

NOTES

DENYING AFFORDABLE ACCESS TO CONTRACEPTIVES IN THE NAME OF ACCOMMODATING RELIGION

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INTRODUCTION

Prior to 1964, women suffered severely from gender discrimination in the workplace with no legal remedies available against such discrimination. It was not until Title VII of the Civil Rights Act that women began to gain some even-footing in their employment opportunities.¹ Even then, it took more than ten years for the government to explicitly forbid employers from discriminating against women for any pregnancy-related medical conditions.² Despite progress toward gender equality in the workplace, women still face gender-based discrimination. In 2018, roughly 53,694 individuals filed gender-based complaints under Title VII with the United States Equal Employment Opportunity Commission.³ 2,790 of those complaints specifically alleged pregnancy-based discrimination, including issues with contraceptive coverage.⁴ Ninety-nine percent of women have used some form of birth control in their lifetime,⁵ and, on average, sixty-two percent of women currently use at least one method.⁶ Yet only *half* of all employer-provided healthcare plans actually cover prescription contraceptives.⁷ Out-of-pocket expenses for prescription birth control pills

1. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§701-716, 78 Stat. 241, 253–66 (codified at 42 U.S.C. §2000e).

2. See Pregnancy Discrimination Act, Pub. L. No. 95-555, §701(k), 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e).

3. *Title VII of the Civil Rights Act of 1964 Charges*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges> [<https://perma.cc/5994-USL8>].

4. *Id.*

5. Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease In Out-Of-Pocket Spending For Contraceptives After ACA Mandate Removed Cost Sharing*, HEALTH AFF. 34 NO. 7, 1204 (2015).

6. See Jamila Taylor & Nikita Mhatre, *Contraceptive Coverage Under the Affordable Care Act*, CENTER FOR AMERICAN PROGRESS (October 6, 2017, 5:09 pm), <https://www.americanprogress.org/issues/women/news/2017/10/06/440492/contraceptive-coverage-affordable-care-act/> [<https://perma.cc/TFF6-U8U6>].

7. See C. Keanin Loomis, *A Battle over Birth Control: Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 WM. & MARY BILL OF RTS. J. 463, 465 (2002).

can cost hundreds of dollars per year,⁸ ranging anywhere from \$215 to \$1,210 per year.⁹ This accounts for more than a third of the out-of-pocket expenses women pay annually.¹⁰ And on average, uninsured women end up paying over sixty percent more out-of-pocket healthcare costs annually than men.¹¹

Today, women face three distinct barriers to affordable access to birth control under their employer-provided healthcare plans: (1) the religious exemption of the Affordable Care Act, (2) Executive Order No. 13798 and its subsequent rules, and (3) the Religious Freedom Restoration Act. Each of these barriers allows for employers with religious beliefs of sincere moral convictions to circumvent the current federal mandate that expressly requires contraceptive coverage for female employees in their healthcare plans. As a result, each of the barriers must either be eliminated or revised in order to effectively balance women's reproductive rights with an employer's religious freedom.

Section II(A) discusses the history of women's rights in equal employment opportunities, specifically focusing on Title VII and the Pregnancy Discrimination Act. Section II(B)–(D) explores the current legislative barriers that prevent women from obtaining affordable birth control as well as the unique burdens the barriers place upon women. Section III(A) outlines the judicial decisions that led to the creation of the Religious Freedom Restoration Act. Section III(B) explores the subsequent judicial decisions that have shaped the modern interpretation, application, and analytical framework of the Religious Freedom Restoration Act.

Section IV(A) explores the hallmark decision in *Burwell v. Hobby Lobby* while Section IV(B) demonstrates the impact of that decision on subsequent cases in lower courts which have reached inconsistent conclusions. Section V(A) explains the policy concerns raised by the current legislative barriers and accompanying judicial decisions. Section V(B) describes the necessary modifications that must be made to the current system of religious accommodations in order to effectuate the contraceptive mandate in the Affordable Care Act. Section VI proposes a

8. Taylor & Mhatre, *supra* note 6.

9. Jessica Arons & Lindsay Rosenthal, *The Health Insurance Compensation Gap*, CENTER FOR AMERICAN PROGRESS (April 16, 2012, 9:00am), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/health_insurance_gap.pdf [<https://perma.cc/F5L9-4WEH>].

10. Laurie Sobel, Alina Salganicoff & Caroline Rosenzweig, *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*, KAISER FAMILY FOUNDATION: HEALTH REFORM (Nov. 19, 2018), <https://www.kff.org/health-reform/issue-brief/new-regulations-broadening-employer-exemptions-to-contraceptive-coverage-impact-on-women/> [<https://perma.cc/T4CE-YS9A>].

11. Loomis, *supra* note 7, at 465.

revised version of the Religious Freedom Restoration Act that incorporates all of the modifications listed in the previous section. Section VII briefly concludes.

I. THE EVOLUTION OF WOMEN'S REPRODUCTIVE RIGHTS AND EQUAL ACCESS TO HEALTHCARE COVERAGE IN THE WORKPLACE

A. Title VII and The Pregnancy Discrimination Act

Upon the enactment of The Civil Rights Act of 1964 ("The Civil Rights Act"), women seemed to achieve legislative equality for employment opportunities via Title VII.¹² On paper, Title VII eliminated sex discrimination in the workplace and placed men and women on an equal playing field for hiring opportunities, promotions, and benefits.¹³ Specifically Section 703 made it unlawful for any employer to refuse to hire, terminate, segregate, classify, or otherwise discriminate against any individual with respect to his or her "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁴ However, discrimination persisted. Although Title VII was designed to make men and women coequals, it failed to take into account their biological differences, especially in terms of reproductive capacities. Thus, because Title VII failed to compensate for these differences, it fell short of advancing anything more than facial equality.

For example, in *General Electric Company v. Gilbert*, the Supreme Court declared that a company's health insurance plan was "facially nondiscriminatory," even though it did not offer disability benefits for pregnancy.¹⁵ The company's insurance plan provided benefits to every employee who became disabled as a result of a "nonoccupational sickness [or] accident."¹⁶ Female employees who sought disability benefits for absences related to pregnancy and child birth were routinely denied.¹⁷ These women brought suit, alleging that the company's insurance plan discriminated against them on the basis of their gender, in violation of Title VII.¹⁸ The Supreme Court concluded that the plan did not violate Title VII's

12. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§701-716, 78 Stat. 241, 253-66 (codified at 42 U.S.C. §2000e).

13. "That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy." Civil Rights Act of 1964, Pub. L. No. 88-352, §§701, 78 Stat. 241, 254 (codified at 42 U.S.C. §2000e).

14. See *supra* note 13.

15. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 139-40 (1976).

16. *Id.* at 128.

17. *Id.* at 128-29.

18. *Id.* at 129.

prohibition on gender-discrimination because the plan gave the same benefits to, and covered the same risks for, both men and women.¹⁹

[G]ender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.²⁰

Justice Brennan dissented, pointing out the absurd fallacies of the majority's opinion.²¹ Notably, Justice Brennan acknowledged that pregnancy could not be excluded merely on the grounds that it was a "voluntary" disability; the plan covered other voluntary disabilities, such as sporting injuries.²² Further, the company's plan covered medical expenses that could only be incurred by male employees.²³ "[T]he plan also insure[d] . . . prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan. Again, pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage."²⁴ Although the plan did include some coverage for female-specific disabilities, Brennan emphasized that the most common and prevalent disability among women—pregnancy—was not covered.²⁵ In his view, the company's insurance plan was a clear violation of Title VII's objective to eliminate sex-discrimination in the workplace.²⁶

Justice Stevens wrote a separate dissent, in which he criticized the majority's roundabout, and ultimately erroneous, analysis for a simple issue.²⁷

Rather, the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. The analysis is the same whether the rule

19. *Id.* at 138.

20. *Id.* at 138–39.

21. *Id.* at 146 (Brennan, J., dissenting).

22. *Id.* at 151.

23. *Id.* at 152.

24. *Id.*

25. *Id.* at 154.

26. *Id.* at 160.

27. *Id.* (Stevens, J., dissenting).

relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan.²⁸

The Court's extremely literal and superficial interpretation of Title VII completely disregarded the biological and anatomical differences between men and women.

In direct response to this decision,²⁹ Congress enacted the Pregnancy Disability Act ("PDA") in 1978.³⁰ The PDA amended Section 701 of Title VII to "prohibit sex discrimination on the basis of pregnancy" and other related medical conditions.³¹

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 . . .³²

Importantly, both the first and second clauses use the conjunction "or" to forbid employer discrimination, not just against pregnancy itself, but also against any manifestations or medically related aspects of pregnancy.³³ In this way, the PDA would appear to mandate healthcare coverage for pregnancy as well as the mere *possibility* of pregnancy, thus encompassing a wide spectrum of conditions ranging from paid maternity leave to contraceptives.³⁴ However, since the PDA itself did not explicitly require an employer to cover the cost of contraceptives in its health insurance plan, it was not until 2001 that circuit courts began to interpret the PDA's non-discrimination mandate to include contraceptives.³⁵

28. *Id.* at 161.

29. *See* Young v. UPS, 135 S. Ct. 1338, 1342 (2015) (observing that "[T]he [Pregnancy Discrimination] Act was intended to overturn the holding and the reasoning of General Elec. Co. v. Gilbert.").

30. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, §701(k), 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e).

31. *Id.* at 2076.

32. *Id.*

33. Loomis, *supra* note 7, at 464.

34. *Id.*

35. *See, e.g.,* EEOC v. UPS, Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001), which holds that the failure to provide prescription coverage for oral contraceptives to cure hormonal imbalances violates § 703 of Title VII because it provided prescription coverage for men with hormonal imbalances; Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001), which holds that an employer's

B. Current Barriers: The Affordable Care Act

Following course, President Obama enacted the Affordable Care Act (“ACA”) in 2010. The ACA included a so-called “contraceptive mandate” that imposed cost-sharing requirements on employers, with fifty or more full-time employees, to provide minimum essential coverage for female employees, including “preventative care and screenings,” at zero-cost-sharing.³⁶ Pursuant to its statutory authority, the Health Resources and Service Administration, a component of the Health and Human Services Department (“HHS”), promulgated a comprehensive set of guidelines that defined preventative care to include all “Food and Drug Administration-approved contraceptive methods.”³⁷ Any employer who failed to provide coverage would be required to pay a hefty fine.³⁸

However, the PDA and ACA mandates were not absolute. Both Title VII, as amended with the PDA, and the ACA exempted religious employers from providing healthcare plans that covered the cost of contraceptives for female employees.³⁹ Specifically, this “opt-out” clause provides that

. . . a nonprofit religious employer who (1) [o]pposes providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria, . . . is entitled to an accommodation to avoid ‘contracting, arranging, paying, or referring for contraceptive coverage[.]’⁴⁰

benefit plan violated Title VII and the PDA because it failed to cover birth control prescriptions; *Cath. Charities of Sacramento, Inc. v. Superior Ct.*, 90 Cal. App. 4th 425, 109 Cal. Rptr. 2d 176 (2001), which holds that a religious employer’s exclusion of contraceptives from its health insurance plan constituted gender-discrimination in violation of federal and state law.

36. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §2713, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 300gg-13(a)(1)-(5)); *Pennsylvania v. President U.S.*, 930 F.3d 543, 556 (3d Cir. 2019).

37. *Pennsylvania*, 930 F.3d at 556.

38. Patient Protection and Affordable Care Act § 2713; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696-98 (2014).

39. Civil Rights Act of 1964, Pub. L. No. 88-352, §702,78 Stat. 241, 255 (codified at 42 U.S.C. §2000e); *Pennsylvania*, 930 F.3d at 556–57.

40. *Pennsylvania*, 930 F.3d at 557.

HHS has defined “nonprofit religious employer” to include “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively religious activities of any religious order.”⁴¹

At first glance, this exemption might seem reasonable. However, a quick peek behind the curtain reveals the extraordinary cost of accommodating religion. Annual out-of-pocket expenses for prescription birth control can cost anywhere from \$215 to \$1,210 per year.⁴² Ninety-nine percent of women have used some form of birth control in their lifetime,⁴³ and, on average, sixty-two percent of women currently use at least one method.⁴⁴ And, although a study by the Obama Administration revealed that fifty-five million women received coverage under the ACA,⁴⁵ roughly half of all health care plans do not cover prescription contraceptives.⁴⁶ Thus, uninsured women end up paying “63 to 68 percent higher out-of-pocket healthcare costs than men,”⁴⁷ with over a third of those costs attributable to birth control.⁴⁸

Even though the ACA attempted to close the gap of gender disparity in healthcare coverage, it created another barrier that women must push through in order to receive affordable contraceptives. By reaffirming the religious exemption in Title VII, the ACA’s opt-out clause broadens the loophole for nonprofit employers. Nonprofit employers can avoid financial responsibility for their female employees’ reproductive health by merely self-certifying that providing contraceptive coverage violates their religious beliefs.

C. Current Barriers: Executive Order No. 13798 and its Accompanying Rules

The implications of this religious accommodation are further compounded by President Donald Trump’s recent attempts to restrict the applicability of the ACA’s contraceptive mandate even further. In May 2017, President Trump announced a new era of religious exemptions and declared that “people of faith [would not] be targeted, bullied or silenced

41. See *Hobby Lobby Stores*, 573 U.S. at 698.

42. See Arons & Rosenthal, *supra* note 9.

43. See Becker & Polsky, *supra* note 5.

44. See Taylor & Mhatre, *supra* note 6.

45. See Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES, October 6, 2017, at A1; See Brianna Ehley, *Trump rolls back Obamacare birth control mandate*, POLITICO (October 6, 2017, 11:21 am), <https://www.politico.com/story/2017/10/06/trump-rolls-back-obamacares-contraception-rule-243537>.

46. Loomis, *supra* note 7, at 465.

47. *Id.*

48. See Sobel, Salganicoff & Rosenzweig, *supra* note 10.

anymore.”⁴⁹ Thereafter, the President signed Executive Order No. 13798 (“the Executive Order”) designed to “promote free speech and religious liberty.”⁵⁰ The order, while echoing the values enshrined in the First Amendment, provides in pertinent part,

. . . that the Department of the Treasury does not take any adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective . . . the term ‘adverse action’ means the imposition of any tax or tax penalty; *the delay or denial of tax-exempt status*; the disallowance of tax deductions for contributions made to entities exempted from taxation under section 501(c)(3) of title 26, United States Code; or any other action that makes unavailable or denies any tax deduction, exemption, credit, or benefit.⁵¹

Section 3 of the order further allows the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services to make new rules and regulations to address and accommodate any “conscience-based objections to the preventive-care” requirements outlined in the ACA.⁵²

In October 2017, the Department of Health and Human Services promulgated two rules that effectively steamrolled the ACA’s contraceptive mandate.⁵³ The rules provide for broad exemptions for employers, both nonprofit and for-profit, with religious beliefs or “sincerely-held moral convictions.”⁵⁴ While the Trump administration has declared the rules to be a victory for religious freedom, it coarsely admitted that it “[did] not have sufficient data to determine the actual effect of these rules, the extra costs that women might incur for contraceptives, or the number of unintended

49. Pear, Ruiz & Goodstein, *supra* note 45.

50. Exec. Order No. 13798, 82 Fed. Reg. 21, 675 (May 4, 2017).

51. *Id.* (emphasis added).

52. *Id.*

53. See Pear, Ruiz & Goodstein, *supra* note 45.

54. See Exec. Order No. 13798, *supra* note 50; *Insurance Coverage of Contraceptives*, GUTTMACHER INSTITUTE (June 15, 2020), <https://www.guttacher.org/state-policy/explore/insurance-coverage-contraceptives> [https://perma.cc/PUR8-EE4J]; *Recent Developments in the Battle over the Affordable Care Act’s Contraception Mandate*, NAT’L L. REV. (Jan. 30, 2019), <https://www.natlawreview.com/article/recent-developments-battle-over-affordable-care-act-s-contraception-mandate> [https://perma.cc/56T9-N39F]; Ehley, *supra* note 45.

pregnancies that might occur.”⁵⁵ These rules, having exacerbated the religious accommodations put in place by Title VII, which were unsuccessfully addressed by the PDA and then woefully reaffirmed by the ACA, have since become one of the biggest hurdles women must face in the fight for their reproductive rights and equal access to healthcare coverage.

D. Current Barriers: The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (“RFRA” or “the Act”) complicates matters even further. To be clear, the ACA and the Executive Order, along with its subsequent rules, are merely the first two obstacles that stand in the way of healthcare equality in the workplace since they each specifically provide for religious exemptions to the federal contraceptive mandate.⁵⁶ RFRA, however, provides the legal analytical framework for evaluating those exemptions. The Act provides that neutral and generally applicable laws, which only incidentally burden religious beliefs, are nevertheless unconstitutional if the laws cannot survive a strict scrutiny analysis.⁵⁷

Since the contraceptive mandate in the ACA is a generally applicable law, in that it does not target employers of any particular faith, RFRA governs its statutory application. Litigation has since ensued where religious employers, who have been denied exemptions to the contraceptive mandate, seek judicial review on the grounds that the ACA violates RFRA by substantially burdening their right to the free exercise of religion.⁵⁸

II. BALANCING RELIGIOUS RIGHTS: THE CREATION AND EVOLUTION OF RFRA

Understanding the complexities and implications of RFRA is necessary to understand the role it currently plays in obstructing women’s abilities to access birth control under a religious employer’s healthcare insurance plan. Part A of this Section explores the history of RFRA and its

55. See Pear, Ruiz & Goodstein, *supra* note 45.

56. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §2713, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 300gg-13(a)(1)-(5)); Exec. Order No. 13798, *supra* note 50.

57. RFRA, 103 Pub. L. 141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §2000gg).

58. See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Sharpe Holdings, Inc. v. United States HHS*, 801 F.3d 927 (8th Cir. 2015); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410-11(E.D. Pa. 2013).

analytical framework. Part B outlines the subsequent judicial decisions that have shaped the Act's modern application.

A. The Road to RFRA

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁵⁹ This provision thereby prohibits the federal government⁶⁰ from imposing burdens on, or withholding benefits from, individuals and entities because of their religious beliefs.⁶¹ However, the Free Exercise Clause does not stand as a complete prohibition on government regulation of religious activity.⁶² The United States Supreme Court has maintained that the government may pass laws of general applicability, even if they incidentally burden religious activity, without violating the principle of religious neutrality embodied in the Free Exercise Clause.⁶³

Inevitably, however, there are situations where a person may not be able to comply with laws of general applicability due to her religious beliefs. There are two forms of such noncompliance: Either a person's religious beliefs prohibit her from taking a mandated action, or a person's religious beliefs require her to take an unlawful action.⁶⁴ Thus, the question then becomes whether the Free Exercise Clause requires the government to exempt these individuals from compliance with generally applicable laws

59. U.S. CONST. amend I.

60. The Free Exercise Clause of the First Amendment also places the same prohibition on state governments as applied through the Fourteenth Amendment of the United States Constitution. *See* U.S. CONST. amend XIV.

61. U.S. CONST. amend I; *See also* *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that “to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”).

62. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (observing that the “activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.”); *Sherbert*, 374 U.S. at 403 (observing “the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for ‘even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.’” (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961))).

63. *See* *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Emp't Div. Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990).

64. *Smith*, 494 U.S. at 877 (observing that “the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts.”).

due to their religious beliefs. To answer this question, the Supreme Court employed a variety of scrutiny tests throughout the late-twentieth-century in an attempt to refine the outer-contours of the relationship between religious neutrality and government regulation.

Between 1963 and 1989, the Supreme Court employed a “strict scrutiny” test to determine whether a religious individual should be afforded an exemption from a generally applicable law. This level of scrutiny requires a two-part examination. First, the party seeking an exemption had to prove that the challenged law imposed a substantial burden on her religious practices by forcing her to take action, or refrain from taking an action, in violation of her beliefs.⁶⁵ If a law only imposed an incidental burden on the religious individual, merely by virtue of being incompatible with the individual’s beliefs, the legal analysis would conclude and an exemption would not be granted.⁶⁶

If the party seeking the exemption satisfied the first prong of the strict scrutiny test, then the burden would shift to the government to prove that any burden imposed on an individual’s constitutional right to the free exercise of religion was justified by a compelling government interest.⁶⁷ To satisfy this prong, the government had to demonstrate the challenged law was sufficient to override the burden on religious exercise because it was narrowly tailored to the least restrictive means available to achieve the purported interest.⁶⁸

In *Sherbert v. Verner*, a Seventh-Day Adventist was fired from her job because she refused to work on Saturdays, the Sabbath Day of her faith.⁶⁹ When the Adventist could not obtain another job due to her objection to Saturday work, she filed for unemployment compensation under her state’s unemployment statute.⁷⁰ In order to be eligible for unemployment benefits under the state statute, an applicant must meet certain criteria. Part of the criteria stipulated that if an applicant had failed, without good cause, to accept suitable work when it was offered to her, she

65. *Sherbert*, 374 U.S. at 403 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

66. *Id.*; *Smith*, 494 U.S. at 879 (citing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940)) (“The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”); *Yoder*, 406 U.S. at 215 (observing that “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

67. *Sherbert*, 374 U.S. at 403 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

68. *Id.*

69. *Sherbert*, 374 U.S. at 399.

70. *Id.* at 399-400.

would be ineligible to receive unemployment benefits.⁷¹ The state determined that the Adventist's unemployment claim fell within this provision and disqualified her from receiving benefits.⁷²

The Supreme Court reversed⁷³ and found that the state's disqualification provision of the unemployment statute imposed a substantial burden on the Adventist's constitutional right to the free exercise of religion.⁷⁴ Essentially, the statute imposed a monetary deterrent on individuals by conditioning their eligibility to receive benefits upon their surrender of their religious beliefs. Such a condition directly violates the Free Exercise Clause.⁷⁵ Further, although the statute was enacted to promote public welfare and not to interfere with religious practices, its practical effect imposed an indirect burden on the Adventist by forcing her to choose between abandoning part of her religious beliefs or forfeiting financial aid.⁷⁶ The "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."⁷⁷

Significantly, according to the *Sherbert* Court, the distinction between a direct and indirect burden is of little legal consequence. "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."⁷⁸ All that matters, for purposes of the strict scrutiny test, is whether the burden is substantial.

Regarding the second prong of the test, the Supreme Court rejected the state's argument that it had a compelling interest in preventing fraudulent unemployment claims.⁷⁹ First, the state's unemployment statute exempted Sunday-worshippers from the ineligibility provision, thereby unfairly discriminating against those of other religious faiths.⁸⁰ Second, the state failed to demonstrate that the ineligibility provision was the only means available, much less the narrowest means available, to achieve its

71. *Id.* at 400–01.

72. *Id.* at 401.

73. *Id.* at 410.

74. *Id.* at 403.

75. U.S. Const. amend I; *Sherbert*, 374 U.S. at 406 (holding that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

76. *Sherbert*, 374 U.S. at 403–04.

77. *Id.* at 404.

78. *Id.* (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)) (emphasis added).

79. *Id.* at 406–07.

80. *Id.* at 406.

purported interest.⁸¹ The Supreme Court thus concluded that a state could not “constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest” and exempted the Adventist from complying with the challenged provision of the unemployment statute.⁸²

The Court continued to apply this strict scrutiny test in *Wisconsin v. Yoder*.⁸³ *Yoder* concerned a compulsory education law that required children under the age of sixteen to attend a public or private institution.⁸⁴ Two Amish families were convicted of violating this statute because they refused to send their children, ages fourteen and fifteen, to school past the eighth grade.⁸⁵ The Wisconsin Supreme Court reversed the conviction, holding that the statute, as applied, unconstitutionally interfered with the Amish families’ right to the free exercise of religion.⁸⁶ The United States Supreme Court, after reviewing the issues with strict scrutiny, affirmed the ruling of the state supreme court.⁸⁷

The Amish sincerely believe that higher education, beyond the first eight years of school, imposes secular values on children that alienate them from God.⁸⁸ Such education exposes children to worldly views that directly conflict with, and may even be hostile to, central Amish beliefs.⁸⁹ Under the first prong of the strict scrutiny test, the Supreme Court held that Wisconsin’s compulsory-education law substantially burdened those of the Amish faith by threatening to undermine their religious practices.⁹⁰

“The impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”⁹¹ From the Court’s perspective, the statute coerced the Amish families to choose between abandoning their faith in order to assimilate into modern society or migrating to a more tolerant state in order to remain devout.⁹² Thus, forcing those of the Amish faith to comply with Wisconsin’s compulsory-education statute would “gravely endanger if not destroy the free exercise of respondents’ religious beliefs.”⁹³

81. *Id.* at 407.

82. *Id.* at 410.

83. *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972).

84. *Id.* at 207.

85. *Id.*

86. *Id.* at 213.

87. *Id.* at 207, 234, 236.

88. *Id.* at 212.

89. *Id.* at 211.

90. *Id.* at 218.

91. *Id.*

92. *Id.*

93. *Id.* at 219.

Further, the Supreme Court was not persuaded that Wisconsin's purported interest in creating and maintaining a uniform education system was compelling enough to outweigh the substantial burden imposed on the Amish faith.⁹⁴ Although Wisconsin had legitimate interests in requiring "some degree of education" to prepare "self-reliant" individuals who could contribute "effectively and intelligently" to society, the state's compulsory-education statute was not a narrowly-tailored means by which to achieve those interests.⁹⁵

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.⁹⁶

Moreover, Wisconsin failed to demonstrate how its interests would be adversely affected by granting an exemption to the Amish.⁹⁷ Therefore, because the state had not satisfied its burden of proof under the second prong of the strict scrutiny test, the Supreme Court struck down the compulsory-education statute as applied to the Amish.⁹⁸

The Court was careful to note in its holding, however, that its ruling did not undermine the general applicability of the law; Wisconsin's statute was still valid insofar as it did not interfere with the Amish faith.⁹⁹ Further, the Court observed that its holding did not prevent Wisconsin from promulgating reasonable standards governing the "continuing agricultural [and] vocational education" of Amish children, which presumably would suffice as a narrowly tailored means of achieving the state's interest in fostering informed citizens.¹⁰⁰

From 1963–1989 the Supreme Court continued to carve out religious exemptions from generally applicable laws. However, in 1990 the Court switched positions, indicating that it was not the role of the judiciary to accommodate religion wholesale. Instead, the Court emphasized the need

94. *Id.* at 222.

95. *Id.* at 221–22, 228–29.

96. *Id.* at 224–25.

97. *Id.* at 236.

98. *Id.*

99. *Id.*

100. *Id.*

for legislative action to balance governmental interests with religious exemptions, while remaining true to religious neutrality.

In *Employment Division v. Smith (Smith II)*, Justice Scalia disavowed the strict scrutiny test set forth in *Sherbert* as applied to claims for religious exemptions from generally applicable laws.¹⁰¹ The issue on appeal concerned an Oregon statute which prohibited citizens from ingesting peyote, a hallucinogenic drug, without a medical prescription.¹⁰² Two individuals were fired from their jobs after “they ingested peyote for sacramental purposes” as part of a religious ceremony at the Native American Church.¹⁰³ The individuals were thereafter denied unemployment compensation because they had violated Oregon’s criminal statute.¹⁰⁴ The Oregon Supreme Court applied the strict scrutiny test articulated in *Sherbert* and determined that the state’s interest in protecting the financial integrity of the unemployment fund was not sufficient to override the burden imposed on the individuals’ religious practices.¹⁰⁵

The United States Supreme Court reversed, holding that Oregon may properly prohibit the religious use of peyote without violating the Free Exercise Clause.¹⁰⁶ Writing for the Court, Justice Scalia observed that the Court had refrained from applying the *Sherbert* test outside the realm of unemployment compensation.¹⁰⁷ Justice Scalia noted that, although this case concerned a claim for unemployment compensation, the underlying dispute concerned a criminal state statute generally prohibiting certain conduct.¹⁰⁸ The Court has never applied the *Sherbert* test to invalidate a criminal law that was properly promulgated under a state’s police power.¹⁰⁹

The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling” – permitting him, by virtue of his beliefs, “to become a law unto himself,” –

101. *Emp’t Div. Dep’t of Hum. Res. v. Smith*, 494 U.S. 885 (1990).

102. *Id.* at 874.

103. *Id.*

104. *Id.*

105. *Id.* at 875.

106. *Id.* at 890.

107. *Id.* at 883.

108. *Id.* at 884.

109. *Id.* at 884–85.

contradicts both constitutional tradition and common sense.¹¹⁰

According to the Court, the “compelling government interest” requirement, as applied to criminal statutes, would create a “constitutional anomaly” by allowing private individuals to place themselves above the law.¹¹¹

If such a stringent scrutiny test is applied across the board, almost every law would fail.¹¹² In the eyes of the Court, society “cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”¹¹³ A rule like the one in *Sherbert* would coerce society into “courting anarchy” and would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”¹¹⁴

Moreover, the “compelling interest” component of the *Sherbert* strict scrutiny test often requires judges to evaluate the “centrality” or “sincerity” of an individual’s religious beliefs.¹¹⁵ In Scalia’s mind, such a judicial inquiry would be improper as it essentially requires the “[evaluation of] the relative merits of differing religious claims.”¹¹⁶ However, in its conclusion, the Court was careful to note that its refusal to further involve the judiciary in the accommodation of religion did not preempt the legislature from participating in such an event.¹¹⁷

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the *political* process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government *must be preferred* to a system in which each conscience is a law

110. *Id.* at 885 (citations omitted).

111. *Id.* at 885–86.

112. *Id.* at 888.

113. *Id.*

114. *Id.*

115. *Id.* at 887.

116. *Id.*

117. *Id.* at 890.

unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹¹⁸

The Supreme Court's decision in *Smith II* reined in the judiciary's role in balancing religious rights with governmental interest by striking down the strict scrutiny test outlined in *Sherbert* for purposes of evaluating generally applicable laws for possible Free Exercise Clause violations. After *Smith II*, laws of neutral or general applicability do not need to be justified by a compelling governmental interest, even if the law incidentally burdens a religious practice.¹¹⁹ The Court's significant withdrawal from the accommodation of religion prompted Congress to enact the Religious Freedom Restoration Act of 1993.¹²⁰

Section 2(b)(1) of the Act provides that the purpose of the act is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."¹²¹ As enacted in 1993, RFRA requires both the state and federal governments to grant special exemptions to individuals who cannot comply with a neutral law due to their sincerely held religious beliefs.¹²² Section 3 of the Act specifically prohibits the government from substantially burdening an individual's religious exercise, even incidentally, unless the government can successfully demonstrate that the neutral law is narrowly tailored to the least restrictive means available to furthering a compelling government interest.¹²³ Section 3 of RFRA also makes claims for religious exemptions subject to judicial review.¹²⁴ Although RFRA did not provide special benefits to any particular religious denomination, the Act raises several policy concerns which are addressed in Section V(A).¹²⁵

B. The Road Beyond RFRA

The Religious Freedom Restoration Act of 1993 quickly became controversial, with criticisms ranging from its possible violations of the Establishment Clause to criticisms regarding the Act's application to state and local governments. Merely four years after the Act was signed into law,

118. *Id.* (emphasis added).

119. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Smith*, 494 U.S. at 885.

120. RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See infra* Section V.

the United States Supreme Court addressed Congress's authority to enact RFRA in *City of Boerne v. Flores*.¹²⁶

In *Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church.¹²⁷ When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which included the church, the Archbishop challenged the permit denial under the Religious Freedom Restoration Act of 1993.¹²⁸ The District Court concluded that RFRA exceeded the scope of Congress's authority to regulate the states.¹²⁹ The Fifth Circuit reversed and held RFRA to be a constitutional exercise of Congressional power.¹³⁰ The United States Supreme Court reversed the Fifth Circuit, holding that the Act was unconstitutional as applied to the several states.¹³¹

In enacting RFRA, Congress relied on Section 5 of the Fourteenth Amendment to apply the statute to the states. The Fourteenth Amendment, provides in pertinent part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Court, led by Justice Kennedy,¹³² looked to its precedent and to the history of the Fourteenth Amendment to determine that Congress's power under Section 5 was merely "remedial" in nature.¹³³ Legislation which remedies or prevents infringements of constitutionally protected rights falls within Congress's enforcement power under Section 5, even if it intrudes into "legislative spheres of autonomy previously reserved to the States."¹³⁴

126. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

127. *Id.* at 512.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 512, 519, 536.

132. *Id.* at 511.

133. *Id.* at 519 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

134. *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

However, “enforcement” power is not “substantive” power.¹³⁵ Therefore, legislation that alters the meaning of any constitutional provision is not a valid Congressional exercise of the enforcement power under Section 5.¹³⁶ Simply put, “Congress does not enforce a constitutional right by changing what the right is.”¹³⁷

Additionally, the Supreme Court observed that, in general, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”¹³⁸ In applying this principle to RFRA, the Court determined that the Act could not be considered remedial or preventative in nature because it was not created to respond to, or prevent, unconstitutional conduct.¹³⁹ The Act applies to all federal and state law, not merely those which were motivated by religious bigotry.¹⁴⁰ There is no termination date for the Act and no mechanism by which to limit its broad coverage.¹⁴¹ The Court further argued that RFRA was not remedial legislation because of its adoption of the strict scrutiny test from *Sherbert*.¹⁴²

[The test] reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.¹⁴³

Ultimately, the Court concluded that RFRA was a substantive change in the scope of protections afforded by the Free Exercise Clause of the First Amendment.¹⁴⁴ Therefore, the Supreme Court struck down the Act, to the extent that it applied to the several states, as an unconstitutional exercise of Congressional authority.¹⁴⁵

135. *Id.* at 519.

136. *Id.*

137. *Id.*

138. *Id.* at 520.

139. *Id.* at 532.

140. *Id.* at 532, 535.

141. *Id.* at 532.

142. *Id.* at 533.

143. *Id.* at 533–34.

144. *Id.* at 532.

145. *Id.* at 536.

Justice Stevens concurred in the judgment of *Boerne* but wrote separately to express his view that RFRA privileged religion in violation of the Establishment Clause.¹⁴⁶ Justice Scalia also wrote a concurrence, joined by Justice Stevens, to defend the principles he opined in *Smith II* against Justice O'Connor's dissent which sought to reconsider the standard *Smith II* set forth regarding the evaluation of Free Exercise Clause claims.¹⁴⁷ The Supreme Court decision in *Boerne* left open several important questions: (1) whether the Religious Freedom Restoration Act was unconstitutional as applied to the federal government; (2) whether the Act violated the Establishment Clause; and (3) whether the RFRA violated the Separation of Powers Doctrine.

Years later, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court held that RFRA governed the actions of the federal government, without delving into a deeper explanation regarding the Act's constitutionality.¹⁴⁸ The Court merely noted that

RFRA operates by mandating consideration, under the compelling interest test, of exceptions to rules of general applicability . . . Congress determined that the legislated test “is a workable test for striking sensible balances between religious liberty and competing prior governmental interests” . . . This determination finds support in our cases.¹⁴⁹

Gonzales involved a suit brought by the O Centro Espirita Beneficente Uniao do Vegetal (“UDV”) seeking to enjoin the federal government from applying the Controlled Substances Act to its sacramental use of *hoasca*, a hallucinogenic drug, in tea ceremonies.¹⁵⁰ The government argued that it was not required to grant an exception to the UDV because the Controlled Substances Act was the least restricting means of furthering three different compelling interests: (1) “protecting the health and safety of UDV members”; (2) “preventing the diversion of *hoasca* from the church to recreational users”; and (3) “complying with the 1971 United Nations Convention on Psychotropic Substances.”¹⁵¹

The Court quickly rejected each of these interests, relying on the findings of the District Court that determined that health risks and diversion of *hoasca* were “virtually balanced” with the interests set forth by the

146. *Id.* at 536–37 (Stevens, J., concurring).

147. *Id.* at 537 (Scalia, J., concurring); *Id.* at 544–45 (O'Connor, J., dissenting).

148. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

149. *Id.* at 436.

150. *Id.* at 425.

151. *Id.* at 426.

federal government.¹⁵² Thus, in applying RFRA's strict scrutiny test, the unanimous Court held that the federal government failed to satisfy its burden to justify its criminalization of the religious use of a hallucinogenic drug.¹⁵³

Interestingly enough, Justice Stevens did not inquire into RFRA's possible violations against the Establishment Clause, as he did in *Boerne v. Flores*,¹⁵⁴ but rather joined in the majority opinion.¹⁵⁵ Although the Court does not address the question of whether RFRA violates the Establishment Clause, the Court did touch on the issue of Separation of Powers, indicating that it was within Congress's authority to dictate the standards by which the Court should evaluate claims for religious exemptions.¹⁵⁶

RFRA . . . plainly contemplates that courts would recognize exceptions – that is how the law works . . . Congress' role in the peyote exemption . . . confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.¹⁵⁷

The Court's decision in *Gonzales* reaffirmed the applicability of RFRA. As it stands today, the Act is still good law as applied to the federal government, and therefore it governs litigation where the ACA's federal contraceptive mandate is challenged on religious grounds.

III. BALANCING RELIGIOUS FREEDOM WITH REPRODUCTIVE FREEDOM

Several hallmark judicial decisions have shaped the way RFRA is interpreted and applied to challenges against the contraceptive mandate in the ACA. *Burwell v. Hobby Lobby* was the first United States Supreme Court case that specifically addressed this issue. Due to the narrow holding of the decision in *Hobby Lobby*, a circuit split formed among the lower courts as to whether the contraceptive mandate imposed a substantial burden on religious employers. Part A of this Section breaks down the decision of *Hobby Lobby* and explores how it broadened the scope of the opt-out clause in the ACA. Part B explores the impact of the *Hobby Lobby* decision on lower courts in subsequent cases.

152. *Id.* at 426–27.

153. *Id.* at 429.

154. *Flores*, 521 U.S. at 536–37 (Stevens, J., concurring).

155. *Gonzales*, 546 U.S. at 422.

156. *Id.* at 434.

157. *Id.*

A. *Burwell v. Hobby Lobby*

In the landmark case of *Burwell v. Hobby Lobby*, the Supreme Court addressed the issue of whether the ACA's contraceptive mandate, as applied, substantially burdened the free exercise of religion in violation of RFRA.¹⁵⁸ Three businesses (collectively, "the businesses"), including Hobby Lobby, shared the religious belief that life begins at conception and modeled their enterprises to run in accordance with Christian principles.¹⁵⁹ As such, the owners objected to providing certain contraceptives, "morning after" pills and intrauterine devices, to female employees because they believed that these methods constituted "abortifacients."¹⁶⁰ The business owners faced penalties of up to \$1.3 million per day, or up to \$475 million per year, for noncompliance with the ACA.¹⁶¹ The owners brought suit against the Department of Health and Human Services ("HHS"), seeking an injunction against the contraceptive mandate and arguing that "it [was] immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs."¹⁶² Ultimately, the injunctions were denied, and the case was appealed to the Supreme Court.¹⁶³

Writing for the majority, Justice Alito first questioned whether the ACA opt-out clause provided exemptions to for-profit corporations and, if so, whether RFRA protected such corporations.¹⁶⁴ After an extensive analysis, the Court interpreted the ACA's opt-out clause and the language of RFRA to protect both for-profit organizations as well as nonprofit organizations.¹⁶⁵ Thus, the Act governed the legality of the ACA as applied to the businesses at bar, which were all for-profit organizations.¹⁶⁶ The Court turned to consider whether the ACA mandate substantially burdened the businesses' free exercise of religion.¹⁶⁷ Assuming that there was a compelling interest in providing zero-cost-sharing access to FDA-approved contraceptive methods, the Court focused on whether the contraceptive mandate was the least restrictive means by which HHS could achieve its goal.¹⁶⁸ In finding the ACA contraceptive mandate did not meet the least-restrictive-means standard, the Court noted there were other ways in which HHS could accomplish its interest.¹⁶⁹

158. *Burwell v. Hobby Lobby*, 573 U.S. 682, 691 (2014).

159. *Id.* at 700–01.

160. *Id.* at 701–03.

161. *Id.* at 691.

162. *Id.* at 701–04.

163. *Id.* at 702, 704–05.

164. *Id.* at 705.

165. *Id.* at 719.

166. *Id.*

167. *Id.* at 728.

168. *Id.*

169. *Id.*

The most straightforward way of doing this would be for the Government to assume the cost of providing the . . . contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown . . . that this is not a viable alternative.

In concluding that the contraception mandate violated RFRA,¹⁷⁰ the Court emphasized the narrow scope of its holding, noting that “[w]e do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.”¹⁷¹

Justice Ginsburg dissented, arguing that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁷² She rejected the majority's interpretation that RFRA impliedly protected for-profit entities, flatly pointing out the lack of case law to support “. . . the notion that free exercise rights pertain to for-profit corporations.”¹⁷³ In her view, for-profit corporations could not claim religious freedoms since such entities use labor to make a dollar while nonprofits seek to uphold the religious values of a shared community.¹⁷⁴ “By incorporating a business . . . an individual separates herself from the entity and escapes personal responsibility for the entity's obligations.”¹⁷⁵ Following this logic, Justice Ginsburg concluded that owners of the businesses in question could not claim religious freedom on behalf of their enterprises.¹⁷⁶

Justice Ginsburg also faulted the majority for its failure to inquire into whether the ACA contraceptive mandate actually imposed a substantial burden on the businesses.¹⁷⁷ Had the majority bothered to look a little deeper, she opined, it would have discovered that such a burden did not exist. Deeply held religious beliefs, no matter how sincere, are not sufficient to give rise to a RFRA claim.¹⁷⁸ Justice Ginsburg aptly pointed out that there is a difference between factual allegations that a court must accept as true and the legal conclusion that religious exercise is

170. *Id.* at 736.

171. *Id.* at 731.

172. *Id.* at 741 (Ginsburg, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

173. *Id.* at 751–52.

174. *Id.* at 756 (quoting *Gilardi v. United States*, 733 F. 3d 1208, 1242 (2013) (Edwards, J., concurring in part and dissenting in part)).

175. *Id.*

176. *Id.*

177. *Id.* at 758.

178. *Id.* at 758–59.

substantially burdened.¹⁷⁹ Rationalizing that the contraceptive mandate does no more than require the businesses to finance comprehensive healthcare plans, Justice Ginsburg concluded that “. . . the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”¹⁸⁰

Finally, even assuming the businesses had a cognizable claim, Justice Ginsburg questioned the majority’s application of RFRA. Specifically, she argued that a viable least-restrictive-means alternative “. . . cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.”¹⁸¹ Thus, Ginsburg contended that the majority’s suggested “government pays” alternative was not a *viable* alternative because it would not aid the compelling interest in providing contraceptive coverage at zero-cost-sharing in the same manner as the current ACA requirements would.¹⁸² Forcing women to search outside of employment-funded healthcare for contraceptive coverage would “. . . imped[e] women’s receipt of benefits ‘by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit’ . . .”¹⁸³ Emphasizing that Title X of the Public Health Service Act, which is the *only* federal program that devotes its funding to family planning services, is “not designed to absorb the unmet needs of . . . insured individuals,”¹⁸⁴ Ginsburg doubted the ability of women to gain sufficient contraceptive coverage outside the scope of their employer-provided healthcare.¹⁸⁵

B. The Impact of Hobby Lobby

Following the Supreme Court’s decision in *Hobby Lobby*, lower courts have disagreed over whether the ACA’s contraceptive mandate imposes a substantial burden on religious entities. Some circuits have held that the mandate does not impose a substantial burden on the religious exercise of for-profit and nonprofit entities. For example, the Tenth Circuit, in *Little Sisters of the Poor Home for the Aged v. Burwell*,¹⁸⁶ held that the ACA did not impose a substantial burden on the plaintiffs’ religious freedom.¹⁸⁷ The plaintiffs, owners of several nonprofits, brought an action

179. *Id.* at 759 (quoting *Kaemmerling v. Lappin*, 384 U.S. App. D.C. 240, 250 (2008)).

180. *Id.* at 760.

181. *Id.* at 765.

182. *Id.*

183. *Id.*

184. *Id.* at 766.

185. *Id.* at 768.

186. *Little Sisters*, 794 F.3d 1151, *vacated sub nom. Zubik*, 136 S. Ct. 1557.

187. *Little Sisters*, 794 F.3d at 1173, 1195.

under RFRA, complaining that the contraceptive mandate violated their sincerely held religious beliefs by forcing them to be complicit in sinful practices.¹⁸⁸ The plaintiffs also alleged that even obtaining a religious exemption under the ACA would still “trigger” contraceptive coverage, thereby making them just as complicit by allowing others to provide contraceptives to their employees.¹⁸⁹

In concluding that neither the ACA’s contraceptive mandate nor its religious “opt-out” clause constituted a substantial burden to the plaintiffs’ religious exercise, the Tenth Circuit observed,

[T]he opt-out does not “cause” contraceptive coverage; it relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor . . . Although a religious non-profit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.¹⁹⁰

The Second, Fifth, and D.C. circuits have all reached similar conclusions.¹⁹¹ Conversely, only one circuit, the Eighth Circuit, has held that the ACA’s contraceptive mandate imposes a substantial burden on religious exercise.

In *Sharpe Holdings, Inc v. Burwell*, two nonprofit religious organizations, CNS International Ministries, Inc. (“CNS”) and Heartland Christian College (“HCC”), sought to enjoin HHS from enforcing the ACA’s contraceptive mandate against them.¹⁹² Both organizations adhered to the Christian faith and asked that their employees promote the same standards and practices integral to their beliefs.¹⁹³ As part of their mission statements, the organizations “strive ‘to promote certain moral and ethical standards in their employees, including . . . a belief in the sanctity of life which precludes abortion on demand.’”¹⁹⁴ As part of their religious missions, CNS and HCC offered healthcare insurance plans to their full-

188. *Id.* at 1168–69.

189. *Id.* at 1180.

190. *Id.* at 1182–83.

191. *See, e.g., Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated by* 136 S. Ct. 2450 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated sub nom. Zubik*, 136 S. Ct. 1557; *Priests for Life v. United States HHS*, 413 U.S. App. D.C. 135 (2014), *vacated sub nom. Zubik*, 136 S. Ct. 1557.

192. *Sharpe Holdings, Inc. v. Burwell*, 801 F.3d 927, 932 (8th Cir. 2015), *vacated sub nom. HHS v. CNS Int’l Ministries*, 136 S. Ct. 2006 (2016).

193. *Id.* at 933.

194. *Id.*

time employees, yet these plans did not provide coverage for contraceptives.¹⁹⁵

The organizations asserted that they should not be required to cover certain birth control options for their female employees—“Plan B, ella, and copper IUDs”—because they were “functionally equivalent to abortion on demand.”¹⁹⁶ CNS and HCC argued that the ACA’s contraceptive mandate imposed a substantial burden on their free exercise of religion, in violation of RFRA, by imposing severe monetary penalties for noncompliance.¹⁹⁷ They also asserted that the ACA’s religious opt-out clause was “no accommodation at all” because it still allowed a third party administrator to provide the contraceptives.¹⁹⁸ According to the organizations, this does not eliminate the substantial burden the ACA placed upon their free exercise of religion.¹⁹⁹

Conversely, the government argued that the ACA’s contraceptive mandate and current accommodation procedures did not “substantially burden CNS and HCC’s exercise of religion.”²⁰⁰ The government also contended that “even if there were a substantial burden on the exercise of religion, it ha[d] employed the least restrictive means to accomplish its compelling interest[s] in ensuring access to no-cost contraceptive coverage” and safeguarding public health.²⁰¹ It did not, however, dispute the sincerity of the CNS and HCC’s religious beliefs.²⁰² The district court granted an injunction to the nonprofits.²⁰³ On appeal, the Eighth Circuit reviewed the case to determine whether the ACA, as applied, substantially burdened the nonprofits’ free exercise of religion in violation of RFRA.²⁰⁴

Under RFRA, courts must employ a strict scrutiny review to determine if a law, which substantially burdens the free exercise of religion, is justified by a compelling government interest that is narrowly tailored to the least restrictive means available.²⁰⁵ For religious exemptions, “a governmental action substantially burdens the exercise of religion when it coerces private individuals into violating their religious beliefs or penalizes them for those beliefs by denying them the ‘rights, benefits, and privileges

195. *Id.* at 935.

196. *Id.* at 935–36.

197. *Id.* at 936; *Id.* at 933 (observing that companies that do not comply with the ACA contraceptive mandate face penalties of up to \$100 per day, or \$2000 per year, for noncompliance).

198. *Id.* at 938.

199. *Id.*

200. *Id.* at 936.

201. *Id.* at 936, 943.

202. *Id.* at 938.

203. *Id.* at 932.

204. *Id.* at 936–37.

205. *Id.* at 937.

enjoyed by other citizens.”²⁰⁶ Here, the Eighth Circuit noted that the monetary fines imposed on CNS and HCC for noncompliance mirrored the burden in *Hobby Lobby*, which was determined to be a substantial burden.²⁰⁷ “When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, ‘[t]here has never been a question’ that the government ‘imposes a substantial burden on the exercise of religion.’”²⁰⁸

Relying on *Hobby Lobby*, the Eighth Circuit determined that it was bound to accept the sincerity of CNS and HCC’s religious beliefs since neither party disputed the issue.²⁰⁹ The government, however, attempted to persuade the Eighth Circuit that the organizations’ objection to the ACA’s accommodation procedure was “simply too attenuated” from their religious and moral beliefs to bear any weight.²¹⁰ The court was unpersuaded. Again, relying on the Supreme Court’s decision in *Hobby Lobby* and on the principle that “religious beliefs need not be ‘acceptable, logical, consistent, or comprehensible to others’ to deserve protection,”²¹¹ the circuit court rejected the government’s contention.²¹² Holding otherwise would be “tantamount to telling religious objectors” that their views on immoral complicity were “flawed”—thereby overstepping the role of the judiciary.²¹³ Therefore, the Eighth Circuit concluded that the ACA’s accommodation procedure did not adequately relieve the substantial burden on CNS and HCC to pay heavy monetary fines for noncompliance.²¹⁴

However, the question still remained if the ACA’s contraceptive mandate and accommodation procedures were narrowly tailored to the least restrictive means available.²¹⁵ “[A] regulation may constitute the least restrictive means of furthering the government’s compelling interests if ‘no alternative forms of regulation’ would accomplish those interests without

206. *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988)).

207. *Id.* at 937.

208. *Id.* at 938 (quoting *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, No. 13-5368, 808 F.3d 1, 2015 U.S. App. LEXIS 8326 at *49, n.3 (D.C. Cir. May 20, 2015) (Kavanaugh J., dissenting from denial of rehearing en banc)).

209. *Id.* at 941 (first citing *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014); then citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (“It 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.”)).

210. *Id.* at 942.

211. *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981)).

212. *Id.* at 942.

213. *Id.*

214. *Id.* at 942–43.

215. *Id.* at 943.

infringing on a claimant's religious-exercise rights."²¹⁶ CNS and HCC both suggested that the government has other "least-restrictive means" available to achieve its purported interests. Namely, they proposed that the government assume the cost of providing contraceptives.²¹⁷ "[T]he government could provide subsidies, reimbursements, tax credits, or tax deductions to employees, or that the government could pay for the distribution of contraceptives at community health centers, public clinics, and hospitals with income-based support."²¹⁸

Alternatively, CNS and HCC recommended that the government provide contraceptives to female employees through its own healthcare exchanges.²¹⁹ Because the government had made no showing that these alternatives were not feasible, the court concluded that the ACA accommodation procedure, as applied to CNS and HCC, was not narrowly tailored to the least restrictive means available.²²⁰ Thus, the court held that the ACA's contraceptive mandate substantially burdened the nonprofits' exercise of religion in violation of RFRA.²²¹ Ultimately, the Eighth Circuit affirmed the district court's order granting the nonprofits an injunction.²²²

IV. EVALUATING THE COST OF ACCOMMODATING RELIGION

As it stands, the opt-out clause of the ACA, the Executive Order and its accompanying rules, and RFRA have all worked together to accommodate religion at the expense of women's reproductive rights. By providing for broad religious exemptions to the federal mandate that requires employers to provide preventative care for female employees, including birth control, these pieces of legislation have erected barriers that directly contravene modern societal values. In particular, these barriers, although designed with religious freedoms and individual liberties in mind, fail to strike the proper balance between accommodating religion and protecting public welfare. Part A of this Section will explain the four primary reasons why the current religious exemption method, as created by the ACA and as perpetuated by the Executive Order and RFRA, are damaging to society. Part B of this Section will demonstrate the necessary steps that must be taken to rectify that damage.

216. *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)).

217. *Id.* at 945.

218. *Id.*

219. *Id.*

220. *Id.* at 945–46.

221. *Id.* at 946.

222. *Id.*

A. Four Reasons Why: Financial Burdens, Healthcare Complications, Decreased Individual Liberties, and Inconsistent Final Judgments.

As of 2020, roughly sixty-two million women have birth control coverage.²²³ According to one study, women have saved over \$1.4 billion in out-of-pocket costs for contraceptives since the enactment of the ACA in 2010.²²⁴ However, when President Trump signed the Executive Order in 2017, which led to the enactment of two new rules that provided for even broader religious exemptions to the contraceptive mandate, his administration claimed that it didn't know ". . . the extra costs that women might incur for contraceptives."²²⁵ Under these new policies, HHS estimates that the average woman will lose \$584 per year to cover out-of-pocket costs for contraceptives.²²⁶ There are millions of women who stand to lose contraceptive coverage as a result of the Executive Order.²²⁷ That is a net annual loss of billions of dollars.

Whether the cost of accommodating religion is evaluated on a national scale or an individual scale, it is clear that the cost is too high. One of the most common complaints from religious employers seeking an exemption to the ACA requirements is that the federal mandate forces them into a Hobson's choice: Either pay a hefty monetary fine for noncompliance, or be complicit in immoral behavior that violates their religious beliefs.²²⁸ However, courts routinely have failed to recognize that bending over backwards to accommodating religious views means forcing women into a Hobson's choice: Either pay a hefty out-of-pocket expense for basic preventative care, or forfeit employment opportunities; either add the financial weight of their own autonomy to their monthly bills, or risk pregnancy to save hundreds of dollars.²²⁹

223. Brigitte Amiri, *The Supreme Court Takes Up the Issue of Birth Control Coverage – Again*, AMERICAN CIVIL LIBERTIES UNION (Jan. 17, 2020), <https://www.aclu.org/news/reproductive-freedom/the-supreme-court-takes-up-the-issue-of-birth-control-coverage-again/>.

224. Amiri, *supra* note 223; Sobel, Salganicoff & Rosenzweig, *supra* note 10.

225. Pear, Ruiz & Goodstein, *supra* note 45, at A1.

226. Sobel, Salganicoff & Rosenzweig, *supra* note 10.

227. See Planned Parenthood Action Fund, *7 Facts You Need to Know About Birth Control and Costs*, (Last viewed July 2, 2020), <https://www.plannedparenthoodaction.org/issues/birth-control/facts-birth-control-coverage> (“The people who stand to lose birth control coverage without the ACA’s benefit includes nearly 800,000 people who work for Catholic hospitals and receive these benefits through their employer-sponsored health insurance plans . . . Approximately two million students and workers at universities with religious affiliations.”).

228. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

229. See, e.g., *id.* at 1140–41 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)).

While many of these religious employers claim that their female employees can obtain contraceptive coverage through other government-assisted programs, Title X of the Public Health Service Act is the only federal-funded program that devotes its entire annual budget to family planning services.²³⁰ Although Title X had a total budget of \$286,479,000 to divert to grants in 2019,²³¹ it only covered “low-income” individuals and families that were below the national poverty line.²³² Thus, out of 20,280,000 million uninsured women,²³³ only 13,488,000 could have possibly qualified for contraceptive coverage under Title X in 2018.²³⁴

Considering which party has the financial resources and ability to bear the cost of contraceptives, the answer is easily the employer. A recent study in 2011 found that “the direct costs of providing contraception as part of a health insurance plan . . . do not add more than approximately 0.5% to the premium costs per adult enrollee . . . [that’s] about \$26 per year per enrolled female.”²³⁵ Moreover, another study conducted by Global Health Outcomes found that, by taking into account the costs of contraception, costs of unintended pregnancy, and indirect costs of paid maternity leave and overall productivity, providing contraceptive coverage actually saves employers an average of \$97 annually per employee.²³⁶

The opt-out clause of the ACA, the Executive Order and accompanying rules, and RFRA impermissibly allows corporations with religious beliefs or moral convictions to avoid fiscal responsibility for their female employees. This reckless cost-shifting, if left unchecked, will eventually place such a heavy financial burden on both the government and

230. See *Funding History*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (last updated Apr. 4, 2019), <https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/funding-history/index.html>; *Burwell v. Hobby Lobby*, 573 U.S. 682, 766 (2014) (Ginsburg, J., dissenting).

231. See *Funding History*, *supra* note 230.

232. Title X Family Planning, 42 U.S.C. § 300a-4 (2011).

233. In 2019, roughly 12% of the female population, ages 19-44, were not covered by private or public health insurance. Out of a total population of roughly 169 million women, that means roughly 20,280,000 women were uninsured in 2019. See *Health of Women and Children*, UNITED HEALTH FOUND.: AMERICAN’S HEALTH RANKINGS, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/Uninsured_women/state/ALL.

234. See *Nonelderly Adult Poverty Rate by Gender*, KAISER FAMILY FOUNDATION: STATE HEALTH FACTS, <https://www.kff.org/other/state-indicator/adult-poverty-rate-by-gender/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

235. See John Bertko ET. AL., *The Cost of Covering Contraceptives through Health Insurance*, U.S. DEP’T OF HEALTH AND HUMAN SERVS.: OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING AND EVALUATION (Feb. 10, 2012), <https://aspe.hhs.gov/basic-report/cost-covering-contraceptives-through-health-insurance>.

236. *Id.*

individuals alike that the economy will suffer and healthcare complications will rise.

If employers refuse to provide contraceptive coverage for women, and if those women do not qualify for government-assistance programs nor generate enough income to afford birth control on their own dime, the number of unintended pregnancies will undoubtedly increase in the coming years. Currently, fifty percent of all pregnancies are unintended.²³⁷ The Centers for Disease Control and Prevention estimated that over three million births occurred in 2018.²³⁸ That means 1.5 million births were a result of an unintended pregnancy. In 2010, unintended pregnancies cost taxpayers more than \$21 billion in providing prenatal care, labor and delivery, postpartum care, infant care, miscarriages, and other pregnancy-related medical conditions.²³⁹

Although a number of factors can contribute to an unintended pregnancy, the most common cause is lack of birth control.²⁴⁰ Each year, healthcare coverage, including public funding for family planning services, prevents about 1.94 million unintended pregnancies. “Preventing these pregnancies results in 860,000 fewer unintended births, 810,000 fewer abortions and 270,000 fewer miscarriages . . . [a]voiding the significant costs associated with these unintended births saves taxpayers \$4 for every \$1 spent on family planning.”²⁴¹ Thus, if women are routinely denied access to contraceptives, these rates will undoubtedly increase and ultimately cost taxpayers, including religious employers, more money annually than if employers simply provided contraceptive coverage for female employees.

If employers are allowed to continue circumventing the ACA’s contraceptive mandate through the broad religious exemptions imposed by the opt-out clause, the Executive Order, and RFRA, the cost of providing care of unintended pregnancies and pregnancy-related complications could rise well-beyond \$21 billion.²⁴² Moreover, with increased pregnancies comes the increased possibility of flooding the foster care system, which is already overwhelmed, or potentially increasing the number of annual

237. See *Evidence Summary: Prevent Unintended Pregnancy*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last reviewed Oct. 4, 2018), <https://www.cdc.gov/sixeighteen/pregnancy/index.htm>.

238. See *Births and Natality*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/fastats/births.htm>.

239. See *Evidence Summary*, *supra* note 237.

240. See *Unintended Pregnancy*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last reviewed Sept. 12, 2019), <https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/index.htm>.

241. See Bertko ET. AL., *supra* note 235.

242. See *supra* note 237; see also Adam Sonifield, *Beyond Preventing Unplanned Pregnancy: The Broader Benefits of Publicly Funded Family Planning Services*, 17 *Guttmacher Policy Review* 4, at 5 (estimating the amount saved through title X in 2010).

abortions.²⁴³ To avoid these consequences, it is imperative that employers take responsibility for providing contraceptive coverage and for any religious exemptions to be construed as narrowly as possible.

Although religious employers argue that forcing them to provide contraceptive coverage for female employees violates their religious beliefs, this argument is based on a faulty premise. Providing preventative care, including birth control, in healthcare plans does not violate the ability of an employer to faithfully *exercise* his or her religion. RFRA, by its plain language, does not protect an employer's religious beliefs—it protects his or her religious *exercise*.²⁴⁴ Religious beliefs and religious exercise are distinctly different. While the former implies conscious adherence to a set of moral values, the latter implies behavioral devotion.²⁴⁵ In other words, religious exercise is the freedom to act and practice one's faith. By merely providing for contraceptive coverage in healthcare plans, an employer is not prevented from practicing the tenants of his or her religion. Instead, employers with sincere religious beliefs and moral convictions are only prevented from forcing their female employees to conscribe to their religion. Thus, although perhaps morally objectionable, the contraceptive mandate does not infringe upon an employer's First Amendment right to the free *exercise* of religion, nor does it violate RFRA.

However, the religious exemptions provided for by the ACA, and broadened by both the Executive Order and RFRA, may in fact infringe upon a woman's fundamental right to privacy. The Supreme Court has held that a penumbra in the Fourth Amendment creates a fundamental right to privacy that the government cannot interfere with.²⁴⁶ In the same breath, the Court reasoned that the right to privacy includes the right of an individual to decide whether or not to have a child because the use of contraceptives is central to dignity and autonomy.²⁴⁷ Thus, by creating a federal loophole by which the employers can effectively take away a woman's ability to access contraceptives, the religious exemptions pose a serious threat to a constitutionally protected right.

243. See *Trends in Foster Care and Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. CHILDREN'S BUREAU (last updated Aug. 22, 2019) (showing a rising trend of children entering foster care from 2013-2017), <https://www.acf.hhs.gov/cb/resource/trends-in-foster-care-and-adoption>; See also Joelle Abramowitz, *Access to Birth Control through ACA Drives Down Abortion Rate*, IHPI NEWS (Nov. 15, 2017), <https://ihpi.umich.edu/news/access-birth-control-through-aca-drives-down-abortion-rate>.

244. See RFRA, 103 Pub. L. 141, 107 Stat. 1488.

245. Compare *Exercise*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("to put into action") with *Belief*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("a state of mind").

246. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

247. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Finally, the barriers presented by the opt-out clause, the Executive Order, and RFRA have the potential to frustrate the administration of justice by causing inconsistent final judgments. As previously noted, after the Supreme Court's decision in *Hobby Lobby*, lower courts are split on whether the ACA mandate imposes a substantial burden on the freedom of religious exercise. Thus, the same factual scenario could have wildly different outcomes depending on the jurisdiction where the litigation is brought. This confusion appears to be based on the fact that courts cannot agree on what constitutes a "substantial burden." For example, while the Tenth Circuit did not view the monetary penalties for noncompliance as a substantial burden, the Eighth Circuit found that such penalties mirrored the substantial burden on the businesses in *Hobby Lobby*.²⁴⁸ The varied interpretations indicate the need for significant reform to the religious exemptions.

B. Striking the Proper Balance Between the Free Exercise of Religion and Reproductive Rights

The current religious exemptions to the contraceptive mandate are too broadly-drawn to effectuate the desired outcome of accommodating both religious rights and reproductive rights. The current exemptions set the bar too low by allowing for-profit corporations to escape the responsibility of providing basic healthcare coverage to their female employees by merely self-certifying that it would go against their moral conscience to do so. In order to properly redistribute the protections afforded to religious freedom and individual liberties, three changes must be made to the current accommodation scheme. First, the Executive Order and its accompanying rules promulgated by HHS must be repealed. Second, the ACA's opt-out clause should only apply to nonprofit religious organizations, thereby excluding for-profit organizations altogether. Finally, the strict-scrutiny test in RFRA, as applied to challenges on the ACA's contraceptive mandate, must be modified to define the scope of religious exercise and to add a prong that evaluates third-party harm.

The Executive Order and its accompanying rules must be repealed because they broaden the accommodation qualification criteria to the point where even an employer's mere moral convictions, unfounded in any religious beliefs, may satisfy the requirements for an exemption to the contraceptive mandate. Sincere *moral* beliefs are not the same as religious beliefs. There is no fundamental right to the free exercise of moral conscience. The First Amendment explicitly protects the free exercise of religion—not morality.²⁴⁹ Title VII only carved out exceptions for religious

248. *Compare* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1160 (10th Cir. 2015), *with* Sharpe Holdings, Inc. v. Burwell 801 F.3d 927, 937 (8th Cir. 2015).

249. U.S. CONST. amend. I.

purposes.²⁵⁰ The ACA only carved out exceptions for religious purposes.²⁵¹ Thus, the moral exemptions set forth in the rules promulgated pursuant to the Executive Order have no historical support; they appeared out of thin air in an attempt to broaden the existing accommodations to the detriment of women's reproductive health.

These moral accommodations do not further the purpose of the exemptions to promote religious tolerance and freedom. However, merely repealing the rule authorizing such moral exemptions would not, by itself, fix the overarching problem. Instead, it is necessary to repeal both rules promulgated by HHS pursuant to the Executive Order, as both are far too broad to effectively balance the interests of religious employers against the interests of female employees in obtaining adequate healthcare. Moreover, the Executive Order itself should be retracted because it gives too much leash to administrative agency to promulgate new rules that are just as broad, if not more so, than the current ones. To effectively prevent the government from taking advantage of the religious accommodation set forth in the ACA, the Executive Order and its accompanying rules must be repealed.

For similar reasons, the ACA's opt-out clause must be restricted solely to nonprofit organizations. For-profit entities are not centered on the promotion of certain religious values and therefore do not acutely further the purpose of the accommodation to protect the free exercise of religion. Moreover, for-profits are better equipped to shoulder the financial burden of covering birth control costs in their healthcare plans. Drawing the line at nonprofits would therefore significantly reduce the number of organizations that could legitimately claim exemptions for religious purposes. A clear line would also promote clarity among lower courts and would result in more consistent outcomes.

Finally, the strict-scrutiny analysis in RFRA should be modified to define what constitutes as religious exercise for purposes of seeking an exemption to the contraceptive mandate. Defining the scope of religious exercise would provide clarity to courts in determining whether the ACA substantially burdens that exercise. The term "exercise" is distinct from "belief" because exercise implies action. To exercise a religious belief is to perform some overt act.²⁵² It is an external process that requires conscious movement and physical manifestations. A religious belief, standing alone, is an internal process that merely requires conscious thought. Conflation of the two terms has impermissibly broadened the religious accommodation

250. See Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964).

251. See Pub. L. No. 111-148, § 2713, 124 Stat. 119 (codified as 42 U.S.C. §§ 300gg-13(a)(1)-(5) (2010)).

252. Compare *Exercise*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("to put into action") with *Belief*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("a state of mind").

beyond its original scope to protect more than necessary. As such, the term “exercise” should be narrowly construed and explicitly defined in RFRA.

Additionally, the strict-scrutiny analysis in RFRA should also be modified to require courts to evaluate the third-party harm that would result if a religious accommodation is granted. Specifically, courts should consider whether the third-party is eligible for assistance under Title X, or some other federal assistance program, and what out-of-pocket costs the third-party would incur if they were not eligible for coverage under such a program. Adding these elements to the strict scrutiny test in RFRA, only as applied to religious challenges to the contraceptive mandate in the ACA, would help ensure that all the rights of all the affected parties, including the female employees who would be denied coverage, are adequately evaluated and addressed so that the cost of birth control is shifted to the most appropriate party. Section VI provides a revised version of RFRA that incorporates these modifications.²⁵³ Specifically, the revised version adds two third-party harm considerations to the strict scrutiny test, defines “persons,” redefines “religious exercise,” and repeals a provision in Section 6 that purports to extend RFRA beyond its intended scope and purpose, as set forth in Section 1, to protect religious beliefs as well as religious exercise.²⁵⁴ For clarity, the modifications are italicized and bolded.

V. PROPOSED REVISIONS TO RFRA

....

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES

....

- (b) PURPOSES – The purposes of this Act are:
- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free *exercise* of religion is substantially burdened; and
 - (2) to provide a claim or defense to persons whose religious *exercise* is substantially burdened by government.

253. See *infra* Section VI.

254. See *infra* Section VI.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED

- (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).
- (b) EXCEPTIONS – Government may substantially burden a person’s exercise of religion if it demonstrates that:
- (1) the 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;
 - (2) *the burden placed on the person is substantially outweighed by a third-party’s countervailing interest in an individual liberty as guaranteed by the United States Constitution; or*
 - (3) *the burden placed on the person is substantially outweighed by the financial burden that a religious accommodation would place upon a third-party.*

....

SEC. 5. DEFINITIONS

As used in this Act:

- (1) the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
- (2) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
- (3) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion;
- (4) the term “exercise of religion” means:
 - (a) the exercise of religion under the First Amendment to the Constitution; and
 - (b) *any external physical manifestation of a religious belief, including but not limited to attending worship services, reading religious literature,*

speaking about religious tenets, or engaging in prayer.

- (5) *the term “exercise of religion” does not mean “religious beliefs” and nothing in this Act shall be construed to that effect.*
- (6) *the term “person” includes any individual or nonprofit religious organizations, such as churches, their integrated auxiliaries, conventions or associations of churches, or any religious order.*

SEC. 6. APPLICABILITY

....

- (c) RELIGIOUS BELIEF UNAFFECTED – *Repealed by striking* “Nothing in this Act shall be construed to authorize any government to burden any religious belief.”

CONCLUSION

Women have been fighting for equality and their reproductive rights for decades. The current legislation that protects equality for female employees is in direct conflict with the current legislation that protects an employer’s religious freedom. The ACA attempted to give women better access to birth control to promote equality in healthcare and to encourage reproductive autonomy. However, the gaps left by the ACA’s “opt-out” clause have been overfilled by courts and administrative agencies to the point where religious accommodations have effectively nullified the privacy rights guaranteed to individuals by the Constitution. In order to rebalance women’s rights against religious freedom, it is paramount to reevaluate these religious exemptions and to construe them in a narrower fashion. The cost of accommodating religion is not one that women should have to bear.