Justice Ginsburg acknowledged, both the plaintiffs in *Hobby Lobby* and the majority of the Court were not troubled by the hypotheticals she raises. In their views, each case would be considered under an individualized least restrictive/compelling interest test.[77] Tellingly, Justice Ginsburg responded that "approving some religious claims while deeming others unworthy of accommodation could be 'perceived as favoring one religion over another,' the very 'risk the Establishment Clause was

74 42 U.S.C. § 2000bb-1(b) (2012).

75 *See supra* notes 48–49 and accompanying text.

76 *See supra* note 61.

77 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

designed to preclude.'"[78] Therefore, she concluded, "[t]he Court, I fear, has ventured into a minefield, by its immoderate reading of RFRA."[79] Perhaps because Justice Ginsburg would eschew judicial consideration of religious sincerity, thereby removing one safeguard against overly broad religious protections, she would instead substitute a more limited application of RFRA through increased judicial inquiry into the asserted nature of the burden on religion.

Justice Ginsburg's critique of the majority leaves open a number of questions of its own. Indeed, though Justice Ginsburg refers to the majority's "immoderate reading of RFRA,"[80] she does not explain precisely how a different reading of RFRA would affect the outcome in the hypotheticals she raises, or—more to the point—how any reading of RFRA would avoid the application of balancing tests that, depending on the facts of particular scenarios, might result in outcomes that favor some religions and not others.

Ultimately, Justice Ginsburg seems to be advocating, in some ways, an even more robust and extensive form of the Court's hand-off approach, one that would preclude these kinds of individualized and fact-specific considerations of religious claims. Regardless of the possible appeal of Justice Ginsburg's arguments, the more restricted form of religious freedoms that her analysis could produce may illustrate yet another potential problem presented by the hands-off approach.

CONCLUSION

In the past three terms, the United States Supreme Court has decided three important religious freedom cases that implicated, to different degrees, the Court's hands-off approach to questions of religious practice and belief. In the 2012 case, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[81] in a unanimous opinion authored by Chief Justice Roberts, the Court formally recognized the ministerial exception, holding that, "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[82] In the 2015 case, *Holt v. Hobbs*,[83] in another unanimous decision, this time authored by Justice Alito, the Court accepted an inmate's characterizations of both his practice of religion and the burden that prison regulations would place on

78 *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring in judgment)).

79 *Id.* (citing Spencer v. World Vision, Inc., 633 F.3d 723, 730 (9th Cir. 2010) (O'Scannlain, J., concurring)).

80 *Id.*

81 132 S. Ct. 694 (2012).

82 *Id.* at 702.

83 135 S. Ct. 853 (2015).

his religious exercise.[84] Although the Justices reached unanimity in both of these cases, the opinions seemed to leave unanswered a number of difficult questions, likewise implicated by the hands-off approach, involving the precise contours of the ministerial exception[85] and the extent to which prison officials must defer to inmates' religious claims.[86]

In notable contrast to the unanimity achieved in these cases, *Burwell v. Hobby Lobby, Inc.*,[87] decided in the interim, proved highly contentious, prompting a sharply divided Court to issue starkly contrasting majority and dissenting opinions. In further contrast to *Hosanna-Tabor* and *Holt*, in *Hobby Lobby*, the Justices took the opportunity to more fully explore the implications of the Supreme Court's hands-off approach to religion. Although the debates among the Justices in *Hobby Lobby* revolved around a number of controversial issues,[88] the differences between the opinions of Justice Alito and Justice Ginsburg turned, in part, on important differences with respect to the hands-off approach. Significantly, *Hobby Lobby* exposes some of the underlying fault lines and tensions among the Justices regarding the proper formulation and application of the hands-off approach to religion, raising additional concerns over the continued wisdom and viability of the Court's current approach and demonstrating the need for further exploration and, perhaps, substantial reconsideration in the future.

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84 *See id.* at 862–63.

85 *See, e.g.*, Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307; Levine, Hosanna-Tabor, *supra* note 3; Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183 (2014); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821 (2012); Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. & PUB. POL'Y 493 (2012). For more critical views of *Hosanna-Tabor*, see, for example, Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405 (2013); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981 (2013); Ioanna Tourkochoriti, *Revisiting* Hosanna-Tabor v. EEOC*: The Road Not Taken*, 49 TULSA L. REV. 47 (2013).

86 *See, e.g.*, Incumaa v. Stirling, 791 F.3d 517 (4th Cir. 2015); Sessing v. Beard, No. 1:13-cv-01684-LJO-MJS (PC), 2015 WL 3953501 (E.D. Cal. June 29, 2015); *see also* Holt v. Hobbs, 135 S. Ct. 853, 867 (2014) (Sotomayor, J., concurring). For a more critical view, see, for example, Marci Hamilton, *The Supreme Court's New Ruling on the Religious Land Use and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions*, FINDLAW (June 2, 2005), http://writ.news.findlaw.com/hamilton/20050602.html.

87 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

88 *See supra* note 5.

A MATTER OF TRIAL AND ERROR, OR BETTING ON APPEALS

*Radek Goral**

In civil litigation, the function of the appellate review is to correct errors made by the court below and enforce uniform application of law. To make sure that the judgment was fair, the appellate panel is asked by the losing party to second-guess the trial judge and jury. Some, though, try to get to the table in between those two guesses, placing an outside bet on the appellate outcome before the wheel of justice finally stops. They are called appellate funders.

How does one gamble on a pending appeal for money? What kinds of cases are suitable for such bets? And why should anyone only get involved once relatively little remains to be done? Despite the rapidly growing practice where legal claims get funded by third parties, and the concurrent surge of scholarly interest in the phenomenon, the strategy of appellate financiers has not been explored in the literature.

Sampling from the actual portfolio of a leading third-party litigation financier, this Essay demonstrates that making systematic bets on pending appeals is a viable business model applicable to a wide range of cases. "Appellate investments" may include both consumer and commercial cases, including also public-interest actions where prevailing plaintiffs are permitted attorney's fees—even if they themselves do not seek monetary relief. Additionally, the analyzed sample indicates that appellate funders buy both from plaintiffs and plaintiffs' attorneys, often in the same case.

The overview of the business strategy of appellate financing contributes to a larger theme: the role and impact of external money in litigation. In particular, this Essay challenges the assertion that third-party funders necessarily bring about more litigation; after all, appellate funders support prevailing plaintiffs hoping to withstand the procedural onslaught of losing defendants vying for a rematch. Therefore, and contrary to popular belief, this Essay argues that in a dispute funders can generally play either offense or defense, as long as the risks and rewards are right.

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I. APPEALS AS LATER-STAGE LITIGATION INVESTMENTS

Warren Buffett's advice for getting and staying rich is simple enough. "Rule No. 1: Never lose money. Rule No. 2: Never forget Rule No. 1."[1] And while it is really hard to *never* lose money, savvy investors realize that the upside potential of a deal means little unless it is weighed against the downside risk. There is no universally right answer to the question of how many extra dollars one would need to be paid (if things go well) to chance that an additional dollar might be lost (if they do not). For, quite simply, people vary in their attitudes to risk. Many, however, would likely heed Warren Buffett's advice and not as much as dip a toe into the water which looks to them too treacherous, even if surfing it could be highly satisfying.

Figuring out whether a venture is too daring for comfort is not always easy. Nevertheless, one metric usually considered a good proxy for the risk of an investment project is its stage. For example, when Peter Thiel made his angel bet on "The Facebook" in June of 2004, it was a much riskier proposition than the one which attracted Goldman Sachs six and a half years later, with Facebook already thinking about an initial public offering.[2] In the current market, such later-stage investments have been on the rise. In 2014, out of $52 billion injected by institutional investors into private companies, about $31 billion (almost sixty percent) was directed at targets developed enough to consider going public, like Uber or Cloudera.[3]

But what if, instead of young companies, a financier is interested in more unconventional assets, such as legal disputes? The practice where third parties bankroll lawsuits to profit from them has been developing rapidly over the last decade, generating a sizable interest among scholars.[4]

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1 MARY BUFFETT & DAVID CLARK, THE TAO OF WARREN BUFFETT 3 (2006).

2 *See* JP Mangalindan, *Timeline: Where Facebook Got Its Funding*, FORTUNE (Jan. 11, 2011, 3:46 PM), http://fortune.com/2011/01/11/timeline-where-facebook-got-its-funding/; Anupreeta Das, Geoffrey A. Fowler & Liz Rappaport, *Facebook Sets Stage for IPO Next Year*, WALL ST. J. (Jan. 6, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703730704576066162770600234.

3 *See* Russ Garland, *Venture Investments Soar, Driven by Later-Stage Deals*, WALL ST. J. (Jan. 14, 2015, 11:30 PM), http://www.wsj.com/articles/venture-investments-soar-driven-by-later-stage-deals-1421296203.

4 *See, e.g.*, Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377 (2014) (discussing lending to lawyers and its ethical implications); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004) (offering an early insight into funding of consumer claims); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) [hereinafter Molot, *Litigation Risk*] (proposing that by building a portfolio of litigation-related liabilities, a financier may diversify unsystematic risk, reducing randomness in outcomes); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (discussing claims investing in the context of legal ethics); Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939 (2014) (discussing why non-lawyers may want control in legal decision-making);

And litigation uncertainty has been singled out as a key aspect of litigation funding; either owing to the fact that it makes sense to transfer such risk to financial third parties better able to assume and diversify it,[5] because some analogies may be found between funding and insurance,[6] or since litigation funders—like Peter Thiel and Goldman Sachs—follow different strategies and have different risk profiles.[7]

The point of departure for this Essay is the latter notion: that those who bet on legal disputes pick the level of uncertainty about the outcome which they think is right for them; and, moreover, that like their colleagues specializing in startups, litigation funders are able and willing to purposefully select a preferred level of risk of financial loss (or subpar return) by betting after a particular key event in the life cycle of a dispute.[8]

What lawyers may take for granted, but what is far from obvious to an asset manager used to dealing in more traditional kinds of investment projects, is that the legal process follows a predictable path with well-defined consecutive milestones. A broad-brush timeline of a dispute normally starts at the time when a cause of action accrues; a complaint is then filed and served on the defendant who replies; next, the defendant's motion to dismiss and other pleadings are litigated; discovery is conducted; parties move for summary judgment; the case is tried; a verdict is reached; adversaries engage in post-trial motion practice; the loser appeals; and an appellate decision is issued.

Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1325–38 (2011) (arguing that with smart regulation third-party funding will increase access to justice and encourage private law enforcement); JOHN BEISNER ET AL., SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 5–7 (2009), http://legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf (warning that funding will invite frivolous lawsuits); STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (providing the first empirical overview of the market).

5 *See* Molot, *Litigation Risk*, *supra* note 4, at 392–403; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 82–101 (2010).

6 *See, e.g.*, Molot, *Litigation Risk*, *supra* note 4, at 376–78 (arguing that the analogy between funding and insurance is valid); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 464–71 (2011) (same); Steinitz, *supra* note 4, at 1295–96, 1310–12, 1334–46 (same). *But see* Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012) (arguing the opposite); Catherine M. Sharkey, *The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky*, 60 DEPAUL L. REV. 695 (2011) (same).

7 *See* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. (forthcoming 2015) [hereinafter Goral, *Justice Dealers*], http://ssrn.com/abstract=2530798.

8 *Id*. (manuscript at 29–34).

In short, the same procedural roadmap applies to virtually all civil disputes. (A similar logic, but with fewer steps, applies to disputes in arbitration.) Publicly traded funds betting on high-stakes litigation, such as Burford Capital, Ltd. (Burford) or Juridica Investments, Ltd. (Juridica), both explicitly acknowledge that they track progress of funded cases at key junctures, adjusting value of an investment by comparing assumptions made for a given milestone with actual outcomes.[9]

Importantly, however, each of the steps along the path of the legal process is conditional on the success (or failure, depending on the point of view) of the directly preceding step. If the case is concluded at some point due to dismissal or settlement, the process terminates. What matters from the point of view of an outside third party, without access to privileged information about the case considered as an investment, is that phases (or states) in a legal process are often easily observable. In consequence, a financier has the option to take the wait-and-see approach, putting money into only those suits that survived long enough on their own.[10]

This Essay is an empirical study of those third-party funders who choose to do with litigation what Goldman Sachs did with Facebook: they enter the stage only for the last act.[11] That is to say, they fund just the

9 *See, e.g.*, BURFORD CAPITAL, LTD., ANNUAL REPORT 2010, at 16 (2011) (pointing to motion to dismiss, summary judgment, and appeal as examples of key stages of a matter that impact its fair value); JURIDICA INVESTMENTS, LTD., ANNUAL REPORT & ACCOUNTS 2009, at 18 (2010) (stating that a judgment or appeal in a funded case triggers its reassessment).

10 *See, e.g.*, Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1 (1996) (providing divisibility of litigation as a potential explanation of lawsuits with negative expected value); Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173 (1990) (arguing that suits have embedded real options); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1276–89 (2006) (distinguishing different kinds of litigation real options). Grundfest and Huang model for what they call a "learning option," which a plaintiff exercises by paying the cost of developing his case to a point where new information becomes available, enabling the decision of whether to continue with the case or abandon it. *Id*. at 1288, 1290. Analogously, it can be argued that a third-party funder gets—for free—his own learning option, which he exercises by doing nothing, or waiting to learn whether a lawsuit survives until the next phase.

11 This Essay builds on the author's doctoral dissertation on third-party funding of legal disputes in the United States written at Stanford Law School, and it uses first-hand fieldwork data collected for the purposes of that dissertation: forty-five semi-structured interviews and about twenty shorter, informal chats with individuals knowledgeable about some aspects the practice of litigation funding. Radek Goral, Buying Suits: Exploring Business-to-Business Financing of American Disputes (Dec. 2014) (unpublished Ph.D dissertation, Stanford University) (on file with author) [hereinafter Goral, Dissertation]. In addition, this Essay uses data on funded cases retrieved from public records.

appellate phase of a dispute, after its merits and value have already been determined by the lower court, but before all litigation risk is removed.[12]

The rest of this Essay is organized in the following way. Part II explains how appellate funding works. Part III provides concrete examples of different types of lawsuits funded in that way. In Part IV, patterns identified within the sample are confronted with several claims made previously in the literature. This Essay concludes with a brief summary of findings.

II. AFTER TABLES TURN: FUNDING PLAINTIFF'S DEFENSE

Appellate financiers try to guess the outcome of an appeal. More precisely, they invest in the hope that the appellate review will not change the first-instance result advantageous to the backed litigant (normally, the plaintiff). An appellate third-party investment is peculiar in that it is a wager on a post-trial status quo: it funds the party trying to *defend* the ground already gained against the adversary who *attacks* that ground by engaging in additional litigation. Simplifying a little, appellate funding is about taking a financial stake in a plaintiff's case after she turned the table on a defendant.

In the discussed business strategy, a funder may invest in the stake of a plaintiff, an attorney, or both.[13] The "dual-use" nature of the appellate model is significant: third-party funding is a relational business, built around the grid of connections among repeat-players. Third parties provide capital to both the litigant and the litigator, but often their primary relationship is with the lawyer.[14] When in need, such attorneys will likely turn to the financier they know, offering him a chance to invest in an appellate case of a client in the outcome of which they, the lawyers, have a financial stake of their own. Put differently, appeals seem to be funded in the interest of the plaintiffs' attorneys, and, sometimes, their clients as well—rather than the other way around.

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12 *See* Goral, *Justice Dealers*, *supra* note 7, at 33, 35, 41 (placing appellate funding within a larger market framework and identifying its main providers).

13 Certain smaller funders specialize solely in appellate financing, but others offer it as an additional line of business, intended to complement law-firm loans. *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 33, 41). In addition, my fieldwork data suggests that sometimes law-firm lenders agree to what in economic, if not legal, terms could be called a debt-to-equity conversion: a funder would *de facto* accept "equity" in appealed judgments (or other assets) as a way to restructure debt of a law firm in financial distress.

14 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 24). For a general discussion of the tripartite relationships between attorneys, their clients and third-party funders and the emergence of lasting relationships between funders and attorneys, see Radek Goral, *Skin in the Game: Why Business Lawsuits Get Third-Party Funded*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming 2015) [hereinafter Goral, *Skin in the Game*], http://ssrn.com/abstract=2531045.

Whether the fundee happens to be a plaintiff-appellee or her lawyer, parties transact in litigation equity: the funder pays a lump sum in cash and at times, additionally advances the costs of appellate defense. In exchange, he takes a portion of the judgment of a tentative value, subject to the outcome of the appeal. The financier thus becomes a joint-venture partner and a direct equity stakeholder in a specific suit.

An appellate funder aims to aggregate judgment stakes into a portfolio. Like pre-settlement funders who invest in individual early-stage cases, the appellate-stage strategy is about choosing one case at a time, with risk and return attached to the outcome of each funded case separately. Therefore, an appellate portfolio is a high-stakes, low-volume proposition.[15] Appellate funders are picky, and, as one industry insider put it, "the appellate space is finite"[16]—in part because each investment must be attractive enough to justify both the risk associated with the funder's limited recourse and a higher cost of investment acquisition.[17]

In principle, betting on appellate cases follows the same logic as other strategies of litigation funding: a case is submitted, evaluated, and if it seems promising enough and parties can agree on terms, they sign a funding contract. After closing, the funder keeps an eye on his investment and, depending on the arrangement reached, he may get a say on how the case is managed. In terms of complexity and cost of case selection, the appellate funding is somewhere between the business of attorney lending (which follows a well-structured and largely repeatable procedure of picking law-firm borrowers) and betting on commercial high-ticket disputes (where funders carry out a more detailed and bespoke assessment of candidate cases).

Like their "commercial" brethren, appellate funders also evaluate potential investments in detail and on a case-by-case basis.[18] On the other hand, because of the later stage of their investments, the latter are usually able to obtain better information, and the scope of their inquiries is narrower. The first-instance outcome is known; the risk that the defendant would appeal is already realized; and the future path of the litigation is significantly constrained. Moreover, to the extent that appellate funding is offered by a third-party financier catering to law firms, the funder may benefit significantly from his prior knowledge of the lawyer on the case (because the appellate investment then becomes a part of a long-term relationship between repeat-players).

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15 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 38–39).

16 Goral, Dissertation, *supra* note 11 (manuscript at 221).

17 Not every case considered for funding will be funded. Therefore, the cases selected as investments must offer enough of a return to bear a portion of the total underwriting cost, including money spent on evaluation of those cases that were rejected.

18 *See* Goral, *Justice Dealers*, *supra* note 7 (manuscript at 33).

But the logic of an appellate financier, and his evaluation of an "appellate asset," is not limited to legal issues. For one, funders appear to believe that since they invest in legal defense of judgments, questions and risks related to the doctrine of champerty are off the table, reducing the risk that their interest in the case would prove unenforceable.[19] Some also think that the counterparty risk is limited, because appellants are often ordered to secure the judgment by reserving the money or posting a supersedeas bond pending the appellate review.[20]

Appellate funders also consider how their investments may be influenced by the judicial administration, about which they generally seem to hold a less-than-flattering opinion.[21] Echoing a broader sentiment, one interviewee, a trial lawyer-turned-financier, said that in his opinion, betting on judgments was a good idea because appellate courts are reluctant to reverse "knowing full well that the system doesn't have the bandwidth to handle reversals."[22]

Another contact recalled that his company once considered funding an appealed judgment where the defendant's line of argument depended on a single point of law.[23] Because of the high amount at stake, he and his partners asked a retired justice of the high court of the state where the suit was pending to appraise the case.[24] The justice told them that the appeal would definitely be dismissed on procedural grounds.[25] Accordingly, the funder invested.[26] But the plaintiff eventually lost, for reasons that the interviewee believed were unrelated to the merits of the case.[27]

A third funder-side source openly admitted that he was funding appellate cases assuming that each case evaluated as strongly meritorious would nevertheless only have a fifty percent chance of success.[28] He was of the opinion that, excepting clear-cut cases, which rarely survive until trial in the first place, an appeal is essentially a game of chance.[29]

The disenchantment about fairness and predictability of the appellate review notwithstanding, all interviewees familiar with the appellate niche

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19 Goral, Dissertation, *supra* note 11 (manuscript at 222). For a comprehensive overview of champerty, see Sebok, *supra* note 6. The ability to attach their interest to a judgment prompts some appellate funders to voluntarily disclose their investment to the court. *See infra* note 34. In stark contrast, third parties betting on pre-settlement litigation, whether through lawyers or directly, avoid disclosure.

20 Goral, Dissertation, *supra* note 6 (manuscript at 222).

21 *Id.* (manuscript at 223).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

agreed that well-picked judgments may be highly profitable.[30] Insiders perceive the "appellate market" as underserved by investors, allowing incumbents to bet on fat-tail cases at bargain prices.

III. AN EMPIRICAL SAMPLE OF CHERRY-PICKED APPEALS

Some third-party funders who bet on suits one at a time consider appellate cases as possible investments for their portfolios. In other words, they bet on appeals opportunistically, next to other cases that seem like good investments but are at an earlier stage of development.

To illustrate the above point, consider Burford, which reported an (unsuccessful) investment of $3.1 million in a patent dispute at a stage where "the plaintiff had won a substantial judgment that was on appeal."[31] In a similar vein, Juridica invested in a case where the jury had awarded the plaintiff more than $25 million, which the defendants attempted—in vain—to take all the way to the U.S. Supreme Court.[32]

But is it also possible to invest by taking stakes solely in judgments on appeal. Indeed, some financiers have done as much. To show the potential range of funded appellate litigation, I selected (non-randomly) nine recent lawsuits from the actual portfolio of LFG Special InvestorGroup, LLC (LFG).[33] It appears that in most cases the third party purchased, for cash,

30 *Id.*

31 BURFORD CAPITAL, LTD., ANNUAL REPORT 2012, at 12 (2013). Burford also said that they helped finance operations of a cash-strapped appellee, rather than the appeal itself, in a post–trial matter represented on contingency by an AmLaw 100 law firm. JONATHAN T. MOLOT, BURFORD CAPITAL, LTD., THEORY AND PRACTICE IN LITIGATION RISK 11 (2012), http://www.burfordcapital.com/wp-content/uploads/2015/01/Booklet-Theory-and-Practice.pdf.

32 JURIDICA INVESTMENTS, LTD., ANNUAL REPORT & ACCOUNTS 2012, at 8 (2013).

33 An affiliate of Law Finance Group, a leading third-party funder and a pioneer of law-firm financing, LFG Special InvestorGroup, LLC is a Nevada series limited liability corporation, with separate annual series. *See, e.g.*, Cal. UCC Filing No. 13-7390097928 (UCC1) (Dec. 10, 2013) (listing LFG Special InvestorGroup, LLC as a secured party); Mass. UCC Filing No. 201295436040 (UCC1) (Apr. 26, 2012) (same); N.Y. UCC Filing No. 201208165927485 (UCC1) (Aug. 16, 2012) (same). This suggests that LFG may raise capital for this particular mode of financing in annual rounds, from a separate group of investors with a comparatively higher risk appetite. A series LLC is a fairly novel and highly flexible corporate form, until recently popular mainly in offshore jurisdictions (and Delaware), brought on shore by a number of states competing for income generated by a business-friendly corporate domicile. A series LLC divides a corporation into "cells," which work as internal liability shields: assets and liabilities of each cell are kept separate. Under the structure, each cell may have a different composition of shareholders and different management, and, moreover, some series may be senior with respect to others. For more on the structure of a Nevada series LLC, see NEV. REV. STAT. §§ 86.296, 78.196 (2015), https://www.leg.state.nv.us/nrs/. For a general discussion see, for example, Jennifer Avery, et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties That Remain*, 45 TEX. J. BUS. L. 9 (2012) (arguing that although Texas LLCs offer benefits, they

an interest in a challenged judgment by way of assignment.[34] Additionally, LFG would routinely secure its interest in the proceeds of a case with a lien. It would file a UCC1 statement, thus disclosing details of the pledged judgment-cum-collateral; a UCC record would then specify the date of the lower-court judgment, the parties, the docket number, and sometimes also other details identifying the lawsuit in which LFG purchased a stake.[35]

The appellate transactions discussed below involved a definite sale of an interest (rather than a loan secured by such interest) in individual lawsuits (rather than pools of lawsuits). Thus, in each of those cases LFG became a party in interest by acquiring litigation equity from a plaintiff, her counsel, or both of them.

A. Personal Injury: Gonzalez

Plaintiff filed a slip-and-fall lawsuit against the City of New York, seeking to recover for damages sustained in a lobby of a public school in Brooklyn during snowy weather.[36] The case went before the jury, which found the defendant one hundred percent at fault and ordered it to pay $1 million in damages; accordingly, the judge entered judgment for the plaintiff.[37] The city appealed and two years later, the appellate division reversed and remanded on the question of liability.[38] The case currently awaits retrial. After the initial jury verdict was appealed, the plaintiff obtained financing against her rights to the judgment from LFG.[39] On the

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also raise tax, bankruptcy, and corporate governance issues); Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 808–25 (2010) (discussing series LLCs in the light of bankruptcy laws and asserting that bankruptcy courts should not recognize individual series as persons); and Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK. L. REV. 385, 405–06 (2007) (describing the idea of series LLCs generally and pointing out issues that call for a careful statutory design).

34 In some matters, LFG notified the court about its interest, and filed an assignment agreement. *See, e.g.*, Assignment of Judgment (Partial)/Acknowledgment of Assignment, Chaudhry v. City of Los Angeles, No. CV 09-01592-RGK (RZx) (C.D. Cal. Aug. 21, 2012), ECF No. 456. Typically, the plaintiffs as judgment creditors "owning the legal and/or equitable rights, title and interest in and to the Judgment and Proceeds thereof" sell a portion of their "Judgment Rights," up to a named sum, in exchange for an undisclosed "value received." *Id.* They also give LFG as the purchaser an explicit right to notify the court, the defendant, its insurer, and other third parties of its rights as assignee. *Id.*

35 For an in-depth look at the process of using future proceeds from pending law cases as collateral for secured-credit transactions, see Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS (forthcoming 2015), ssrn.com/abstract=2617057.

36 See Gonzalez v. City of New York, 970 N.Y.S.2d 286 (App. Div. 2013).

37 *See* Judgment, Gonzalez v. City of New York, No. 194462007 (N.Y. Sup. Ct. June 8, 2011), 2011 WL 11004084, *rev'd*, 970 N.Y.S.2d 286 (App. Div. 2013).

38 *See Gonzalez*, 970 N.Y.S.2d 286.

39 N.Y. UCC Filing No. 201208165927485 (Form UCC1) (Aug. 16, 2012).

same day that LFG disclosed its financing of Ms. Gonzalez, it also went on record as creditor of the plaintiff's counsel.[40]

B. Medical Malpractice: Alta Bates

The lawsuit alleged that negligence by a hospital and a doctor during surgery caused death of a patient.[41] The case went to trial, and the jury found the hospital liable, awarding $175,000 for mental anguish and an additional $1 million for wrongful death, which—because of the preemption under the Medical Injury Compensation Reform Act (MICRA)[42] and a preexisting settlement—the judge reduced to $220,000.[43] The hospital appealed, but the appeal was dismissed.[44] Post-judgment, LFG backed both the plaintiff[45] and her attorney.[46]

C. Product Liability: Evans

In 2004, the plaintiff sued a tobacco company for wrongful death, negligence, and breach of duty to warn (among other claims), asserting that his mother died of lung cancer because she was addicted to menthol cigarettes manufactured by the defendant.[47] After six years of litigation and fourteen days of trial,[48] the jury returned a verdict for the plaintiff, ordering the tobacco company to pay more than $150 million in compensatory and punitive damages (net of interest and attorney's fees).[49]

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40 N.Y. UCC Filing No. 201208165927500 (Form UCC1) (Aug. 16, 2012) (indicating as debtor a New York personal injury law firm of The Edelsteins, Faegenberg & Brown, LLP).

41 Keys v. Alta Bates Summit Med. Ctr., 185 Cal. Rptr. 3d. 313, 315–16 (Cal. Ct. App. 2015).

42 MICRA provides a limit of $250,000 for damages for noneconomic losses in any action for injury against a health care provider based on professional negligence. CAL. CIV. CODE § 3333.2 (West 2015).

43 *See* Judgment on Jury Verdict, Keys v. Alta Bates Summit Med. Ctr., No. RG09478812 (Cal. Super. Ct. Jul. 11, 2013), 2013 WL 4565813, *aff'd*, 185 Cal. Rptr. 3d. 313 (Cal. Ct. App. 2015).

44 *Alta Bates*, 185 Cal. Rptr. 3d. 313 (affirming judgment).

45 Cal. UCC Filing No. 13-7390097928 (Form UCC1) (Dec. 10, 2013).

46 Cal. UCC Filing No. 13-7390098050 (Form UCC1) (Dec. 10, 2013) (disclosing the financing of The Willoughby Law Firm from the Northern California, specializing in medical malpractice and personal injury).

47 Evans v. Lorillard Tobacco Co., 990 N.E.2d. 997, 1005–06 (Mass. 2013).

48 *See* Evans v. Lorillard Tobacco Co., West's Jury Verdicts – Massachusetts Reports (Thomson Reuters/West) (Mass. Super. Ct. Dec. 10, 2010), 2010 WL 5145125.

49 *See* Special Jury Verdict Form at 5–6, Evans v. Lorillard Tobacco Co., No. 2004-2840-A (Mass. Super. Ct. Dec. 14, 2010), 2010 WL 5137965 (awarding $21 million to the son and $50 million to the mother's estate in compensatory damages); Special Verdict Question, *Evans*, No. 2004-2840-A (Mass. Super. Ct. Dec. 16, 2010), 2010 WL 5137966 (awarding $81 million in punitive damages).

Among post-trial motions, the judge reduced the "extraordinarily large" compensatory damages, but not the punitive damages;[50] in addition, plaintiff was awarded over $2.5 million in attorney's fees and costs.[51] The tobacco manufacturer challenged the outcome. The Massachusetts Supreme Judicial Court granted direct review, and then remanded on the issue of punitive damages only.[52] In October of 2013, the tobacco company paid $79 million to settle the case.[53] Plaintiff secured appellate funding from LFG against his "rights and proceeds."[54] The third-party financier terminated his lien in the judgment immediately after the defendant paid the amount agreed in the settlement.[55]

D. Wrongful Termination: Taylor

Taylor was a whistleblower case. A former deputy chief of police in Burbank sued alleging that the city retaliated against him for complaining about sexual harassment and discrimination against minority police officers.[56] The jury agreed with the whistleblower; consequently, the court entered judgment for the plaintiff in the amount of $1.3 million.[57] Moreover, the defendant was ordered to pay more than $850,000 in attorney's fees, expert witness fees, and costs.[58] The city contested the judgment, but the appeal ultimately proved unsuccessful.[59] LFG has been

50 *See* Memorandum of Decision and Order on Lorillard Tobacco Company's Motion for Remittitur, Evans v. Lorillard Tobacco Co., No. SUCV200402840 (Mass. Super. Ct. Sept. 2, 2011) [hereinafter Remittitur Order], 2011 WL 7090720, *aff'd in part, rev'd in part*, 990 N.E.2d. 997 (Mass. 2013).

51 *See* Memorandum of Decision and Order on Plaintiff's Request for Attorneys Fees and Costs, *Evans*, No. SUCV200402840 (Mass. Super. Ct. Dec. 2, 2011), 2011 WL 7090715. The compensatory damages were remitted to $10 million for Willie Evans and $25 million for the mother's estate. Remittitur Order, *supra* note 50. Hence, the lower court outcome, if upheld on appeal, would have been worth $116 million before interest and costs.

52 *See Evans*, 990 N.E.2d at 1025–27 (holding that some jury instructions were prejudicial to the defendant).

53 *See* Lorillard, Inc., Quarterly Report (Form 10-Q), at 29 (Oct. 23, 2013).

54 Mass. UCC Filing No. 201295436040 (Form UCC1) (Apr. 26, 2012) (registering the lien).

55 Mass. UCC Filing No. 201307593440 (Form UCC3) (Oct. 25, 2013) (terminating the lien).

56 Taylor v. City of Burbank, No. B242502, 2014 WL 2153762 (Cal. Ct. App. May 22, 2014).

57 Judgment on General Verdict, Taylor v. City of Burbank, No. BC 422 252 (Cal. Super. Ct. Apr. 12, 2012), 2012 WL 1670540 (entering judgment for the plaintiff), *aff'd*, No. B242502, 2014 WL 2153762 (Cal. Ct. App. May 22, 2014).

58 *Taylor*, 2014 WL 2153762, at #3.

59 *Id.*

disclosed as funder of both the whistleblower[60] and his attorneys,[61] who are secured on their rights to the appealed judgment.

E. Employment Discrimination: Muniz

Plaintiff sued her employer, claiming that she was demoted because she was a woman.[62] The case proceeded to trial, even though the court granted in part the defendant's motion for summary judgment.[63] The jury found that the plaintiff's surviving claims were justified in principle; nevertheless, they awarded her only $27,000—a small fraction of what her attorney asked for.[64] Following the verdict, each party claimed victory, and both moved the court for costs. The judge held that the plaintiff should be considered the prevailing party, despite the modest damages recovered, and ordered the employer to pay costs exceeding $700,000.[65] In effect, the plaintiff's attorney won for himself twenty-five times more than the sum he won for the client. The defendant appealed, arguing abuse of discretion by the lower court; however, the Ninth Circuit affirmed with a minor exception.[66] Parties settled the remaining difference soon after.[67] Here, LFG was betting that the court of appeals would not reduce the attorney's fees award too much, backing financially the counsel to the plaintiff as a creditor secured on his proceeds from the case.[68]

60 Cal. UCC Filing No. 12-7330892590 (Form UCC1) (Sep. 28, 2012).

61 Cal. UCC Filing No. 12-7330305357 (Form UCC1) (Sep. 25, 2012) (disclosing debt of Gregory W. Smith, lead counsel in the case); Cal. UCC Filing No. 12-7342712574 (Form UCC1) (Dec. 28, 2012) (disclosing the same for Christopher Brizzolara, Mr. Smith's co-counsel).

62 *See* Order Denying Plaintiff's Motion for Leave to File an Amended Complaint and Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, Muniz v. UPS, Inc., 731 F. Supp. 2d 961, 963–66 (N.D. Cal. 2010) (No. C 09-01987 CW).

63 *Id.* at 977.

64 *See* Verdict Form, *Muniz*, 731 F. Supp. 2d 961 (N.D. Cal. 2010) (No. C-09-1987 CW), 2010 WL 5816928.

65 *See* Order Granting and Denying Various Motions, *Muniz*, 731 F. Supp. 2d 961 (N.D. Cal. 2011) (No. C 09-01987 CW), 2011 WL 3740808, *aff'd in part, vacated in part*, 738 F.3d 214, 227 (9th Cir. 2013).

66 *See Muniz*, 738 F.3d at 227 (vacating the portion of fees attributable to the work of a paralegal and remanding for determination of attorney's fees).

67 *See* Stipulation Regarding Satisfaction of Judgment and Order, *Muniz*, No. C-09-01987 CW (N.D. Cal. Jan. 13, 2014) (dismissing the case after remand on parties' stipulation).

68 Cal. UCC Filing No. 12-7328265056 (Form UCC1) (Sep. 10, 2012) (recording the financing of Stephen R. Jaffe and his law firm).

F. Breach of Warranty: Hoang

Mr. Hoang purchased a home from a bank, but he discovered that the plot of land he acquired was contaminated.[69] He sued the seller, and the jury found the bank in breach of contract, awarding $2,320,000 in damages.[70] The court entered judgment for the plaintiff, additionally awarding $115,000 in attorney's fees.[71] The bank appealed; however, the California Court of Appeal dismissed it.[72] In this case, LFG funded both the plaintiff and his attorney during the post-trial stage.[73]

G. Breach of Contract: Tary Network

Defendant, an aircraft company, was commissioned to customize and finish out two luxury jets.[74] The client, shielded by two special-purpose entities registered in the British Virgin Islands, paid substantial deposits to rent hangars and retain labor for the job.[75] After the contractor backed out and withheld the deposits, the jet owners sued in Texas state court.[76] After a jury trial, the court awarded the plaintiffs more than $55 million in damages and interest.[77] Defendant challenged the lower court outcome, and the parties stipulated after trial that it would be reasonable for the plaintiffs to recover about $1.25 million in attorney's fees, should the appeal prove unsuccessful.[78] However, the Court of Appeals of Texas sided with the appellants,[79] and after the remand the case awaits retrial

69 Hoang v. Cal. Pac. Bank, No. A139139, 2014 WL 3616424, at *1–2 (Cal. Ct. App. July 23, 2014).

70 Jury Verdict on the Complaint, Hoang v. Cal. Pac. Bank, No. RG10528400 (Cal. Super. Mar. 6, 2013), 2013 WL 1901745, *aff'd*, No. A139139, 2014 WL 3616424 (Cal. Ct. App. July 23, 2014).

71 *See* Judgment on the Jury Verdict, *Hoang*, No. RG10528400 (Cal. Super. Mar. 14, 2013), 2013 WL 1931913 (entering final judgment); First Amended Judgment on Jury Verdict, *Hoang*, No. RG10528400 (Cal. Super. Nov. 8, 2013) (entering amended judgment and awarding attorney's fees).

72 *Hoang*, 2014 WL 3616424.

73 Cal. UCC Filing No. 13-7375738721 (Form UCC1) (Aug. 29, 2013) (stating the plaintiff as debtor); Cal. UCC Filing No. 13-7375738963 (Form UCC1) (Aug. 29, 2013) (securing LFG on the litigation interest of the plaintiff's lawyer, Mr. Earl Johnson).

74 *See* Plaintiffs' First Amended Petition at 3–4, Tary Network Ltd. v. Associated Air Ctr. L.P., No. DC-10-01620 (Tex. Dist. Ct. May 23, 2012).

75 *Id.* at 1, 3–7.

76 *Id.* at 7–10.

77 Final Judgment, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 22, 2013), 2013 WL 10543035, *rev'd*, 2015 WL 970664 (Tex. App. Mar. 4, 2015).

78 *See* Plaintiffs' Motion for Judgment on the Jury Verdict at 5, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 18, 2013); Defendants' Proposed Order Regarding Plaintiffs' Attorneys' Fees, *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Mar. 20, 2013).

79 *Tary Network*, 2015 WL 970664 (reversing judgment and remanding the case).

scheduled for May of 2016.[80] Here, LFG disclosed that it holds interest in that part of the appealed judgment which is owed to the plaintiffs' counsel—a high-profile Texas law firm focused on commercial and intellectual-property cases.[81]

H. Tortious Interference: American Master Lease

American Master Lease (AML) owned a business method on structured real estate investments.[82] The dispute at hand stems from a falling-out among the shareholders of the company. Three of them, jointly holding less than half of the stock, wanted to make a deal with a private equity firm, Idanta Partners (Idanta), which the majority shareholder vetoed.[83] Nevertheless, the minority believed they could find a way around the block: the three founded a new company to which they licensed the valuable business method—claiming they were authorized to issue a license on behalf of AML.[84] Immediately after, Idanta purchased an eighty-five percent stake in the startup.[85] The majority shareholder, through AML, brought suit against Idanta and several of its partners, alleging tortious interference, and aiding and abetting a breach of fiduciary duty[86] (The minority partners whose tort was aided and abetted were sued in a separate action.)[87] Plaintiff prevailed: the jurors ordered that Idanta and several of its partners pay in excess of $7 million in restitution and interest.[88] On appeal, the judgment of the superior court was upheld as to liability, but defendants were granted a new trial as to the amount of the

80 Revised 162nd Uniform Scheduling Order (Level 3), *Tary Network*, No. 10-01620 (Tex. Dist. Ct. Sept. 16, 2015) (entering into docket tentative trial date of May 9, 2016).

81 Tex. UCC Filing No. 13-0032792633 (Form UCC1) (Oct. 15, 2013). The statement discloses as debtor the law firm of Gruber Hurst Johansen Hail Shank, LLP. The firm states that its "fundamental goal is to focus on results, sharing in the risk and rewards with our clients by maintaining a stake in the outcome." *Overview*, GRUBER HURST JOHANSEN HAIL SHANK, LLP, http://www.ghjhlaw.com/OurFirm/Overview (last visited Dec. 4, 2015).

82 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., No. B247478, 2014 WL 4678703, at *1–2 (Cal. Ct. App. Sept. 22, 2014).

83 *See id.*

84 *See id.* at *1.

85 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d. 548, 557 (Cal. Ct. App. May 5, 2014), *aff'd*, No. B247478, 2014 WL 4678703 (Cal. Ct. App. Sept. 22, 2014).

86 *See* Complaint at 7–13, *Am. Master Lease*, No. BC367987 (Cal. Super. Ct. Mar. 15, 2007).

87 Roberts v. Andrews, No. BS120091 (Cal. Super. Ct. Apr. 10, 2009); *see Am. Master Lease*, 171 Cal. Rptr. 3d. at 559.

88 *See* Am. Master Lease LLC v. Idanta Partners, Ltd., 43 Trials Digest 15th 8 (Thomson Reuters/West) (Cal. Super. Ct. July 19, 2012), 2012 WL 5332483.

disgorgement.[89] The case was remanded to the superior court for further proceedings and as of the date of this Essay, it is about to go before the Los Angeles jury for the second time.[90] Given the mandate of the court of appeals, the plaintiff is certain to prevail, although the original jury award may be reduced. In the dispute between AML and Idanta, plaintiff's trial counsel obtained financing from LFG against the share of the challenged judgment they are owed as attorney's fees.[91]

I. Theft of Trade Secrets: InfoFlows

In 2004, Steve A. Stone, a high-level software engineer at Microsoft, founded InfoFlows Corporation (InfoFlows).[92] His focus was on technology that allowed tracking of specific images on the Internet.[93] The startup soon found a partner in Corbis Corporation (Corbis), an "image farm" founded by Bill Gates, with an inventory of more than 100 million images available for commercial license.[94] Corbis retained the talents of Mr. Stone for a project involving development of "smart media object[s]."[95] In 2006, Corbis contracted InfoFlows to build for it a tailor-made license management system; parties agreed that Corbis would own the final product, but InfoFlows would retain most of the underlying technology.[96] But after InfoFlows had developed the software, Corbis rejected it and terminated the agreement (the parties would continue to disagree as to why the software was rejected).[97] Shortly after, InfoFlows launched its image management system as an independent product.[98] As it would turn out later, a few months before the contract was signed, Corbis—without telling Mr. Stone or naming him as an inventor—filed a non-public patent application which, according to Mr. Stone, was based on his technology.[99]

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89 *See Am. Master Lease*, No. B244689 (Cal. App. 2nd Feb. 25, 2014), *vacated*, 225 Cal. App. 4th 1451 (May 27, 2014).

90 *Am. Master Lease*, No. BC367987 (Cal. Super. Ct.) (docket showing trial scheduled for Dec. 16, 2015).

91 Cal. UCC Filing No. 13-7380115685 (Form UCC1) (Sep. 30, 2013) (disclosing the financing of Graham & Martin LLP).

92 Corbis Corp. v. Stone, No. 64505–6–I, 2012 WL 1020250, at *2 (Wash. Ct. App. Mar. 26, 2012), *review granted in part, denied in part*, 290 P.3d 131 (Wash. 2012).

93 *Id.*

94 *Id.* at *1; *see also* CORBIS, http://corporate.corbis.com/company-fact-sheet/ (last visited Oct. 17, 2015); *About Us*, CORBIS, http://corporate.corbis.com/about-us/our-business/ (last visited Oct. 17, 2015); *infra* note 102.

95 *Corbis Corp.*, 2012 WL 1020250, at *1.

96 *See id*. at *3–4.

97 *See id*. at *5.

98 *Id*.

99 *Id*. at *3.

In early 2007, both parties sued, each alleging that the other misappropriated trade secrets and breached the contract.[100] The case culminated in a three-week trial in August of 2009, which brought the plaintiff an overwhelming victory.[101] The jury dismissed all causes of action asserted by Corbis, and found in favor of InfoFlows on all eight claims allowed by the judge to be tried, awarding damages in excess of $36 million.[102] Corbis moved for judgment as a matter of law and remittur, but the trial court upheld the jury award except for one claim, ordering the defendant to pay more than $20 million.[103] Both parties filed an appeal, the net outcome of which reduced the trial-court award by $7 million.[104] The result proved disappointing to both InfoFlows and Corbis, with both seeking review by Washington's highest legal authority. Adding another twist to the acrimonious dispute, the Washington Supreme Court granted review, but limited it to a single claim by InfoFlows on which the jury had put a price tag of $16.5 million but which both courts below had subsequently dismissed.[105] Ultimately, the case was discontinued before oral arguments,[106] signaling a settlement.[107]

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100 *Id.* at *5.

101 *See id.* at *6.

102 *Id.* at *6; *see also* Verdict, Corbis Corp. v. Stone, No. 07-2-03244-4 SEA (Wash. Super. Ct. Aug. 24, 2009), 2009 WL 3829327.

103 *Corbis Corp.*, 2012 WL 1020250, at *6; *see also* Judgment Against Corbis Corporation, Including Declaratory Judgment and Permanent Injunction, *Corbis Corp.*, No. 07-2-03244-4 SEA (Wash. Super. Ct. 2010), 2010 WL 3267776 (entering final judgment and awarding attorney's fees), *rev'd*, 2012 WL 1020250 (Wash. Ct. App. 2012), *review granted in part, denied in part*, 290 P.3d 131 (Wash. 2012).

104 The appellate court then set aside the award for fraudulent inducement (worth $7 million), affirmed dismissal of the conversion award (worth $16.5 million), and reversed a pre-trial grant of summary judgment favorable to Corbis. *See Corbis Corp.*, 2012 WL 1020250, *1–2.

105 Order, *Corbis Corp.*, 290 P.3d 131 (Wash. 2012) (No. 87555-3) (granting review).

106 *See Supreme Court – Briefs*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=C (last visited Oct. 16, 2015) (hearing date set for May 23, 2013); *Dockets and Oral Argument Calendars for 2013*, WASHINGTON COURTS, http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display_file&fileID=dspCalYear&yr=2013 (last visited Oct. 16, 2015) (no hearing held).

107 Outside of the *InfoFlows* litigation, Corbis is noteworthy for its impact on the image-licensing industry. As Lawrence Lessig argues:

> [T]he modern-day painter, using the tools of Photoshop, sharing content on the Web, must worry all the time. Images are all around, but the only safe images to use in the act of creation are those purchased from Corbis or another image farm. . . . [T]here is a highly regulated, monopolized market in cultural icons . . . .

LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 186 (2004); *see also id. at* 134–45 (arguing that technology-enabled constraints on creative process stifles innovation). It is profoundly ironic that the very company that Professor Lessig mentions by name as a

It appears that after Corbis appealed to the Washington Supreme Court, InfoFlows secured funding from LFG against its rights to the challenged judgment, as modified by the intermediate appeal.[108]

IV. DISCUSSION

The sampled cases from the appellate portfolio actually built by a third-party funder identified in the previous Part inform the question of how third-party money bankrolls the legal industry in the United States.

First, because appeals are much narrower than trial proceedings in the first instance and usually pivot around points of law, appellate funding is largely cross-substantive and independent of the plaintiff's status. While the market for legal claims has been repeatedly classified based on who gets the money (corporations, consumers, or attorneys),[109] in reality the market is fragmented and more complex. From a funder's point of view, the common denominator for appealed lawsuits to invest in is a particular level of risk and control associated with late-stage investments in litigation equity. The nature of a disputed cause of action or the person who brings it, although relevant, seem secondary.

Second, the anecdotal portfolio of LFG emphasizes the central role played by litigation attorneys in third-party funding arrangements. The majority of the examined cases saw the funder consolidate his stake by backing both the plaintiff and her counsel. Sometimes, he would buy only from the lawyer—either because the stake of the plaintiff was financially insignificant (*Muniz*), or because the plaintiffs likely had no interest in giving up equity, even if their contingency lawyers did (*Tary Network* and *American Master Lease*). Only in one of the selected cases, *Evans*, did LFG fund the plaintiff without also funding the lawyers.[110]

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symbol of the aggressive enforcement of intellectual property rights would illegally take ideas from a startup. Or at least that is how the King County jury saw it after hearing the *InfoFlows* case.

108 Wash. UCC Filing No. 2013-031-5279-7 (Form UCC1) (Jan. 31, 2013) (registering a secured interest in judgment rights); Wash. UCC Filing No. 2013-165-8141-6 (Form UCC3) (June 14, 2013) (terminating security).

109 *See, e.g.*, Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 501 (2014) (noting that low-end tort actions and high-end commercial suits are two distinct markets for third-party funders); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 574 (2010) (claiming that litigation funding takes the form of either loans to personal injury plaintiffs or "syndicated lawsuit[s]"); GARBER, *supra* note 4, at 7–17 (distinguishing consumer funding, commercial funding, and lending to law firms).

110 It is possible that the *Evans* lawyers chose to wait and keep their equity. Mr. Evans was represented by Davis, Malm & D'Agostine P.C. (Davis Malm), an established and relatively large law firm from Boston. Davis Malm enjoys a long-term relationship with a bank from its own community, Eastern Bank from Massachusetts, which holds a blanket lien on all assets of the law practice, including "all accounts and accounts receivable," "all

The analyzed sample suggests that, as a rule, plaintiffs and their claims were third-party funded because of the connection between the financier and the lawyer, not the other way around.[111] The funder-lawyer-plaintiff chain would also help explain why the model of appellate financing is, generally speaking, the domain of those funders who, like LFG, have started out as law-firm lenders.

When combined, the two previously made assertions—that appellate funding is cross-substantive and that deals are often brokered by lawyers—lead to another notable conclusion: the American market for suits is not limited to actions for damages. The strategy of appellate funding makes business sense also in those cases where, as in public-interest litigation, plaintiffs seek an injunction or token damages but their attorneys can still win substantial attorney's fees due to a statutory fee-shifting rule.[112] Appellate funders could fund class counsel, including actions where class members receive no money.[113]

Finally, in virtually all sampled cases funding was directed at plaintiff-appellees—which means that the third-party financier bet on the party defending the lower-court outcome during additional litigation initiated by a defendant-appellant. In other words, appellate funders bet not on the success of appellate litigation, but on its failure—they go short on the defendant's case in the hope that the trial judgment will be upheld. This supports the claim that the third-party business is concentrated on the

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contract rights," and "all rights under judgments, all commercial tort claims and choses in action." *See* Mass. UCC Filing No. 201189924970 (Form UCC1) (Aug. 19, 2011). Two alternative explanations are also plausible. One is that the plaintiff's counsel was funded, but I failed to find the "financial footprint" of the transaction–which is not very likely given that LFG is a meticulous record keeper. Another possibility is that lawyers were funded through the plaintiff, and the price paid by the funder for the litigation stake sold by the plaintiff was then shared between him and his lawyers according to the split agreed in the contingency fee agreement.

111 *Cf.* Goral, *Skin in the Game*, *supra* note 14 (arguing that financiers often use law firms as conduits for third-party capital investments).

112 For example, The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012), allows "reasonable attorney's fee[s]" as part of the costs awarded to parties who win in federal court against state actors who violated federal rights "under color of [law]" (42 U.S.C. § 1983); in sex discrimination cases under Title IX (20 U.S.C. §§ 1681–88); or in race discrimination cases under Title VI (42 U.S.C. §§ 2000d–2000d-7). In California, courts may award attorney's fees to prevailing parties enforcing "an important right affecting the public interest." CAL. CIV. PROC. CODE § 1021.5 (West, Westlaw through Ch. 511 of 2015 Reg. Sess.).

113 In a certified class action, lead counsel may be awarded reasonable attorney's fees. *See* FED. R. CIV. P. 23(h). The fees should consider, among others, the benefit conferred on the class. *See, e.g.*, Goldberger v. Integrated Res., Inc., 209 F.3d 43, 53–56 (2d Cir. 2000). But such benefits do not necessarily have to be monetary. *See, e.g.*, Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1311 (3d Cir. 1993); *In re* Ikon Office Sols., Inc. Sec. Litig., 209 F.R.D. 94 (E.D. Pa. 2002).

plaintiff side because of the economic incentives and realities of American litigation. Given opportunity and a satisfactory metric of litigation success, third parties seem more than happy to make money playing defense.

The last point is particularly salient, because it sheds new light on the policy debate over the risks and benefits of litigation funding. In particular, one of the key arguments raised by critics has been the assertion that the presence of third-party money causes more litigation and, therefore, it promotes frivolous suits that would otherwise fail to ever make it into a court of law.[114] And while the onus for such an assertion remains with the critics who, so far, have failed to discharge it,[115] the anecdotal data presented in this Essay shows a major flaw in the critics' argument.

It might be true that some of the third-party money is used to bring new suits or help those plaintiffs who have already filed last longer in the fight than they would have on their own. But there are also modes of financing, such as appellate funding, which seek to prevent additional—and potentially frivolous—litigation (which may include the appellate stage as well as a retrial if the appealed judgment is reversed). Therefore, those who take as an axiom that more litigation is bad should wholeheartedly embrace appellate funding, which is to a defendant's appeal what insurance is to a plaintiff's suit at the lower-court level: a source of money thrown at the opponent in order to thwart his procedural efforts.

CONCLUSION

This Essay provides a short introduction to appellate financing, a niche in the market for third-party funding of litigation which might be analogized to later-stage venture investing. It is a business strategy that consists of acquiring an economic stake in a judgment challenged by the losing defendant; therefore, it is a wager *against* the appellant and *for* the post-trial outcome. Often, a funder obtains a stake in a judgment from both the plaintiff-appellee and her contingency attorney, which underscores the important role of attorneys in third-party funding arrangements.

Appellate funding is not limited to a particular genre of litigation, such as personal-injury or commercial lawsuits. In fact, it quite is possible to fund appeals also in those disputes where, as in public-interest litigation or class actions, plaintiffs win little or no money, or the judgment award is too

114 *See, e.g.*, Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 677 (2011) (pointing out, in critique of third-party funding, that the availability of external financing allows plaintiffs to bring lawsuits which would not be filed without it); BEISNER ET AL., *supra* note 4, at 5–7 (contending that third-party financing encourages "frivolous and abusive" lawsuits).

115 *See* Hensler, *supra* note 109 (deconstructing the argument that funding promotes frivolous suits and critiquing its underlying assumptions in the context of class actions).

dispersed. In such cases plaintiff's attorneys may be able to earn substantial fees, and attorney's fees make investible financial assets.

Since appellate financiers bankroll plaintiffs who defend against further legal action, their practice challenges the claim that third-party funding inevitably leads to more litigation, some of it unmeritorious. Rather, it seems that funding is directed primarily at plaintiffs because of a relatively stronger demand from that side of the bar. Yet financiers seem ready to back any party, at any stage of legal process—as long as the risk-return profile of a litigation investment suits their preferences.