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# Reframing RFRA: Why Considering Third-Party Harm is Essential to Determine Whether Religious Exemptions to the Affordable Care Act's Contraceptive Mandate Impose a Substantial Burden on Religion

*Jessica Marsella\**

*Despite the well-documented benefits of widespread access to contraceptives, there are a number of religious exemptions and religious accommodations to the Affordable Care Act's (ACA) contraceptive mandate, which make accessing contraceptives more difficult or may prevent such access altogether. The validity of such exceptions and accommodations have reached the Supreme Court numerous times. A common theme in all of these challenges, however, is the lack of consideration that granting the exemptions or accommodation has on others. This Note primarily focuses on the religious exemptions to the contraceptive mandate and will explore how the Supreme Court's treatment of such exemptions and accommodations are flawed due to the Supreme Court's failure to consider how third parties are adversely affected, as required by the Religious Freedom Restoration Act (RFRA). This failure has wide ranging effects: it indirectly inhibits social growth and encourages inherent sexism.*

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## INTRODUCTION

Millions of individuals lost their jobs as a result of the COVID-19 pandemic.<sup>1</sup> Now imagine some of them finally obtain a job with health insurance, only to find that contraceptives are excluded under their particular healthcare plan. When they inquire as to why contraceptives are not included, the newly employed individual learns it is because of their secular employers' religious beliefs.<sup>2</sup> This failure to provide such coverage constitutes a form of gender discrimination.

Gender discrimination in healthcare settings was widespread and legally permissible prior to the Patient Protection and Affordable Care Act's (the "ACA")<sup>3</sup> implementation on March 23, 2010.<sup>4</sup> One method of gender discrimination is gender bias. Gender bias is a term used to describe "prejudice in action or treatment against a person on the basis of their sex."<sup>5</sup> In healthcare settings, gender bias "refers to situations where patients are assessed, diagnosed and treated differently and at a lower quality level because of their gender . . . [as compared to] others with the same complaints."<sup>6</sup>

<sup>1</sup> *E.g.*, Paul Fronstin & Stephen A. Woodbury, *How Many Americans Have Lost Jobs with Employer Health Coverage During the Pandemic?*, COMMONWEALTH FUND (Oct. 7, 2020), <http://www.commonwealthfund.org/publications/issue-briefs/2020/oct/how-many-lost-jobs-employer-coverage-pandemic> [<http://perma.cc/4GCX-XP2>].

<sup>2</sup> The most egregious extrapolation, as discussed below in Section III.D, is where an employer states that even filling out the paperwork noting they have a religious objection, violates their religious beliefs, the assertion of which could prevent an employee from obtaining contraceptive coverage.

<sup>3</sup> The ACA is also colloquially referred to as "Obamacare."

<sup>4</sup> *See, e.g.*, *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act*, NAT'L WOMEN'S L. CTR. 1, 5 (Mar. 2012), [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf) [<http://perma.cc/39HU-K4TK>]; Jenny Deam, *Could You Be Denied Health Insurance Just Because You're a Woman?*, PREVENTION (Nov. 29, 2011), <http://www.prevention.com/life/a20430126/health-insurance-and-gender-discrimination/> [<http://perma.cc/FBY4-49LX>].

<sup>5</sup> Thomas Jefferson Univ. Online, *Exploring Gender Bias in Healthcare*, MEDCITY NEWS (Sept. 4, 2019, 5:00 AM), [http://medcitynews.com/?sponsored\\_content=exploring-gender-bias-in-healthcare](http://medcitynews.com/?sponsored_content=exploring-gender-bias-in-healthcare) [<http://perma.cc/VUV7-NYWW>].

<sup>6</sup> *Id.*

In healthcare, it refers to situations where patients are assessed, diagnosed and treated differently and at a lower quality level because of their gender than others with the same complaints. Gender bias in healthcare can also manifest as the assumption that males and females are the same when the sexes have differences that need to be addressed.

*Id.* A recent and visible example of gender bias occurred when a female African American doctor died of COVID-19 in Indiana after posting a video on social media alleging subpar treatment due to her gender and race. *See* Bill Hutchinson, *Black Doctor Dies of COVID after Alleging Hospital Mistreatment: This is How Black People Get Killed*, ABC NEWS (Dec. 24, 2020, 1:50 PM), <http://abcnews.go.com/US/black-doctor-dies-covid-alleging-hospital-mistreatment-black/story?id=74878119> [<http://perma.cc/7HYC-YQTT>].

Discrimination in healthcare settings, however, encompasses more than unfair and prejudicial treatment from medical professionals; it also encompasses systemic, institutionalized barriers to healthcare, both in difficulty obtaining insurance policies and, once obtained, the inability to attain desired services under those insurance policies.<sup>7</sup> Before the ACA's implementation, insurance carriers were not only able to charge women higher premiums than men<sup>8</sup> for individual plans,<sup>9</sup> but were also able to perfunctorily deny women coverage because of pre-existing conditions, such as pregnancy, domestic violence, or rape.<sup>10</sup>

The ACA was passed, *inter alia*, to make health insurance more affordable and accessible to vulnerable populations, including those facing gender discrimination.<sup>11</sup> Specifically to

<sup>7</sup> See Thomas Jefferson Univ. Online, *supra* note 5; Fay Schopen, *The Healthcare Gender Bias: Do Men Get Better Medical Treatment?*, THE GUARDIAN (Nov. 20, 2017, 11:35 AM), <http://www.theguardian.com/lifeandstyle/2017/nov/20/healthcare-gender-bias-women-pain> [<http://perma.cc/JC5U-M7L9>].

<sup>8</sup> This practice of charging women higher premiums than men is called gender rating. Only a few states (including California) banned the practice before the ACA was implemented. In states that did not ban gender rating, 92% of insurance companies charged women more than men, solely on the basis of their gender. See NAT'L WOMEN'S L. CTR., *supra* note 4, at 3.

Women continue to face unfair and discriminatory practices when obtaining health insurance in the individual market—as well as in the group health insurance market. Women are charged more for health coverage simply because they are women, and individual market health plans often exclude coverage for services that only women need, like maternity care. Furthermore, insurance companies—despite being aware of these discriminatory practices—have not voluntarily taken steps to eliminate the inequities. While some states have outlawed or limited these practices, only when the Affordable Care Act is fully implemented in 2014 will they end nationally.

*Id.*

<sup>9</sup> An individual plan is a health insurance policy that is purchased directly for an individual or family by an insurance company. See Davalon, *What's the Difference Between Group and Individual Health Insurance?*, EHEALTH (Jan. 11, 2021), <http://www.ehealthinsurance.com/resources/small-business/whats-difference-group-individual-health-insurance> [<http://perma.cc/QP7Q-F4AP>].

<sup>10</sup> See Deam, *supra* note 4 (“In most states, a man and a woman of the same age and health status will be charged different rates for exactly the same individual health insurance policy, a practice called ‘gender rating.’”); see generally Terry Fromson & Nancy Durborow, *Insurance Discrimination Against Victims of Domestic Violence*, NAT'L HEALTH RES. CTR. ON DOMESTIC VIOLENCE (2019), <http://womenslawproject.org/wp-content/uploads/2019/09/Insurance-Discrimination-2019-Final.pdf> [<http://perma.cc/K7QR-MYK5>] (describing discriminatory insurance policies which deny women coverage due to being a domestic violence victim).

<sup>11</sup> The ACA was also passed to address the rapidly rising cost of healthcare in America. Kimberly Amadeo, *What is Obamacare?*, THE BALANCE (Dec. 7, 2021), <http://www.thebalance.com/what-is-obamacare-the-aca-and-what-you-need-to-know-3306065> [<http://perma.cc/C2PG-MJ2V>].

The aim with this plan was to make health care more affordable for everyone by lowering costs for those who can't afford them . . . . [B]efore the ACA, insurance companies could exclude people with pre-existing conditions. As a result, the people with the greatest health expenses sometimes had to go without insurance

address this concern, section 1557 of the ACA “make[s] sure [that] there are no loopholes: [The ACA] prohibits insurance companies from denying coverage, charging people higher premiums based on their health or gender, limiting benefits tied to preexisting conditions and capping insurance payouts for people who are very sick. . . .”<sup>12</sup>

Since its passage and implementation over ten years ago, the ACA has had an immediate and beneficial impact on women, namely by providing affordable, accessible preventative care.<sup>13</sup> Contraceptive coverage is a crucial component of preventative care. Almost half of all pregnancies in the United States are unintended.<sup>14</sup> For multiple reasons, unintended pregnancies have a profound impact on women.<sup>15</sup> Physically, women who have carried unintended pregnancies to term are at higher risk of having cesarean sections and are more likely to gain excessive weight.<sup>16</sup> Each of these complications may negatively impact the health of both mother and child.<sup>17</sup> Psychologically, unintended pregnancies

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or settle for a policy that did not cover [a pre-existing] condition. Because they couldn’t afford regular doctor visits, they often ended up in hospital emergency rooms, unable to contribute to the expense of their treatments.

*Id.*; see also Larry Levitt, *Want to Protect People with Preexisting Conditions? You Need the Full Affordable Care Act*, WASH. POST (Oct. 22, 2020), <http://www.washingtonpost.com/outlook/2020/10/22/preexisting-conditions-aca-debate-trump-biden/> [<http://perma.cc/X9HQ-5CCY>].

<sup>12</sup> Levitt, *supra* note 11; see also Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471, 1500 (2020).

Two provisions of the ACA, sections 1557 and 2713, broaden protection for civil rights and preventative services respectively. These sections have received particular scrutiny, and have become the subject of intense litigation because they have been applied to extend protection to contraception, to women who have terminated pregnancies, and to transgender individuals.

*Id.*

<sup>13</sup> See Gluck, Regan & Turret, *supra* note 12, at 1493, 1500.

<sup>14</sup> *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019), <http://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf> [<http://perma.cc/38VB-VSA4>] (“In 2011, nearly half (45%, or 2.8 million) of the 6.1 million pregnancies in the United States were unintended.”).

<sup>15</sup> See, e.g., Lois K. Lee et al., *Women’s Coverage, Utilization, Affordability, and Health After the ACA: A Review of the Literature*, 39 HEALTH AFFS. 387, 391 (2020).

<sup>16</sup> Reza Omani-Samani et al., *Impact of Unintended Pregnancy on Maternal and Neonatal Outcomes*, 69 J. OBSTETRICS & GYNECOLOGY INDIA 136, 137 (2019) (“Pregnancy outcomes might be affected by unintended pregnancy such as preeclampsia, preterm birth, cesarean section and low birth weight . . . . We found higher risk of cesarean section and inappropriate weight gain during pregnancy as adverse outcomes of unintended pregnancy. . . .”).

<sup>17</sup> Babies born via cesarean section are more likely to develop transient tachypnea, a breathing disorder, and although rare, may even be injured during the surgery itself. Mothers may develop infections or other surgical complications. *C-Section*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/c-section/about/pac-20393655> [<http://perma.cc/GN6D-6JN4>] (last visited Jan. 1, 2022).

may contribute to an increased risk of maternal depression.<sup>18</sup> All of the foregoing consequences of an unintended pregnancy may result in long term ramifications, with a watershed effect.

That said, contraceptives do far more than simply prevent pregnancy.<sup>19</sup> Numerous health benefits can be derived from their use. For instance, oral contraceptives can prevent or lessen acne, cysts, bone thinning, iron deficiency, and some endometrial and ovarian cancers.<sup>20</sup> But even beyond these health benefits, national use of contraceptives can be linked to women's social mobility.<sup>21</sup> A study conducted by the Guttmacher Institute in 2012 revealed that "[w]omen use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security . . . ."<sup>22</sup> Subsequent to the 2013 Guttmacher Institute study, Planned Parenthood issued a report in which sixty-five percent of women stated that their primary motivation for using contraceptives was for economic reasons: they simply could not afford to raise a child.<sup>23</sup>

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<sup>18</sup> See Jinwook Bahk et al., *Impact of Unintended Pregnancy on Maternal Mental Health: A Casual Analysis Using Follow up Data of the Panel Study on Korean Children (PSKC)*, BMC PREGNANCY & CHILDBIRTH, Apr. 3, 2015, at 8.

The results of this study showed that an absence of intention for a pregnancy had an adverse effect on maternal depression and parenting stress, and that the relation between pregnancy intention and maternal mental health was partly mediated by marital conflict, fathers' participation in child care, and mothers' knowledge of infant development.

*Id.*

<sup>19</sup> *What Are the Benefits of the Birth Control Pill?*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/learn/birth-control/birth-control-pill/what-are-the-benefits-of-the-birth-control-pill> [<http://perma.cc/2483-8PKM>] (last visited Jan. 1, 2022) ("The birth control pill is a safe, simple, and convenient way to prevent pregnancy. It also has other benefits like reducing acne, making . . . periods lighter and more regular, and easing menstrual cramps.").

<sup>20</sup> *Id.*

<sup>21</sup> See *Griswold v. Connecticut*, PLANNED PARENTHOOD, <http://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut> [<http://perma.cc/Z9YP-YCQQ>] (last visited Dec. 20, 2021) (explaining that in 1965, the Supreme Court held in *Griswold v. Connecticut* that there is "a constitutional right to privacy regarding reproductive decisions"). As a result of widespread access to contraceptives, maternal and infant mortality rate significantly dropped. *Id.* ("From 1960 to 2011, the percentage of women who completed four or more years of college multiplied by six.").

<sup>22</sup> Rebecca Wind, *New Study Confirms What Many Have Long Believed to be True: Women Use Contraceptives to Better Achieve their Life Goals*, GUTTMACHER INST. (Sept. 25, 2012), <http://www.guttmacher.org/news-release/2012/new-study-confirms-what-many-have-long-believed-be-true-women-use-contraception#> [<http://perma.cc/FNG4-HZF7>] ("New evidence confirms what most people already believe: Women use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security . . .").

<sup>23</sup> See *Taking Control: The Ongoing Battle to Preserve the Birth Control Benefit in the Affordable Care Act*, PLANNED PARENTHOOD 6 [hereinafter *Taking Control*], [http://www.plannedparenthoodaction.org/uploads/filer\\_public/27/d6/27d67baf-44ad-44e5-b762-8522f17c20d4/bc\\_report\\_062713\\_vf.pdf](http://www.plannedparenthoodaction.org/uploads/filer_public/27/d6/27d67baf-44ad-44e5-b762-8522f17c20d4/bc_report_062713_vf.pdf) [<http://perma.cc/45D7-K2RH>].

After the passage of the ACA, “the rate of uninsured working women (ages 18–64) decreased by 39 percent”<sup>24</sup> and women consistently reported that they are less “worried about paying for health care . . . .”<sup>25</sup> Further, as a direct result of the passage and implementation of the ACA, 20.4 million women were able to obtain access to preventative services, including contraceptives, without cost sharing.<sup>26</sup> Cost sharing is when the cost of medical services is divided between a patient and their insurance company.<sup>27</sup> This practice is a substantial barrier to effective contraceptive use and “is associated with less use of highly effective methods . . . and greater contraceptive nonadherence and discontinuation.”<sup>28</sup> Access to contraceptives without cost sharing resulted in a financial benefit as well: “one study estimates that women saved \$1.4 billion in out-of-pocket costs in 2013” as a result of the contraceptive mandate and “[o]n average, each woman saves \$255 every year.”<sup>29</sup>

Despite the well-documented benefits of widespread access to contraceptives, there are a number of religious exemptions and religious accommodations to the contraceptive mandate, which make accessing contraceptives more difficult or may prevent such access altogether.<sup>30</sup> The validity of such exceptions and accommodations have reached the Supreme Court numerous times.<sup>31</sup> A common theme in all of these challenges, however, is the lack of consideration that granting the exemptions or accommodation has on others. This Note primarily focuses on the religious exemptions to the contraceptive mandate and will explore how the Supreme Court’s treatment of such exemptions and accommodations are flawed due to the Supreme Court’s

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<sup>24</sup> Lee et al., *supra* note 15, at 388.

<sup>25</sup> *Id.* at 390.

<sup>26</sup> *Id.*; see also Gluck, Regan & Turret, *supra* note 12, at 1500 (“Section 2713 of the ACA requires coverage of certain preventative healthcare services without cost sharing—i.e., without paying anything at the point of service.”).

<sup>27</sup> *What is Cost Sharing?*, BLUE CROSS N.C., <http://www.bluecrossnc.com/understanding-health-insurance/cost-sharing#:~:text=Cost%20sharing%20means%20...or%20a%20deductible%20and%20coinsurance> [<http://perma.cc/SU4U-R4Z3>] (last visited Mar. 11, 2021).

<sup>28</sup> Lee et al., *supra* note 15, at 391.

<sup>29</sup> See Jamila Taylor & Nikita Mhatre, *Contraceptive Coverage under the Affordable Care Act*, CAP (Oct. 6, 2017), <http://www.americanprogress.org/issues/women/news/2017/10/06/440492/contraceptive-coverage-affordable-care-act/> [<http://perma.cc/MHT4-VSWT>].

<sup>30</sup> As used throughout this Note, I differentiate between the terms “religious accommodation” and “religious exemption” to demonstrate the practical applications these terms have on third parties. A *religious accommodation* to the contraceptive mandate means that, even though the employer has a religious objection, employees are still able to receive contraceptive coverage via their employer’s health insurance plan. In contrast, the term *religious exemption* is used to mean that the employer is not required to include any contraceptive coverage and employees are *not* able to access contraceptives through the employer’s health insurance plan.

<sup>31</sup> See *infra* Part III.



failure to consider how third parties are adversely affected, as required by the Religious Freedom Restoration Act (“RFRA”). This failure has wide ranging effects: it indirectly inhibits social growth and encourages inherent sexism.

Part I of this Note will explain how the ACA requires preventative services with respect to women, a requirement colloquially known as the contraceptive mandate.<sup>32</sup> Part II will provide an overview of RFRA, which is being used by employers to challenge the validity of the exemptions to the contraceptive mandate. Overall, RFRA requires that the government must show a compelling interest and demonstrate it is using the least restrictive means of achieving that interest to substantially burden someone’s religion.<sup>33</sup> Essentially, the argument made herein is that the government need only show they are using the least restrictive means to achieve a compelling interest only *after* concluding that the government’s actions impose a substantial burden on religion. In determining if government actions substantially burden religion, RFRA—contrary to the approach taken by the Supreme Court—requires that courts weigh the claimant’s sincerity and the adverse consequences to the claimant against the adverse consequences to third parties.<sup>34</sup> Part III of this Note will address the history of the religious accommodations and exemptions and the significant litigation regarding the contraceptive mandate, including *Burwell v. Hobby Lobby Stores, Inc.* (“*Hobby Lobby*”),<sup>35</sup> *Zubik v. Burwell* (“*Zubik*”),<sup>36</sup> and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* (“*Little Sisters*”)<sup>37</sup>.

On its own, the presence of third-party harm does not necessarily mean the government’s actions substantially burden religion, *per se*.<sup>38</sup> Part IV will demonstrate how the RFRA balancing test, including the consideration of third-party harm, should have led the Supreme Court to reject Little Sister’s claims. This Note will show that while the religious claimant’s beliefs may be sincere and there are adverse practical consequences in complying with the contraceptive mandate, the contraceptive mandate *does not* substantially burden religion because granting such broad religious exemptions will cause *significant* third-party harm. Part V will demonstrate how the trend of granting more and more religious

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<sup>32</sup> See 42 U.S.C. § 300gg-13(a)(4).

<sup>33</sup> See *id.* § 2000bb.

<sup>34</sup> See *id.*

<sup>35</sup> 573 U.S. 682 (2014).

<sup>36</sup> 136 S. Ct. 1557 (2016).

<sup>37</sup> 140 S. Ct. 2367 (2020).

<sup>38</sup> See Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 934 (2019).

accommodations and exemptions are actually undermining the purpose of the ACA by sending the message that access to contraceptives is not a priority. Finally, this Note illustrates how RFRA may be amended to specifically address third-party harm.

### I. THE CONTRACEPTIVE MANDATE

Under the ACA, insurance plans must provide essential services, including prescriptions, preventative care, and maternity care.<sup>39</sup> One of the key provisions of the ACA was 42 U.S.C. § 300gg-13, the so-called contraceptive mandate, which provides that employers are required to obtain insurance plans which include preventative care with respect to women.<sup>40</sup> Congress did not define what constitutes preventative care with respect to women, and instead delegated the definition to the Health Resources Services Administration (the “HRSA”)—a department within the Department of Health and Human Services (the “HHS”)—who then delegated the definition to the Institute of Medicine<sup>41</sup> (the “IOM”).<sup>42</sup> “The IOM convened a group of independent experts, including ‘specialists in disease prevention [and] women’s health.’”<sup>43</sup> Ultimately, the IOM “defined women’s preventative services to include all contraceptives approved by the Food and Drug Administration (FDA), including oral contraceptives, intrauterine devices, emergency contraceptives, and sterilization procedures. The mandate does not cover abortion-inducing drugs . . . .”<sup>44</sup>

The HHS fully accepted this definition of what constitutes preventative services with respect to women and adopted it in full, issuing a rule that required employers to provide employees with health insurance plans which include all FDA-approved

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<sup>39</sup> See *10 Essential Health Benefits Insurance Plans Must Cover Under the Affordable Care Act*, FAMS. USA (Feb. 9, 2018) <http://familiesusa.org/resources/10-essential-health-benefits-insurance-plans-must-cover-under-the-affordable-care-act/> [<http://perma.cc/59QC-HYGR>].

<sup>40</sup> See 42 U.S.C. § 300gg-13(a)(4).

<sup>41</sup> See generally *About the National Academy of Medicine*, NAT’L ACAD. OF MED. <http://nam.edu/about-the-nam/> [<http://perma.cc/34XR-DQRM>] (last visited Apr. 26, 2021) (noting that the Institute of Medicine subsequently changed its name to the National Academy of Medicine).

<sup>42</sup> See Swapna Reddy, Nina Patel & Priya Radhakrishnan, *ACA’s Birth Control Mandate at the US Supreme Court: What’s at Stake?*, HEALTH AFFS. (May 4, 2020) <http://www.healthaffairs.org/doi/10.1377/hblog20200430.180292/full/> [<http://perma.cc/DNG9-JWMC>]; *Taking Control*, *supra* note 23, at 17.

<sup>43</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 US 682, 742 (2014) (Ginsburg, J., dissenting) (alteration in original).

<sup>44</sup> Reddy, Patel & Radhakrishnan, *supra* note 42; see also *Birth Control*, FDA (last visited Apr. 8, 2021) <http://www.fda.gov/consumers/free-publications-women/birth-control> [<http://perma.cc/ME2X-BV85>] (listing FDA-approved contraceptives).

contraceptive devices without cost-sharing.<sup>45</sup> The rule, however, contained an accommodation for religious employers, which was defined as an employer that:

(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.<sup>46</sup>

Essentially, this accommodation allows for religious organizations to opt out of providing contraceptives coverage to their employees if doing so would violate their religious beliefs.<sup>47</sup> Simply stated, when an employer opted out for religious purposes, the insurance companies were required to cover contraceptives at no cost to the employees.<sup>48</sup> In 2013, the government issued a revised accommodation that created a system which allowed employers to shift the cost of contraceptives to insurers or third-party administrators<sup>49</sup> so long as employers notified the government of their religious objection.<sup>50</sup> The government would subsequently notify the religious organization's insurers, who were authorized to pay for contraceptives for the employer's beneficiaries.<sup>51</sup> Failing to abide by these rules resulted in employers being fined up to 100 dollars per day, per employee.<sup>52</sup> These accommodations had no practical consequences to employees; they would still be able to receive contraceptives without cost sharing.

Not long after this rule was issued, the Supreme Court expanded this accommodation to secular businesses in *Hobby*

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<sup>45</sup> See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–74 (July 2, 2013).

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 39,874; see also Reddy, Patel & Radhakrishnan, *supra* note 42 (“The final preventive services rule issued in 2012 required insurers and group health plans to cover all such contraceptive services. It also included accommodations for houses of worship and other religious organizations that object to contraceptive coverage for faith-based reasons.”).

<sup>48</sup> See Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39,874; see also *Taking Control*, *supra* note 23, at 18.

<sup>49</sup> Third-party administrators are businesses that “deliver[] various administrative services on behalf of an insurance plan, such as a health plan. . . [and] help with the design, launch, and ongoing management of a health plan.” Kev Coleman, *What is a Third-Party Administrator (TPA)?*, ASSOCIATED HEALTH PLANS (Nov. 18, 2020) <http://www.associationhealthplans.com/group-health/what-is-tpa/> [<http://perma.cc/GTK6-EQZD>].

<sup>50</sup> 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B); see also *Massachusetts v. U.S. HHS*, 513 F. Supp. 3d 215, 225 (D. Mass. 2021).

<sup>51</sup> 45 C.F.R. § 147.131(c)(4)(i), (c)(4)(ii).

<sup>52</sup> 26 U.S.C.S. § 4980D(b)(1) (2012).

*Lobby*, stating that RFRA required “similar accommodations for secular employers that object to contraceptive coverage on religious grounds.”<sup>53</sup> This expansion to secular businesses commenced the erosion of the accommodation and set the stage for things to come.

## II. A BRIEF INTRODUCTION TO RFRA AND THIRD-PARTY HARM

The passage of the ACA was controversial: it resulted in a considerable amount of litigation, much of which focused on the religious accommodations and exemptions to the contraceptive mandate.<sup>54</sup> The scope of this Note primarily focuses on how courts treat these religious exemptions under RFRA.<sup>55</sup>

RFRA was passed in 1993 as a direct result of the Supreme Court’s holding in *Employment Division v. Smith*, which held that a neutral law of general applicability (i.e., a law that applies to everyone regardless of their religion) did not violate the First Amendment’s Free Exercise Clause.<sup>56</sup> RFRA restored the heightened scrutiny courts applied pre-*Smith*: it requires that a law which substantially burdens the exercise of religion serve a compelling governmental interest and that it be the least restrictive means of furthering that interest.<sup>57</sup> Ultimately, if a

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<sup>53</sup> Reddy, Patel & Radhakrishnan, *supra* note 42.

<sup>54</sup> Some of the litigation surrounding the ACA focused on the constitutionality of the individual mandate, which, simply put, required that all Americans have health insurance or be fined. In *National Federation of Independent Business v. Sebelius*, the Supreme Court determined that the individual mandate can be considered a tax, which Congress was authorized to collect under the Tax Clause of Article I, Section 8 of the U.S. Constitution. See *Obamacare Individual Mandate*, OBAMACARE.NET (Nov. 2017) <http://obamacare.net/obamacare-individual-mandate/> [<http://perma.cc/RU8Q-2VLE>].

<sup>55</sup> There has been some debate about whether the exemptions would be permissible under the Establishment Clause. Traditionally, courts have applied the *Lemon* test to determine whether a law runs afoul of the Establishment Clause. Under *Lemon*, it is necessary to determine whether the law has a secular purpose, which neither advances nor inhibits religion and does not foster excessive governmental entanglement with religion. Scholars have argued that “by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exceptions from the [contraceptive] Mandate violate an Establishment Clause constraint on permissive accommodation.” Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014).

<sup>56</sup> In *Smith*, members of the Native American church brought suit after they were denied unemployment benefits because they smoked peyote. The Supreme Court held that someone’s religious belief was not sufficient to excuse him from neutral and generally applicable laws. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>57</sup> The relevant portion of RFRA is as follows:

(3) [G]overnments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. B. Purposes. The

law substantially burdens religion, RFRA requires that courts balance the competing interests of religious adherents with the government's compelling interest as set forth in *Sherbert v. Verner*<sup>58</sup> and *Wisconsin v. Yoder*.<sup>59</sup>

In *Sherbert*, the Supreme Court determined that the government's interest in denying unemployment benefits to a religious individual who refused to work on Sunday did not outweigh the individual's right to exercise their religion.<sup>60</sup> The Supreme Court found that the disqualification of benefits imposed a substantial burden on the appellant's religion because "[t]he ruling [of the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."<sup>61</sup> The Court also noted "this is not a case in which an employee's religious convictions serve to make h[er] a nonproductive member of society."<sup>62</sup> Consequently, the Court determined that there was no substantial competing governmental interest to deny the appellant unemployment benefits.<sup>63</sup>

In *Yoder*, the Supreme Court held that although the State of Wisconsin had a substantial interest in educating its citizens, that interest must be balanced against the countervailing interests of the parents who wished to remove their children from public education to prepare them life in the Amish community.<sup>64</sup> The

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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 . . . .

42 U.S.C. § 2000bb *et seq.*

<sup>58</sup> 374 U.S. 398, 410 (1963).

<sup>59</sup> 406 U.S. 205, 215 (1972).

<sup>60</sup> 374 U.S. at 410.

<sup>61</sup> *Id.* at 404.

<sup>62</sup> *Id.* at 410.

<sup>63</sup> The government attempted to argue that if the Supreme Court were to find in favor of the employee/claimant, there would be a slew of fraudulent claims to follow (i.e., the floodgates would open). *Id.* at 407. The Supreme Court responded by stating that the mere possibility of fraudulent claims being filed was not sufficient to defeat the employee/claimant's interest. *Id.* In fact, the Supreme Court refused to even consider this argument because it was not presented before the South Carolina Supreme Court and the Supreme Court was reluctant to "assess the importance of an asserted state interest without the views of the state court." *Id.*

<sup>64</sup> *Yoder*, 406 U.S. at 215.

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

*Id.*

case arose after Amish parents were fined five dollars after removing two children, aged fourteen and fifteen, from public school after they completed the eighth grade.<sup>65</sup> The parents objected to Wisconsin's requirement that children attend school until the age of sixteen, asserting that public secondary-school education promoted values contrary to the Amish way of life, and, therefore, imposes a substantial burden on religion.<sup>66</sup> The State, however, argued that it had a compelling interest in ensuring that children received a comprehensive education.<sup>67</sup> Ultimately, the Supreme Court determined that the right of the Amish parents to remove their children from school to better prepare them for life in the Amish community outweighed the State's interest in providing an additional year or two of education.<sup>68</sup>

Not only did the Supreme Court in *Sherbert* and *Yoder* utilize a balancing test, but both decisions also implicitly considered how granting the religious exceptions would impact society. *Sherbert* explicitly states that "this is not a case in which an employee's religious convictions serve to make him a nonproductive member of society."<sup>69</sup> Additionally in *Yoder*, a substantial factor in granting the exception was the fact that the parents sought to remove the children from school to be a productive member of the Amish community. The Court stated:

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

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<sup>65</sup> *Id.* at 207–08; *see also id.* at 218 ("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 tenants of their religious beliefs.").

<sup>66</sup> *Id.* at 207, 209.

<sup>67</sup> *Id.* at 221.

<sup>68</sup> *Id.* at 222.

It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in the modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

*Id.*

<sup>69</sup> 374 U.S. 398, 410 (1963); *see also Yoder*, 406 U.S. at 222.

Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.

*Id.*

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.<sup>70</sup>

Thus, by restoring the compelling interest test set forth in *Sherbert* and *Yoder*, a proper analysis under RFRA should require courts to inquire about the impact religious exemptions will have on society at large in an analysis of third-party harm.<sup>71</sup> The Supreme Court, however, has largely ignored this consideration in deciding the contraceptive mandate cases.

#### A. RFRA, RLUIPA, and Third-Party Harm

Consideration of third-party harm is not unique to RFRA; it appears elsewhere in First Amendment jurisprudence,<sup>72</sup> notably in *United States v. Lee*,<sup>73</sup> *Cutter v. Wilkinson*,<sup>74</sup> and *Estate of Thornton v. Caldor*.<sup>75</sup>

In *Lee*, the Supreme Court declined to grant an employer an exemption from paying social security taxes based on the third-party harm principle, explaining that: “Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”<sup>76</sup> *Lee* was decided

<sup>70</sup> *Id.* at 224–25. The State of Wisconsin tried to argue that compulsory education was necessary in the event that some Amish children would wish to leave the community and they would be ill prepared for life in the modern world without an additional year or two of formal education. *See id.* at 224.

<sup>71</sup> *Sherbert* and *Yoder* are “cases that were themselves illustrative of the third-party harm principle and were decided in a period in which the generally applicable third-party harm principle reigned supreme.” *Developments in the Law—Intersections in Healthcare and Legal Rights, Chapter Two: Reframing the Harm: Religious Exemptions and Third-party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2200 (2021) [hereinafter *Developments in the Law*].

<sup>72</sup> In addition to appearing in First Amendment jurisprudence, the third-party harm principle was also fundamental in civil rights discrimination suits “in which religious adherents sought exemptions from laws geared toward eliminating racial discrimination.” *Developments in the Law, supra* note 71, at 2189; *see also* *Newman v. Piggie Park Enter., Inc.* 390 U.S. 400, 402 n.5 (1968); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (“[G]overnmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”).

<sup>73</sup> 455 U.S. 252 (1982).

<sup>74</sup> 544 U.S. 709, 722 (2005) (“[A]n accommodation must be measured so that it does not override other significant interests.”).

<sup>75</sup> 472 U.S. 703, 709–10 (1985).

The State thus commands that Sabbath religious concerns automatically control over all secular interests in the workplace; the statute takes no account of the convenience or interest of the employer or those of other employees who do not observe a Sabbath. . . . This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses[:] . . . “the First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”

*Id.*

<sup>76</sup> *Lee*, 455 U.S. at 261.

before RFRA's passage and demonstrates how the Court applied the third-party harm principle in the *pre-Smith* era.

Additionally, *Cutter* and *Caldor* both found that courts should consider the burdens imposed on third parties when granting accommodations.<sup>77</sup> *Cutter* explicitly states that in “properly applying [the Religious Land Use and Institutionalized Persons Act], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>78</sup> The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) protects “individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws” as well as protects the rights of institutionalized or incarcerated individuals.<sup>79</sup> RLUIPA and RFRA are sister statutes, requiring an analysis of third-party harm under the RLUIPA necessitates that a similar analysis be required under RFRA.<sup>80</sup>

Background information regarding the connection between the two statutes is necessary to fully explain how RFRA and RLUIPA are connected. As noted above, RFRA was passed as an immediate response to the holding in *Employment Division v. Smith*, and initially, RFRA also applied to the states as well as to the federal government.<sup>81</sup> The Supreme Court, however, held in *City of Boerne v. Flores* that RFRA could not extend to the states or local government.<sup>82</sup> “*City of Boerne* involved a land-use dispute between a Catholic Archdiocese that wanted to expand a church in a historic district and local zoning officials who had denied it the necessary permit.”<sup>83</sup> The Supreme Court held that in extending RFRA to the states, Congress had exceeded its legislative power because “Congress had not established a widespread pattern of religious discrimination, [so] RFRA could not be justified as a remedial measure designed to prevent

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<sup>77</sup> *Cutter*, 544 U.S. at 721; *Caldor, Inc.*, 472 U.S. at 708–10.

<sup>78</sup> *Cutter*, 544 U.S. at 720.

<sup>79</sup> *Places to Worship Initiative—What is RLUIPA?*, U.S. DEPT OF JUST. (Nov. 7, 2018), <http://www.justice.gov/crt/place-worship-initiative-what-rluipa> [<http://perma.cc/5XB2-LNSM>].

<sup>80</sup> *See, e.g.*, *Fowler v. Crawford*, 534 F.3d 931, 937 (8th Cir. 2008) (holding that the RLUIPA standard was “identical to the RFRA standard”); *see also*, *Storslee, supra* note 38, at 875 (“Under statutes like RFRA and RLUIPA, courts are required to deny an accommodation when doing so is the least restrictive means of furthering a compelling interest . . . [and] that inquiry necessarily requires courts to consider whether an accommodation ‘unduly restrict[s] other persons . . . in protecting their own interests.’”).

<sup>81</sup> *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

<sup>82</sup> *Id.* at 516–18.

<sup>83</sup> U.S. DEPT OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 3 (2020) <http://www.justice.gov/opa/press-release/file/1319031/download> [<http://perma.cc/8QMP-L2ZQ>].



unconstitutional conduct.”<sup>84</sup> In direct response to this holding, Congress passed RLUIPA in 2000.<sup>85</sup>

Essentially, “RLUIPA institutes a compelling interest test that mirror[ed] the RFRA test for specific types of state actions.”<sup>86</sup> Given that the language and legislative history of both statutes note their similarities, the application of precedent discussing one statute to the other is appropriate. In fact, several courts have applied RFRA precedent to RLUIPA cases, and vice versa. For instance, in *Cutter*, the Supreme Court stated that “Congress carried over from RFRA the ‘compelling governmental interest’/‘least restrictive means’ standard [to RLUIPA].”<sup>87</sup> And, in *Fowler v. Crawford*, the 8<sup>th</sup> Circuit determined that “the RLUIPA standard . . . was identical to the RFRA standard.”<sup>88</sup>

*Cutter* states that courts are required to consider the harm that granting religious exemptions may cause to third parties under RLUIPA, RFRA’s sister statute.<sup>89</sup> Additionally, both *Sherbert* and *Yoder* likewise consider broader social harms.<sup>90</sup> Thus, the Supreme Court should also consider third-party harm in the current line of cases debating the validity of the exemptions to the contraceptive mandate under RFRA.

#### B. An Analysis of Third-Party Harm Should be Under RFRA’s Substantial Burden Prong

Neither a consensus nor a straightforward definition or application of the third-party harm doctrine exists in regard to the contraceptive mandate.<sup>91</sup> Its overarching concept may be best demonstrated by a quote from late law professor Zechariah Chafee, Jr., who stated: “Your right to swing your arms ends just where the other man’s nose begins.”<sup>92</sup>

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<sup>84</sup> Whitney K. Novak, *The Religious Freedom Restoration Act: A Primer*, CONG. RSCH. SERV. 1–2 (2020), <http://crsreports.congress.gov/product/pdf/IF/IF11490> [<http://perma.cc/F9JT-67B4>].

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

<sup>87</sup> 544 U.S. 709, 717 (2005).

<sup>88</sup> 534 F.3d 931, 937 (8th Cir. 2008).

<sup>89</sup> *Cutter*, 544 U.S. at 720.

<sup>90</sup> See *Sherbert v. Verner*, 374 U.S. 398, 410 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); see also *supra* notes 58–72 and accompanying text.

<sup>91</sup> In fact, this particular topic is the subject of several law review articles. See generally Elyssa Sternberg, *Who Moved My Harm Principle? How the Relationship Between Complicity Claims and the Contraception Mandate Shows that Considerations of Third-Party Harms in Religious Exemption Cases Are Not Where We Think They Are*, 28 S. CAL. REV. L. & SOC. JUST. 165 (2019).

<sup>92</sup> Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

How this concept applies to the ACA's contraceptive mandate, however, is heavily debated. One view, proffered by Mark Storslsee, the former Executive Director of the Stanford Constitutional Law Center, states that First Amendment jurisprudence prevents the government from providing religious accommodations when doing so generates any burden to third parties.<sup>93</sup> In contrast, others argue that the impact of religious exemptions should be considered as a part of the RFRA balancing test, although where it should be placed is also debated.<sup>94</sup>

It makes the most logical sense to analyze third-party harm under the substantial burden prong of RFRA.<sup>95</sup> The Supreme Court in *Hobby Lobby* rejected the argument that providing contraceptives to the general public satisfies the compelling interest test.<sup>96</sup> Additionally, according to RFRA and RLUIPA, the government's "compelling interest test [must be] satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."<sup>97</sup> Here, because the contraceptive mandate burdens an employer's religion, the compelling interest analysis must be applied to the employer, not third parties.

However, the Supreme Court, despite considering third-party harm in *Sherbert, Yoder, Lee, Caldor*, and *Cutter*,<sup>98</sup> largely ignores the effect the accommodations to the contraceptive mandate may have on third parties.

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<sup>93</sup> See Storslee, *supra* note 38, at 883 ("[A]lthough religious believers (the 'first party') may sometimes receive exemptions from government (the 'second' party), the Establishment Clause forbids accommodations that generate costs or burdens for 'third parties,' meaning 'persons who derive no benefit from an exemption because they do not believe or engage in the exempted religious practices.'").

<sup>94</sup> Compare Sternberg, *supra* note 91, at 165, 170–71 ("While the compelling interest prong of RFRA is an insufficient basis for contemplating the harm principle, the substantial burden prong of the *Sherbert* test can allow courts to find certain forms of religious exercise to be unprotectable due to their harmful effects on third parties."), with *Developments in the Law*, *supra* note 71, at 2187 (explaining that the third-party harm principle is "couched in a compelling interest analysis"); see also *Yoder*, 406 U.S. at 224 (considering third-party harm under the government's compelling interest prong of RFRA).

<sup>95</sup> While *Hobby Lobby* states—when considering the burden religious accommodations have on nonbeneficiaries—"that consideration will *often* inform the analysis of the Government's compelling interest" the use of the word "often" indicates that a third-party harm analysis is not part of the compelling interest test per se. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 n.37 (2014) (emphasis added).

<sup>96</sup> See discussion *infra* Section III.A.

<sup>97</sup> *Hobby Lobby*, 573 U.S. at 726 (quoting *Gonzales v. O Centro*, 546 U.S. 418, 430–31 (2006)).

<sup>98</sup> The third-party harm principle also appears in antidiscrimination lawsuits, including racial and sexual orientation discrimination. See *infra* notes 192–193 and accompanying text.

### III. SIGNIFICANT MILESTONES REGARDING THE CONTRACEPTIVE MANDATE

#### A. *Hobby Lobby*

After creating an exception for nonprofit organizations, for-profit organizations claimed they should also receive exemptions to the contraceptive mandate. Notably, the Supreme Court first addressed this issue in *Hobby Lobby*. In that case, Hobby Lobby Stores, Inc., a for-profit corporation, challenged the contraceptive mandate's requirement to provide FDA-approved drugs and devices that may act to destroy an embryo, as opposed to preventing conception.<sup>99</sup> The Supreme Court ultimately held that a closely held corporation is entitled to receive religious accommodations to the contraceptive mandate and shift the cost of contraceptives to health insurance companies so long as the corporation filled out the necessary forms notifying the government.<sup>100</sup>

In reaching this decision, the Supreme Court found that the contraceptive mandate imposes a substantial burden on religion, but rejected the argument that the government had a compelling interest in promoting "public health" and "gender equality."<sup>101</sup> The Court quoted *Gonzales v. O Centro*: "[RLUIPA, like RFRA,] contemplates a 'more focused' inquiry [and] 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened."<sup>102</sup>

Thus, the Supreme Court considered "the marginal interest in enforcing the contraceptive mandate in these cases"<sup>103</sup> but decided not to address the issue of whether the government had a compelling interest and simply assumed that it did.<sup>104</sup>

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<sup>99</sup> 573 U.S. at 720.

<sup>100</sup> *Id.* at 688–92.

<sup>101</sup> *Id.* at 726–27. Justice Ginsburg critiques the majority for conflating the sincerity of the religious beliefs with the substantiality of the burden. *Id.* at 760 (Ginsburg, J., dissenting). She states:

I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby . . . purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.

*Id.*

<sup>102</sup> *Id.* at 726 (citing *Gonzales*, 546 U.S. at 430–31).

<sup>103</sup> *Id.* at 727.

<sup>104</sup> *Id.* at 727–28 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . .").

The Supreme Court likely deferred the issue of whether the government had a compelling interest because the final prong of RFRA analysis, that the government use the least restrictive means to achieve their compelling interest, was not satisfied.<sup>105</sup> The majority notes that not only was it possible for the government to assume the cost of providing contraceptives free of charge to women but that the HHS could also expand the current accommodation to secular businesses as well.<sup>106</sup> This accommodation would require employers to self-certify that they oppose the inclusion of certain contraceptives in their healthcare plan.<sup>107</sup> The majority briefly considered the harm that granting the accommodation may cause to third parties: “The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”<sup>108</sup> However, the proposition that there is no third-party harm as a result of the accommodations is no longer correct. After the *Hobby Lobby* decision, the government crafted additional rules granting moral and religious exemptions to the contraceptive mandate, which provide no alternate mechanism for employees to obtain contraceptives without cost sharing.<sup>109</sup>

In her dissent, Justice Ginsburg heavily criticized the majority’s approach.<sup>110</sup> She explained:

In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby . . . or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve

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<sup>105</sup> *Id.* at 728 (“The least-restrictive-means standard is exceptionally demanding . . . and it is not satisfied here.”).

<sup>106</sup> *See id.* at 729–31.

<sup>107</sup> *Id.* at 731.

<sup>108</sup> *Id.* at 693. The Supreme Court appears to “tie accommodation to the fact that the government has other ways of providing for the statute’s intended beneficiaries so that no third-party harm would result from the accommodation.” Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2532 (2015).

<sup>109</sup> *See* discussion *infra* Section III.C.

<sup>110</sup> *See Hobby Lobby*, 573 U.S. at 739–40 (Ginsburg, J., dissenting). Others have also criticized the *Hobby Lobby* decision. For instance, Alexis Florczak argues: “Because the [Supreme] Court provided little guidance to lower courts for evaluating a corporation’s sincerely held religious beliefs, the possibility for a corporation to succeed in asserting insincere beliefs to discriminate and deny medically necessary services . . . is a dangerous consequence inconsistent with RFRA’s original purpose.” Alexis M. Florczak, *Make America Discriminate Again? Why Hobby Lobby’s Expansion of RFRA is Bad Medicine for Transgender Health Care*, 28 *HEALTH MATRIX* 431, 435 (2018).

a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.<sup>111</sup>

Not only does Justice Ginsburg condemn the majority for ignoring the societal harm their decision will have, but she also critiques the majority's application of RFRA itself.<sup>112</sup> According to Justice Ginsburg, the majority's decision, "elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."<sup>113</sup>

Shortly after this decision was rendered, several organizations asserted objections to the accommodation, claiming that even filling out the forms and noting a religious objection violated RFRA.<sup>114</sup>

### B. *Zubik*

In 2016, the second ACA contraceptive mandate and religious accommodation case reached the Supreme Court.<sup>115</sup> Petitioners, most of whom were nonprofit organizations that provided health insurance to their employees, sought an exemption from the contraceptive mandate and argued that the self-certification process, whereby organizations assert they have a religious objection to providing some or all contraceptives required under the ACA, "substantially burdens the exercise of their religion," in violation of RFRA.<sup>116</sup> After oral arguments, the Court remanded the case without deciding the issue.<sup>117</sup> In an unsigned opinion, the Supreme Court instructed the parties to create an approach to the self-certification requirement that "accommodates petitioners'

<sup>111</sup> *Hobby Lobby Stores, Inc.*, 573 U.S. at 740 (Ginsburg, J., dissenting).

<sup>112</sup> *See id.* at 740, 757–59.

[Religious] beliefs, [no matter how] deeply held, do not suffice to sustain a RFRA claim. RFRA properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.

*Id.* at 758–59 (alteration in original) (quoting *Kaemmerling v. Lappin*, 533 F.3d 669, 679 (D.C. Cir. 2008)).

<sup>113</sup> *Id.* at 760.

<sup>114</sup> *See NeJaime & Siegal, supra* note 108, at 2531–32 ("Mere days after issuing its *Hobby Lobby* decision, the Court provisionally recognized another complicity-based conscience claim in its interim order in *Wheaton College v. Burwell* . . . [The claimants alleged] that the self-certification form . . . would 'make it *complicit* in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects.'").

<sup>115</sup> *Zubik v. Burwell*, 578 U.S. 403 (2016). *Zubik* was a series of consolidated cases. *See E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Hum. Servs.*, 778 F.3d 422 (3d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 772 F.3d 229 (D.C. Cir. 2014).

<sup>116</sup> 578 U.S. 403, 405–07 (2016).

<sup>117</sup> *Id.* at 408–10.

religious exercise while at the same time ensur[es] that women covered by petitioners' health plans 'receive full and equal coverage, including contraceptive coverage.'"<sup>118</sup>

### C. The Interim Final Rules and the Final Rules

On remand, in an attempt to follow the *Zubik* directive, the HHS reviewed more than 50,000 comments<sup>119</sup> but announced that the HHS was unable to determine or devise a method by which it could accommodate the petitioners' views while ensuring the seamless contraceptive coverage to women.<sup>120</sup> As a result, the HHS issued Interim Final Rules (IFRs) in October 2017, creating a religious (Religious Exemption IFR)<sup>121</sup> and moral (Moral Exemption IFR)<sup>122</sup> exemption to the contraceptive mandate.<sup>123</sup> These exemptions required employers to self-certify that they had religious or moral objections to the contraceptive mandate, and as a result, the employees would no longer have access to contraceptives via their employer's health insurance plans.<sup>124</sup>

The Religious Exemption IFR expanded the definition of objecting entities to include any nongovernmental plan sponsor that objects, based on its sincerely held religious beliefs, to its "establishing, maintaining, providing, offering, or arranging (as applicable): (i) [c]overage or payments for some or all contraceptive

<sup>118</sup> *Id.* at 408 (internal citation omitted).

<sup>119</sup> *Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 220 (D. Mass. 2021). Generally, before an administrative agency can promulgate rules, the agency must publicly announce that they intend to do so. The public then has the opportunity to submit comments about the proposal. *Learn About the Regulatory Process*, REGULATIONS.GOV, <http://www.regulations.gov/learn> [<http://perma.cc/8GW8-EYYX>] (last visited Jan. 2, 2022).

<sup>120</sup> *Massachusetts*, 513 F. Supp. 3d at 220.

<sup>121</sup> Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,793 (Oct. 13, 2017).

<sup>122</sup> Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,839 (Oct. 13, 2017).

<sup>123</sup> See Reddy, Patel & Radhakrishnan *supra* note 42 ("The Trump administration rules at issue . . . broaden the exceptions to the contraceptive coverage mandate [even] further, notably including employers that object on moral, not just religious, grounds and offering objecting parties outright exemptions from the mandate, rather than just accommodations."). This is also not the first time that the government considered adding a conscience-based objection to the contraceptive mandate. After passing the ACA,

Republican leaders attempted to pass legislation providing conscience exemptions from the law's requirement that employer-provided healthcare insurance cover particular items and services. In 2012, the Respect of Rights of Conscience Act, commonly referred to as the Blunt Amendment, sought to amend the ACA to exempt any employer from "providing coverage" and any plan from "paying for coverage" of any "items or services . . . contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan." . . . The Blunt Amendment was narrowly defeated in the Senate . . .

NeJaime & Siegal, *supra* note 108, at 2550–51.

<sup>124</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377–78 (2020).

services; or (ii) [a] plan, issuer, or third party administrator that provides or arranges such coverage or payments.”<sup>125</sup>

The Moral Exemption IFR expanded the exemption even further; it allows nonprofit organizations and for-profit entities with no publicly traded ownership interests to opt out of, based on its sincerely held moral conviction, “establishing, maintaining, providing, offering, or arranging for (as applicable): (i) [c]overage or payments for some or all contraceptive services.”<sup>126</sup>

Significantly, however, these exemptions, while allowing employers to opt out of the ACA’s contraceptive mandate, do not contain any alternative mechanisms to ensure that women are able to access contraceptives.<sup>127</sup> If an employer certifies that they have a religious or moral objection to providing contraceptives to their employees, their employees will be left with two options: (1) find contraceptive care from existing governmental programs or (2) pay for contraceptives out of their own pocket.<sup>128</sup> Existing governmental programs that provide medical services to low-income individuals, such as Medicaid, are not equipped to deal with a sudden “influx of tens of thousands of previously insured women.”<sup>129</sup> Additionally, suddenly compelling women to navigate the requirements for these programs not only imposes additional barriers, but it also creates a “continuity of care problem, ‘forc[ing those] who lose coverage away from trusted providers who know their medical histories.’”<sup>130</sup> While women could alternatively, pay for contraceptives out of their own pocket, this may impose a substantial financial hardship.<sup>131</sup> For instance, one of the most effective types of contraception is an intrauterine device (IUD),

<sup>125</sup> 45 C.F.R. § 147.132(a)(iv)(2) (2021).

<sup>126</sup> 45 C.F.R. § 147.133(a)(2) (2021); *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 221 (D. Mass. 2021).

<sup>127</sup> *Little Sisters*, 140 S. Ct. at 2403 (Ginsburg, J., dissenting).

<sup>128</sup> *Id.* at 2408–09.

The first option . . . is for women to seek contraceptive care from existing government-funded programs. Such programs, serving primarily low-income individuals, are not designed to handle an influx of tens of thousands previously insured women. . . . The second option for women losing insurance coverage for contraceptives is to pay from contraceptives counseling and devices out of their own pockets.

*Id.*

<sup>129</sup> *Id.* at 2408.

<sup>130</sup> *Id.* at 2409 (quoting Brief for Nat’l Women’s L. Center et al. as Amici Curiae Supporting Respondents at 18, *Little Sisters*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454)); *see also* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013).

<sup>131</sup> *See Little Sisters*, 140 S. Ct. at 2409 (Ginsburg, J., dissenting).

the cost of which “is nearly equivalent to a month’s full-time pay for workers earning the minimum wage.”<sup>132</sup>

The IFRs were superseded by the Final Rules issued in November 2018, which became effective in January 2019.<sup>133</sup> The Final Rules formally codify the expanded exemptions and are substantively similar as the IFRs.<sup>134</sup>

In summary, with the promulgation of these rules, opting out of the contraceptive mandate became easier for secular employers, and the Supreme Court’s directive in *Zubik* that women be provided with full and equal coverage, including contraceptive coverage, was not met.

<sup>132</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 (2014) (Ginsburg, J., dissenting).

<sup>133</sup> Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018).

<sup>134</sup> Also, interestingly, the Final Rules are being challenged in court. Massachusetts is currently involved in litigation against HHS claiming that the Final Rules: (1) are arbitrary and capricious under the Administrative Procedures Act; (2) violate the Establishment Clause; and (3) violate the equal protection guarantee implicit in the Fifth Amendment. *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 513 F. Supp. 3d 215, 223–29 (D. Mass. 2021). The district court determined that the (1) Final Rules did not violate the APA; (2) Massachusetts did not show that the Final Rules violated the Establishment Clause; and (3) the Final Rules did not violate the 5<sup>th</sup> amendment’s equal protection guarantee. *Id.* The fact that the IFRs (and later the Final Rules) included religious and moral exceptions is particularly interesting. Often times the terms (religious and moral) are grouped together, but there are numerous theories exploring the connection between the two. Linda J. Skitka et al., *Moral and Religious Convictions: Are They the Same or Different Things?*, PLOS ONE, June 2018, at 1, 2–4. The four theories are as follows: (1) the equivalence hypothesis provides that religion and morality are inseparable; (2) the secularization hypothesis states that “morality and religion have become increasingly separate overtime[;]” (3) the political asymmetry hypothesis states that “religious Americans are more likely to have conservative than liberal positions on most issues”; and (4) the distinct constructs hypothesis states that morality and religion are fundamentally different. *Id.* According to the distinct construct hypothesis, a key distinction between religion and morality is the degree of authority independence. *Id.* at 4. For instance,

[r]eligious beliefs are more intimately tied to authorities and rules than are moral beliefs. In other words, religious authorities and institutions teach their members what is acceptable or unacceptable, such as whether to eat pork or to go outside without covering one’s head. . . . In contrast, people define moral beliefs in more absolutist terms that transcend what institutions or authorities dictate. If, for example, someone has a moral commitment to the idea that eating meat is morally wrong, it would not matter what authorities or the law had to say about the practice: The perceiver would still see meat consumption as wrong.

*Id.* (footnote omitted). A study conducted by researchers at the University of Illinois at Chicago revealed that the evidence suggests that “moral and religious convictions are largely independent constructs.” *Id.* at 12. This research indicates that there is a distinction between moral and religious beliefs. *Id.* Religious beliefs are protected by RFRA; moral beliefs are not. See Novak, *supra* note 84.



## D. *Little Sisters*

### 1. The Majority Opinion

Little Sisters of the Poor Home for the Aged are an order of Roman Catholic Nuns that operate several nursing homes and objected to the contraceptive mandate's self-certification requirement because "notice to the government implicates them in contraception use."<sup>135</sup> The government responded by asserting that both the Religious Exemption IFR and Moral Exemption IFR were substantively and procedurally invalid.<sup>136</sup> The case made its way to the Supreme Court, and in ruling on the matter, the Court determined that the HHS had the authority to issue the IFRs and that there were no procedural defects.<sup>137</sup> The Supreme Court in *Little Sisters* did not decide whether the self-certification requirement violated RFRA, nor did the Supreme Court consider whether the expansion to the exemptions contained in the IFRs violated the Administrative Procedures Act or the First Amendment's religion clauses.<sup>138</sup>

### 2. Alito's Concurrence

Justice Alito agreed with the majority that the HHS had the authority to promulgate the IFRs but wrote a separate concurrence stating that he would have also decided whether the IFRs violated RFRA.<sup>139</sup> He believes they do not.<sup>140</sup>

Under Justice Alito's RFRA analysis, it is necessary to consider two questions in determining the substantiality of the burden: "would noncompliance have substantial adverse practical consequences" and "would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them?*"<sup>141</sup> In essence, Justice Alito's analysis examines the sincerity of the claim and the practical adverse consequences to

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<sup>135</sup> Frederick Mark Gedicks, "Substantial" Burdens: How the Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 99 (2017); see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1178 n.25 (10th Cir. 2015).

<sup>136</sup> See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2378–79 (2020). Respondents could not argue that the Religious Exemption IFR or Moral Exemption IFR were permissible under RFRA because the text of the Religious Exemption IFR states that the government does not have a compelling interest in providing contraceptives under the ACA. See *id.* at 2392 (Alito, J., concurring).

<sup>137</sup> *Id.* at 2386 (majority opinion).

<sup>138</sup> See *id.* at 2367.

<sup>139</sup> See *id.* at 2387 (Alito, J., concurring).

<sup>140</sup> See *id.*

<sup>141</sup> *Id.* at 2389.

the religious claimants.<sup>142</sup> Though notably, he does not consider the adverse practical consequences to third parties.<sup>143</sup>

Justice Alito begins his analysis with an acceptance that the petitioner's claims were sincere, explaining that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable."<sup>144</sup> Justice Alito further opines that fining the petitioners 100 dollars per day, per employee is a substantial adverse effect.<sup>145</sup> The sincerity of the petitioners' claims coupled with the fine led Justice Alito to conclude that the IFRs substantially burdened religion.<sup>146</sup>

Justice Alito then proceeds to analyze whether the government had a compelling interest and whether the government used the least restrictive means.<sup>147</sup> Pursuant to Justice Alito, the government did not have a compelling interest in providing widespread access to cost-free contraceptives because preventative services with respect to women were not included in the text of the ACA itself.<sup>148</sup> Rather, outside agencies defined what constituted preventative care and included contraceptives in that definition.<sup>149</sup> Additionally, he notes that there are a broad number of exceptions to the contraceptive mandate.<sup>150</sup> Moreover, the Supreme Court has previously determined that if there are a large swathe of exceptions to a generally applicable rule, the government does not have a compelling interest.<sup>151</sup>

Finally, Justice Alito determined that, assuming the government did have a compelling interest in providing contraceptives, the government did not institute the least restrictive means of achieving that interest.<sup>152</sup> An alternative would be for the government to absorb the cost of providing contraceptives to women who could not afford them.<sup>153</sup>

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<sup>142</sup> *See id.*

<sup>143</sup> *See id.* at 2387–2400.

<sup>144</sup> *Id.* at 2390.

<sup>145</sup> *Id.* at 2389–90.

<sup>146</sup> *See id.* at 2391.

<sup>147</sup> *See id.* at 2392.

<sup>148</sup> *See id.* at 2392, 2394 ("[I]t is undoubtedly true that the contraceptive mandate provides a benefit that many women may find highly desirable, but Congress's enactments show that it has not regarded the provision of free contraceptives or the furnishing of 'seamless' coverage as 'compelling.'").

<sup>149</sup> *Id.* at 2387.

<sup>150</sup> *See id.* at 2392–93.

<sup>151</sup> *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993); *see also Rader v. Johnston*, 924 F. Supp 1540, 1552 n.23 (D. Neb. 1996) (holding that the large number of exceptions were not being enforced in a neutral manner and that providing such a large number of exceptions "undercuts" the purpose of the regulation).

<sup>152</sup> *Little Sisters*, 140 S. Ct. at 2394 (Alito, J., concurring).

<sup>153</sup> *Id.* at 2394 ("[T]he Government has 'other means' of providing cost-free contraceptives to women 'without imposing a substantial burden on the exercise of religion by the objecting parties. . . . The most straightforward way,' we noted [in *Hobby Lobby*] 'would be

### 3. Ginsburg's Dissent

Justice Ginsburg, however, approached the issue from a different perspective and wrote a scathing dissent. She began by saying:

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interest of others who do not share those beliefs. . . . Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.<sup>154</sup>

Justice Ginsburg's approach, in contrast to Justice Alito's, considers the third-party harm the accommodations may have as part of a balancing test. A crucial point made by Justice Ginsburg is that if the Supreme Court finds that the self-certification requirement violates RFRA, between approximately "70,500 and 126,400 women would immediately lose access to no-cost contraceptive services."<sup>155</sup> Justice Ginsburg also highlights the ramifications these accommodations would have on the tens of thousands of women who would lose contraceptive coverage: many women will forgo contraception when faced with the high out-of-pocket costs they would need to pay to obtain effective contraceptives.<sup>156</sup>

#### IV. THE SUPREME COURT MISAPPLIES RFRA: THERE IS NO SUBSTANTIAL BURDEN TO LITTLE SISTERS BECAUSE THIRD-PARTY HARM OUTWEIGHS LITTLE SISTER'S SINCERITY AND ANY ADVERSE PRACTICAL CONSEQUENCES

Instances where third-party harm triumphs over religious claimants highlight the need for courts to consistently consider the impact religious exemptions may have on others.<sup>157</sup> However, such a determination can only be made *after* judicial inquiry. Although often overlooked in the context of the contraceptive mandate, the Supreme Court has considered limiting religious exemptions to protect third parties elsewhere, including in the context of LGBTQ+ discrimination. In *Masterpiece Cakeshop*, the Supreme Court, in dicta, explained the importance of confining religious exemptions to protect other liberties:

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for the Government to assume the cost of providing the . . . contraceptives.") (internal citations omitted) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

<sup>154</sup> *Id.* at 2400 (Ginsburg, J., dissenting) (internal citations omitted).

<sup>155</sup> *Id.* at 2401.

<sup>156</sup> *Id.* at 2409 ("[T]he religious exemption reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA.") (internal citations omitted).

<sup>157</sup> For brevity's sake, I only discuss one example of third-party harm triumphing over religious claimants.

[If religious exceptions] were not confined, then a long list of persons who provide goods and services . . . might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.<sup>158</sup>

In that instance, the Supreme Court found that third-party harm warrants the denial of religious exemptions as the societal harm outweighed any adverse effect to the religious claimants.<sup>159</sup>

In the context of the contraceptive mandate, the Supreme Court has not consistently analyzed how religious exemptions will impact third parties. Cumulatively, *Hobby Lobby*, *Zubik*, the IFRs/FRs, and *Little Sisters* demonstrate that the Court largely accepted a claimant's assertion that the exemptions substantially burden the exercise of religion without independently considering third-party harm or whether the assertions are sincere (as opposed to merely accepting the assertion that the claim is sincere). In determining whether the IFRs and FRs violate RFRA, the Court should utilize the balancing test created in *Sherbert/Yoder* and weigh the competing interests of the religious claimants and third parties. Employing this test would require the Supreme Court to analyze the substantiality of the burden, including religious sincerity and third-party harm, and weigh that burden against the government's compelling interest.

The Supreme Court in *Little Sisters* did not consider the adverse practical consequences to third parties. In his concurrence to the majority opinion, Justice Alito only considered two factors in

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<sup>158</sup> *Masterpiece Cake Shop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018). Although the religious claimants in *Masterpiece Cake Shop* relied on the First Amendment's Free Exercise Clause, not RFRA, the legal standards are similar. See *infra* Section II.A. For further discussion about *Masterpiece Cake Shop* and third-party harm, see also *Developments in the Law, supra* note 71, at 2192 (2021) (“[I]n *Masterpiece Cakeshop*, the Court granted an exemption to a state non-discrimination statute, but was also careful to reaffirm the third-party harm principle, this time framed in terms of the need to protect the ‘dignity and worth’ of same-sex couples.”); Douglas NeJaime & Reva Siegal, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J.F.* 201, 210 (2018).

In *Masterpiece Cakeshop*, the Court emphasizes the importance of antidiscrimination protections in public accommodations and reaffirms precedent limiting religious exemptions from such laws. It stresses that exemptions must be limited in order to vindicate the government's interest in securing equal opportunity, to afford protected classes equal access to goods and services, and to shield them from stigma.

*Id.*

<sup>159</sup> The Supreme Court spoke in dicta while considering the hypothetical situation that unrestrained religious-based exceptions could pose severe risks towards the goals of the civil rights movements for members of the LGBTQ+ community. However, their reasoning still proves instructive as they upheld the religious freedom of the baker who declined to make a wedding cake for a gay couple in *Masterpiece Cakeshop*. See *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

deciding whether or not the claimants in *Little Sisters* were substantially burdened: “would noncompliance have substantial adverse practical consequences?” and “would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them?*”<sup>160</sup> However, he neglected to consider in the foregoing analysis, the substantial adverse practical consequences to *third parties*. As described above, third-party harm is a factor to consider when evaluating whether or not a law constitutes a substantial burden to religion.<sup>161</sup>

Moving forward, if this issue returns to the Supreme Court—which must decide whether the claimants face a substantial burden in certifying that they have a religious objection to providing their employees with access to contraceptives—it is necessary to consider more than just the sincerity of their argument. It is also necessary to consider the adverse practical consequences to both religious claimants *and* third parties.

#### A. Sincerity

Petitioners in *Little Sisters* objected to the contraceptive mandate’s self-certification requirement, arguing that the self-certification requirement would still render them complicit in their employees having access to contraceptives.<sup>162</sup> Although courts are generally hesitant to examine the sincerity of religious beliefs, it is particularly important to consider it along with third-party harm in complicity cases “because under a complicity claim, specifically identified persons or groups who do not share the claimant’s belief can be forced to bear the burden of claimant’s exercise, instead of society in general.”<sup>163</sup>

Notwithstanding courts’ hesitancy in scrutinizing sincerity, the employer’s argument in *Little Sisters*—that complying with the self-certification requirement would render them complicit in the sin of using contraceptives—while sincere, is logistically flawed: *Little Sisters* is an employer operating in the United States and is thus required to pay their employees. If an employee uses their paycheck to purchase contraceptives, are the employers not “complicit”

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<sup>160</sup> *Little Sisters*, 140 S. Ct. at 2389 (Alito, J., concurring).

<sup>161</sup> See *supra* Section II.A.

<sup>162</sup> *Little Sisters*, 140 S. Ct. at 2390–91 (Alito, J., concurring).

<sup>163</sup> Sternberg, *supra* note 91, at 173; see also *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (“Although a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”).

then according to Little Sisters' reasoning?<sup>164</sup> However, since courts do not consider the reasonableness of a religious belief in RFRA cases (even when they should),<sup>165</sup> for the purposes of this Note, it is conceded that their belief is sincere.

## B. Adverse Practical Consequences

Notwithstanding a concession pertaining to the reasonableness of Little Sisters' sincerity, their sincerity still must be weighed against the adverse practical consequences to the claimants *and* third parties. In his concurrence, Justice Alito found that fining Little Sisters 100 dollars per day, per employee is a substantial adverse effect.<sup>166</sup> Comparatively, the *Yoder* Court determined that a five-dollar fine was a substantial adverse effect.<sup>167</sup> In making the comparison, it is important to note that in *Yoder*, removing children a year or two early from public school did not impact third parties.<sup>168</sup> Thus, while there was an adverse effect to the claimants, there was no practical consequences to others. Accordingly, the *Yoder* Court properly found that the requirement that Amish children attend school past a certain age imposed a substantial burden on religion.<sup>169</sup>

Similarly in *Sherbert*, the Supreme Court determined that the disqualification of benefits imposed a substantial burden on the appellant's religion because "[t]he ruling [of the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand."<sup>170</sup> Moreover, the Court briefly considered how the disqualification of benefits may impact society at large: "this is not a

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<sup>164</sup> Moreover, "the Little Sisters are employers that do not insulate themselves from those who think and live differently in a pluralistic society. They operate institutions that they hold open to persons of all faith and of no faith—both with respect to employees and clients." M. Cathleen Kaveny, *Law, Religion, and Conscience in a Pluralistic Society: The Case of Little Sisters of the Poor*, in LEGAL STUDIES RESEARCH PAPER SERIES at 1, 6 (Mar. 29, 2016) (B.C. L. Sch., Rsch. Paper No. 394) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2756148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756148) [<http://perma.cc/C8XE-DN2C>].

<sup>165</sup> See Gregory M. Lipper, *The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1332 (2016) ("The government has largely taken the plaintiffs' sincerity for granted, failing to invoke (or even investigate) significant evidence that many of the asserted claims are insincere.").

<sup>166</sup> *Little Sisters*, 140 S. Ct. at 2389 (Alito, J., concurring).

<sup>167</sup> See *Yoder*, 406 U.S. at 208, 236. "Adjusted for inflation, \$5 in 1972 is worth \$31.69 in 2021." *Calculate the Value of \$5.00 in 1972*, DOLLAR TIMES, <http://www.dollartimes.com/inflation/inflation.php?amount=5&year=1972> [<http://perma.cc/HW4J-J98R>] (last visited Apr. 28, 2021).

<sup>168</sup> 406 U.S. at 224–25.

<sup>169</sup> *Id.* at 207.

<sup>170</sup> 374 U.S. 398, 404 (1963).

case in which an employee's religious convictions serve to make h[er] a nonproductive member of society."<sup>171</sup>

Although briefly mentioned in each decision, widespread adverse practical consequences were not a significant factor in either *Sherbert* or *Yoder*.<sup>172</sup> In those cases, there were no countervailing interests to prevent the Supreme Court from concluding that the law imposed a substantial burden on religion.

The line of cases involving the contraceptive mandate, however, are functionally different, as any decision to grant religious exemptions necessarily impacts women who have insurance under which they receive the benefits of contraceptives. In contrast to the absence of third-party harm in *Sherbert* and *Yoder*, if the Supreme Court determines that the religious exemptions to the contraceptive mandate violate RFRA, a substantial impact to third parties would exist. The government estimates that "between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services."<sup>173</sup>

If "between 70,500 and 126,400 women . . . immediately lose access to no-cost contraceptive services[.]"<sup>174</sup> they may face financial hardship in trying to obtain contraceptives elsewhere. They may incur psychological harm due to the elimination of benefits as a result of their employer's religious beliefs that women may not necessarily share.<sup>175</sup> Their alternative would be to obtain contraceptives from existing governmental programs,

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<sup>171</sup> *Id.* at 410.

<sup>172</sup> See *supra* Part III; see also Sternberg, *supra* note 91, at 169 ("This 'complicity claim' is a very different claim from those brought in *Sherbert* and *Smith* because a complicity claim necessarily controls the conduct of a third party.").

<sup>173</sup> Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2401 (2020) (Ginsburg, J., dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> One of the most effective types of contraception is an intrauterine device (IUD), the cost of which "is nearly equivalent to a month's full-time pay for workers earning minimum wage." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 (2014) (Ginsburg, J., dissenting). Additionally, medical bills and expenses are the most cited reasons for individuals filing bankruptcy. One study estimates that a little over 60% of people who file for bankruptcy do so, at least in part, because of medical bills. Unfortunately, the ACA has done little to help reduce this number. Even with health insurance, individuals may be thousands of dollars in debt. By further increasing the costs of healthcare, indigent populations will be disproportionately impacted by a sudden, large increase in fees by having to purchase contraceptives from their own pocket. See Michael Sainato, *I Live on the Streets Now: How Americans Fall into Medical Bankruptcy*, THE GUARDIAN (Nov. 14 2019, 2:00 AM), <http://www.theguardian.com/us-news/2019/nov/14/health-insurance-medical-bankruptcy-debt> [<http://perma.cc/4GJF-DBUE>]; David U. Himmelstein et al., *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 AM. J. PUB. HEALTH 431, 431–33 (2019); see also NeJaime & Siegal, *supra* note 108, at 2528 ("In adjudicated religious liberties law, when accommodation has threatened to impose significant burdens on other citizens, courts have repeatedly rejected the exemption claims. The underlying intuition seems to be that one citizen should not be singled out to bear significant costs of another person's religious exercise.").

but these programs are not designed to handle a sudden influx of tens of thousands of women.<sup>176</sup> Additionally, the potential for social stigmatization exists:

Accommodating such religious beliefs may stigmatize women who use contraception, either by entrenching old norms that condemn women for seeking sex while avoiding motherhood or by labelling contraception as an ‘abortifacient.’ In these ways, sanctioning the employer’s refusal to pay can create meanings that deter women from using contraception, compromising both the individual and societal interests that the [ACA] furthers.<sup>177</sup>

Overall, the contraceptive mandate not only provides financial benefits (via the elimination of cost-sharing), but it also has a broader social impact: access to affordable contraceptives is linked to the financial, physical, and emotional health of women, children, and families.<sup>178</sup> Ultimately, removing access to contraceptives for women at the behest of an employers’ religious convictions, has significant adverse consequences.<sup>179</sup>

<sup>176</sup> *Little Sisters*, 140 S. Ct. at 2408.

<sup>177</sup> NeJaime & Siegel, *supra* note 108, at 2581–83.

<sup>178</sup> Of course, women’s social mobility is not solely linked to access to contraceptives. A broad range of factors has likely contributed to such movement. Contraceptives, however, do play a central role. Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, THE ATLANTIC (July 2, 2014) <http://www.theatlantic.com/health/archive/2014/07/the-broader-benefits-of-contraception/373856/> [<http://perma.cc/M4E6-7NRS>].

According to a 2013 Guttmacher Institute review of more than 66 studies, spanning three decades, reliable contraception allows women to be better parents. Among the findings: couples who experience unintended pregnancy and unplanned childbirth are more likely to have depression and anxiety—while adults who plan their children tend to be happier. Relationships are more likely to dissolve after an unplanned birth than a planned one. And those who are unprepared to be parents are more likely to develop a poor relationship with their child.

. . . Last year, the Guttmacher Institute concluded that access to birth control significantly increases a woman’s earning power and narrows the gender pay gap.

. . .

Embedded in the conversation about birth control access is a cycle of poverty. As income inequality grows families without access to reliable contraception are potentially at a greater disadvantage. Poorer children experience more health problems, live in more dangerous neighborhoods and have higher rates of delayed academic development. Those from poorer households in the long run, have lower test scores, are less likely to complete high school or college, limiting their earning potential as adults.

*Id.*

<sup>179</sup> There is also a substantial impact to public health.

The public health benefit of providing contraception is clearly supported by multiple studies. . . . The US Maternal Mortality Ratio (MMR) is comparable to countries with few healthcare resources: The US MMR was 16 per 100,000 live births from 2006 to 2010 and has risen to 23.8 in 2014. More than 700 women a year die of complications related to pregnancy each year in the United States, and two-thirds of those deaths are preventable. Reducing unintended pregnancy is an important element of addressing the unacceptably high MMR in the United States.



While Little Sisters' claim that the self-certification requirement noting they have a religious objection to providing their employees contraceptives would render them complicit in sinful activity is sincere and being fined 100 dollars per day, per employee does have adverse practical consequences, it does not override the substantial harm these exemptions would do to third-parties. In this instance, employees (who may not necessarily share the religious beliefs of their employers) should not be forced to bear the consequences of their employer's beliefs. By applying the aforementioned test and balancing the claimant's sincerity and adverse practical consequences against the harm imposed by the exemptions to third parties, it is evident that the self-certification requirement does *not* impose a substantial burden on religion as defined under RFRA.

#### V. SIGNIFICANCE AND SOLUTION

Finding that there is no substantial burden is significant because the government is not able to demonstrate that there is a compelling interest in providing contraceptives to women.<sup>180</sup> To demonstrate a compelling interest, "the Government would have to show that it would commit one of the 'gravest abuses' of its responsibilities if it did not furnish free contraceptive[s] to all women."<sup>181</sup> In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court stated that "a law cannot be regarded as protecting an interest of 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."<sup>182</sup> Simply stated, the more exemptions there are to a law, the less likely the government will be able to demonstrate that they have a compelling interest. There are several exceptions to the contraceptive mandate, even beyond the Religious Exemption IFR and Moral Exemption IFR, including exceptions for grandfathered plans, nonprofit institutions, and employers

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Reddy, Patel & Radhakrishnan, *supra* note 42; *see also* Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), <http://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [<http://perma.cc/794T-HYWA>].

<sup>180</sup> Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47800 (Oct. 13, 2017) ("Upon further examination of the relevant provisions of the Affordable Care Act and the administrative record on which the [contraceptive] Mandate was based, the [government] ha[s] concluded that the application of the Mandate to entities with sincerely held religious objections to it does not serve a compelling governmental interest.")

<sup>181</sup> *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

<sup>182</sup> 508 U.S. 520, 547 (1993).

with less than fifty employees.<sup>183</sup> Such a large number of exemptions dilutes the government's argument that providing contraceptives is a compelling interest. Indeed, even the text of the IFRs concede that the government does not have a compelling interest in providing widespread access to contraceptives.<sup>184</sup> Accordingly, the only way for the IFRs/FRs to survive a RFRA challenge is to reframe the substantial burden requirement and weigh sincerity and adverse practical consequences to the claimants, against the adverse practical consequences to third parties.

Regarding the contraceptive mandate, Justice Ginsburg, in her dissent to *Little Sisters*, is the only Supreme Court Justice to consider how granting the religious exemptions may harm third parties. Her analysis properly considers the adverse practical consequences to those who do not share the claimant's religious beliefs.<sup>185</sup> Even beyond the fact that a third-party harm inquiry is required under RFRA, such an analysis is important because third-party harm and the underlying purpose of the ACA are intertwined. As stated above, the ACA was passed, *inter alia*, to reduce discriminatory practices in healthcare.<sup>186</sup> By failing to consider how the exemptions will impact third parties, the ACA cannot function as intended (i.e., to increase access to healthcare and reduce discriminatory practices women experience in healthcare settings).

The Supreme Court's decisions regarding the contraceptive mandate coupled with the current trend of administrative agencies instituting broader exemptions to the contraceptive mandate undermines the purpose of the ACA. Originally, at the outset of the ACA, there were a limited number of exemptions to the contraceptive mandate: only nonprofit organizations who

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<sup>183</sup> See Katie Keith, *Supreme Court Upholds Broad Exemptions to Contraceptive Mandate—for Now*, HEALTH AFFAIRS (July 9, 2020), <http://www.healthaffairs.org/doi/10.1377/hblog20200708.110645/full#:~:text=In%20implementing%20regulations%20in%202011,that%20object%20to%20providing%20contraceptives> [<http://perma.cc/A3WG-R8S8>]; *Understanding Who Is Exempted from the Mandate*, LITTLE SISTERS OF THE POOR, <http://thelittlesistersofthepoor.com/who-is-exempt-from> [<http://perma.cc/3UAJ-ENGM>]; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699 (2014).

<sup>184</sup> See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47800 (Oct. 13, 2017). For more information about the economic and societal benefits of preventing unintended pregnancies, see *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

<sup>185</sup> See *Little Sisters*, 140 S. Ct. at 2367 (Ginsburg, J., dissenting).

<sup>186</sup> The ACA was also passed to address the rapidly rising cost of healthcare in America. See Kimberly Amadeo, *What is Obamacare?*, THE BALANCE, <http://www.thebalance.com/what-is-obamacare-the-aca-and-what-you-need-to-know-3306065> [<http://perma.cc/VT9M-XVEN>] (last updated Sept. 29, 2021); see also *Little Sisters*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting) ("First and foremost, [the contraceptive mandate] is directed at eradicating gender-based disparities in access to preventative care.").

satisfied the criteria,<sup>187</sup> employers with less than fifty employees, and grandfathered plans<sup>188</sup> were eligible. Religious accommodations soon followed.<sup>189</sup> *Hobby Lobby* then expanded the religious accommodations to closely held secular businesses.<sup>190</sup> Subsequently, further challenges to the accommodations resulted in the Supreme Court remanding the issue in *Zubik*, whereby the government responded by crafting a flat-out religious and moral exemption to the contraceptive mandate.<sup>191</sup>

Cumulatively, these decisions implicitly perpetuate the practice of gender bias in health care. By not considering third-party harm or the purpose of the contraceptive mandate when given the opportunity to address it, the Supreme Court is complicit in enabling the concept that providing preventative care with respect to women is not of national importance.<sup>192</sup> Such a position directly conflicts with *why* the ACA was initially passed: to reduce discriminatory practices in healthcare settings.<sup>193</sup> As stated in Part I, access to affordable contraceptives is linked to the financial, physical, and emotional health of women, children, and families.<sup>194</sup> Further, widespread access to contraceptives can be linked to women's upward social

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<sup>187</sup> See Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871, 39,873–74 (July 2, 2013).

<sup>188</sup> Grandfathered health plans are those that were in existence on March 23, 2010, and have not made significant changes in coverage. See *Grandfathered Health Plan*, HEALTHCARE.GOV, <http://www.healthcare.gov/glossary/grandfathered-health-plan/> [<http://perma.cc/S63M-WK5D>].

<sup>189</sup> See Rules and Regulations for Group Health Plans, 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B) (July 1, 2020).

<sup>190</sup> 573 U.S. 682, 683 (2014).

<sup>191</sup> 578 U.S. 403, 408–10 (2016); Religious Exemption Interim Final Rule, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemption Interim Final Rule, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

<sup>192</sup> Other inactions further demonstrate the Supreme Court majority's indifference towards women's rights. The Supreme Court denied an emergency hearing regarding the constitutionality of a recent Texas law, which went into effect on September 1, 2021. That law imposes civil liability for anyone "facilitating" an abortion after a fetal heartbeat is detected, which can be as early as six weeks into a pregnancy, contrary to the holding of *Roe v. Wade*. See Kate Sullivan, *Biden Blasts Texas' 6-week Abortion Ban as 'Extreme' and Violation of a Constitutional Right*, CNN, <http://www.cnn.com/2021/09/01/politics/biden-texas-abortion-ban/index.html> [<http://perma.cc/6PRF-LJGY>] (last updated Sept. 1, 2021); see also "Stunning": Read the Dissents on the Supreme Court Texas Abortion Ban Ruling, AXIOS (Sept. 2, 2021), [http://www.axios.com/texas-abortion-ban-supreme-court-roberts-sotomayor-29e6b7ee-a947-4ef9-a790-35236b474b38.html?utm\\_medium=partner&utm\\_source=verizon&utm\\_content=edit&utm\\_campaign=subs-partner-vmg](http://www.axios.com/texas-abortion-ban-supreme-court-roberts-sotomayor-29e6b7ee-a947-4ef9-a790-35236b474b38.html?utm_medium=partner&utm_source=verizon&utm_content=edit&utm_campaign=subs-partner-vmg) [<http://perma.cc/J64X-TQ8U>] (quoting Justice Sotomayor's dissent: "Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.").

<sup>193</sup> See *supra* INTRODUCTION.

<sup>194</sup> Urist, *supra* note 178.

mobility.<sup>195</sup> There is a significant societal interest in remedying gender discrimination, and the Supreme Court's failure to consider the effect these accommodations have on third parties is problematic, to say the least.<sup>196</sup>

In fact, scholars have cautioned the Supreme Court that rejecting the third-party harm principle in its entirety would generate severe and long reaching ramifications far beyond the contraceptive mandate: “based on its total dismissal of the issue of third-party harm, the [*Little Sisters*] decision could be read to imply that *all* antidiscrimination laws are at risk of being undermined through religious exemptions.”<sup>197</sup> The third-party harm principle is fundamental to antidiscrimination laws and appears in racial discrimination cases<sup>198</sup> and LGBTQ+ discrimination cases.<sup>199</sup> The line of cases regarding the contraceptive mandate are not substantially different from these antidiscrimination claimants who are seeking to be excluded from generally applicable laws which are designed to eliminate the disparate treatment marginalized communities face.<sup>200</sup>

In recent years, the Supreme Court has largely found in favor of religious claimants.<sup>201</sup> This trend is unlikely to change

<sup>195</sup> Wind, *supra* note 22 (“New evidence confirms what most people already believe: Women use contraception because it allows them to better care for themselves and their families, complete their education and achieve economic security . . .”).

<sup>196</sup> See *Developments in the Law*, *supra* note 71, at 2187.

But even if the conservative majority on the Court is increasingly dismissive of third party harms, rejecting the principle entirely would threaten longstanding precedents that held racially discriminatory exemptions to be impermissible on that basis—a change even the most avid conservatives on the Court have indicated a reluctance to undertake.

*Id.*

<sup>197</sup> *Id.* at 2187, 2196.

<sup>198</sup> See *e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

<sup>199</sup> *E.g.*, *Masterpiece Cake Shop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

[If religious exceptions] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

*Id.*

<sup>200</sup> It is important to note, in the context of the contraceptive mandate and third-party harm, I am limiting my arguments to secular businesses claiming religious exemptions (as opposed to religious institutions). How religious institutions address discrimination and third-party harm is beyond the scope of this Note.

<sup>201</sup> Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021) <http://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [<http://perma.cc/B8PA-UJ5F>].

Justice Samuel A. Alito Jr. told the Federalist Society[.] . . . “It pains me to say this, but, in certain quarters, religious liberty is fast becoming a disfavored right.” Those quarters do not include the Supreme court, which has become far more likely to rule in favor of religious rights in recent years . . . .

*Id.*

given the current composition of the Supreme Court.<sup>202</sup> A recent study found that:

The Roberts Court has ruled in favor of religious organizations far more frequently than its predecessors—over 81% of the time, compared to about 50% for all previous eras since 1953. . . . A statistical analysis suggests that this transformation is largely the result of changes in the Court's personnel: a majority of Roberts Court justices are ideologically conservative and religiously devout—a significant break from the past.<sup>203</sup>

This study did not include the newest Justice, Amy Coney Barrett, who is religiously devout and one of the most conservative judges from the Seventh Circuit Court of Appeals.<sup>204</sup>

Thus, one solution would be for Congress to amend RFRA, such that an analysis of third-party harm is required when determining

<sup>202</sup> On April 15, 2021, Democrats introduced a bill that would expand the Supreme Court from nine justices to thirteen justices. By expanding the number of justices on the Supreme Court, Democrats hope the appointment of more liberal justices will counteract the current conservative majority. Many top Democrats, however, do not support the proposal. Sahil Kapur & Rebecca Shabad, *Democrats to Introduce Legislation to Expand Supreme Court from 9 to 13 Justices*, YAHOO! (Apr. 14, 2021) <http://www.yahoo.com/news/democrats-introduce-legislation-expand-supreme-010000976.html> [<http://perma.cc/X24E-K9RU>].

<sup>203</sup> Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait* (Apr. 3, 2021) (accepted for publication in the *Supreme Court Review*), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3825759](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825759); see also *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic systems of government, but political division along religious lines was one of the principle evils against which the First Amendment was intended to protect.”); Kaveny, *supra* note 164, at 3 (stating that the Little Sisters’ “lawsuit is managed by the Beckett Fund, an activist legal organization theoretically dedicated to advancing the general cause of religious liberty under American law. In practice, however, the Beckett fund has been particularly solicitous of the religious liberty of social conservatives protesting the intrusion of progressive law and policy developments.”).

<sup>204</sup> Amy Coney Barrett, BALLOTPEDIA, [http://ballotpedia.org/Amy\\_Coney\\_Barrett](http://ballotpedia.org/Amy_Coney_Barrett) [<http://perma.cc/P6UV-VZMR>]; see also Ruth Graham & Sharon LaFraniere, *Inside the People of Praise, the Tight-Knit Faith Community of Amy Coney Barrett*, N.Y. TIMES (Oct. 8, 2020), <http://www.nytimes.com/2020/10/08/us/people-of-praise-amy-coney-barrett.html> [<http://perma.cc/TX4L-34WQ>]. To be clear, I am not implying Justice Barrett will favor religious claimants *solely* because she herself is religious. Rather, religion is one factor that may influence a judicial decision. See, e.g., Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, DIGITALCOMMONS@UNIVERSITY OF NEBRASKA - LINCOLN (2009), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1302&context=ajacourtreview> [<http://perma.cc/3PQP-CVHR>] (“[T]he U.S. Supreme Court, ‘decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.’”); Rachel Gross, *Do the Religious Beliefs of Supreme Court Justices Influence Their Decisions?*, MOMENT (Jan. 1, 2015), <http://momentmag.com/symposium-religion-supreme-court/> [<http://perma.cc/8CH2-UPCF>].

The abortion question is now driven in a considerable part by the Roman Catholic Church's perspective on that issue. In his rulings on partial birth abortion, Justice Kennedy has especially been acting out his personal Catholic faith. While much of his jurisprudence is driven by liberty interests, when it comes to women's liberty interests, he is tone deaf.

*Id.*

the substantiality to the burden on religion.<sup>205</sup> Specifically, RFRA could be amended as follows, adding subsection (3)(i):

(a) Findings. The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(i) to determine if a law substantially burdens religion, governments must weigh the sincerity of the claim and the adverse practical consequences to the claimants against the adverse practical consequences to third parties.

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(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.<sup>206</sup>

It is especially important to amend RFRA given the rise of complicity-based claims—claims whereby religious claimants object to a government regulation because it would make them “complicit in the assuredly sinful conduct of others”—because such claims, by definition, impact third parties.<sup>207</sup> RFRA was designed to restore the compelling interest test articulated in

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<sup>205</sup> In light of the Supreme Court’s failure to consistently inquire into third-party harm, as required by *Sherbert* and *Yoder*, an explicit legislative amendment to RFRA, as discussed above, should be enacted.

<sup>206</sup> 42 U.S.C. § 2000bb.

<sup>207</sup> Sternberg, *supra* note 91, at 169. *Little Sisters* relies on complicity-based claims.

*Sherbert* and *Yoder*.<sup>208</sup> While societal harm is a theme present in both of those cases, Justice Ginsburg was the only Justice willing to entertain the consideration of third-party harm in regard to the contraceptive mandate. Clearly, this issue must be addressed explicitly to adequately consider the ramifications religious exemptions will have on nonbeneficiaries.<sup>209</sup>

#### CONCLUSION

“The 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.”<sup>210</sup>

Women face unique challenges in the medical system. Prior to the implementation of the ACA, women paid higher insurance premiums<sup>211</sup> and may have been denied coverage because of prior pregnancies, domestic abuse, or sexual assault<sup>212</sup>. The ACA sought to remedy gender bias in healthcare. And the contraceptive mandate serves as an integral part in achieving this goal. Reproductive rights are not something which can be viewed in a vacuum; they are inherently connected to the social welfare of society.

While RFRA provides significant protection to religious claimants, it is crucial to examine how such protections impact third parties. The exemptions to the contraceptive mandate impose a substantial burden on employees who may not share the same religious beliefs as their employers, so much so that it is evident such exemptions do not impose a substantial burden on the employer's religion. The Supreme Court's decisions in *Hobby Lobby*, *Zubik*, and *Little Sisters* have cumulatively eroded the ACA's protections against gender bias and healthcare discrimination, which is not only inconsistent with the purpose of the ACA, but also with prior precedent established by *Lee*, *Cutter*, *Caldor*, *Sherbert*, and *Yoder*. By failing to engage in a substantive analysis of third-party harm, the Court has implicitly enabled the continuation of gender bias and healthcare discrimination—the exact tenets which the ACA sought to abolish. The Supreme Court should either engage in an analysis of third-party harm

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<sup>208</sup> 42 U.S.C. § 2000bb(b)(1).

<sup>209</sup> The suggested amendment to RFRA is intended to ensure courts adequately consider how granting religious accommodations and exemptions will impact third parties. Ultimately, whether or not religious claimants prevail in their challenge is irrelevant.

<sup>210</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>211</sup> Danielle Garrett, *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act*, NAT'L WOMEN'S L. CTR. (Mar. 2012), [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf) [<http://perma.cc/M84E-NC9Z>].

<sup>212</sup> See Deam, *supra* note 4.

(consistent with its own prior precedent) or Congress should amend RFRA to explicitly consider the harm granting religious exemptions will have on others. The failure of either the Supreme Court or Congress to act as described above, may result in the further erosion of women's reproductive rights as well as extend into other emotionally and politically charged areas.



