Reproductive Healthcare Discrimination Masked Behind Religious Freedom

By Ariana Bourdet Tobias*

Introduction

THE UNITED STATES OF AMERICA is a country known for bestowing an abundance of freedoms upon its citizens. The First Amendment to the U.S. Constitution declares that Americans have freedom of speech, press, association, and religion.[1] The country is deeply rooted in freedom of religion given that Congress can neither make a law respecting an establishment of religion nor prohibit the free exercise of any religion.[2] The difficulty with the government refusing to get involved in religious practice is that organizations, including certain corporations, are able to conduct business following their owners' religious beliefs.

This Comment discusses the enactment of the Federal Religious Freedom Restoration Act[3] ("RFRA") and how it has led to an expanded interpretation of the Free Exercise Clause. A clear religious slippery slope exists that could give rise to discrimination hidden behind religious principle. Additionally, this Comment addresses how continued expansion of religious freedom has contributed to the steady diminishment of women's healthcare rights. There appears to be a loophole in this country for legal discrimination labeled as religious freedom, and women bear the brunt of that discrimination.

One of the most controversial issues in the United States—implicated and exacerbated by the introduction of President Obama's Pa-

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1. U.S. Const. amend. I.
2. *Id.*
3. 42 U.S.C. § 2000bb (1993).

tient Protection and Affordable Care Act[4] ("ACA"), the 2016 presidential race, and President Trump's election—has been healthcare and, more specifically, reproductive healthcare rights. The case of *Burwell v. Hobby Lobby Stores, Inc.* (hereinafter *Hobby Lobby*) is a clear example, wherein religious for-profit corporations fought against implementing the reproductive health care aspects of the ACA when it came to their employees.[5]

Part I of this Comment looks at the legislative history that gave rise to the passage of RFRA, including landmark Supreme Court cases. Part II delves into the contraceptive coverage mandate included in the ACA. Part III looks at how RFRA has been interpreted by the Supreme Court through its application to the ACA. Part IV discusses the impact of complicity-based conscience claims on women. Finally, Part V concludes by looking at the possibility of this discrimination against women extending to other marginalized groups in society.

I. The Religious Freedom Restoration Act

In 1993, the government felt it was necessary to enact an additional federal law to protect individuals' interest in religious freedom.[6] RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[7] The law goes on to state that the government may only substantially burden the free exercise of religion if the government has a compelling interest to do so and is using the least restrictive means possible to further that compelling interest.[8] This law directs that strict scrutiny, the most demanding standard, is the appropriate level of judicial review when determining whether RFRA has been violated.

A. Use of the Substantial Burden Test in *Sherbert v. Verner*

In *Sherbert v. Verner*, the appellant was a member of the Seventh-day Adventist Church and unable to work on Saturday, as it was the Sabbath day of her religion.[9] Her South Carolina employer fired her

4. 42 U.S.C. § 18001 (2010).

5. 134 S. Ct. 2751 (2014).

6. *See* H.R. REP. NO. 103-88 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892 (enacted).

7. 42 U.S.C. § 2000bb–1(a) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

8. 42 U.S.C. § 2000bb–1(b)(1)–(2) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

9. 374 U.S. 398, 399 (1963).

because of her inability to work on Saturdays, and she was unable to find other employment due to the same reason.[10] She then filed a claim for unemployment compensation benefits, but she was ultimately disqualified because she fell within a provision that disallowed benefits to workers who failed to accept, without good cause, suitable work when offered.[11]

The first issue that the Court discussed was whether the ineligibility for benefits imposed any burden on the appellant's free exercise of religion.[12] The Court stated, "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[13] The law in question in this case may not have directly impeded the appellant's free exercise of religion, but the indirect burden that it imposed still made it unconstitutional because it pressured the appellant to waive her religious practice of not working on Saturdays.[14] The Court went on to explain that holding otherwise would force the appellant to "choose between following the precepts of her religion and forfeiting benefits" and "abandoning one of the precepts of her religion in order to accept work."[15] The Court reasoned that this choice, created by the governmental imposition, put the same type of burden upon the free exercise of religion as would a fine against the appellant for worshiping on Saturday.[16]

The Court's opinion recognized that a state should not deny unemployment benefits to an employee who was discharged solely for following his or her religious practices unless the "incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[17] This appears to be a less controversial set of facts before the Court, as the appellant had not committed an unlawful act by refusing to work on Saturdays.[18] It may have been decided in a different way had the appellant committed a state crime while exercising their religious freedom, as seen in the next

10. *Id.*
11. *Id.* at 399–401.
12. *Id.* at 403.
13. *Id.* at 404.
14. *Id.*
15. *Id.* (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
16. *Id.*
17. *Id.* at 403.
18. *Id.*

case discussed. The Court also stated, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[19] The Court made sure to clarify that its holding is limited to stating that South Carolina cannot constitutionally apply the unemployment benefits eligibility provisions "so as to constrain a worker to abandon his religious convictions respecting the day of rest."[20] An interesting aspect about this case is that the ruling creates an expectation that religious peoples will likely be able to qualify for unemployment benefits if fired for observing their religious day of rest, as there will almost always be a finding of a substantial burden that cannot be justified by a compelling governmental interest. The application of strict scrutiny to religious liberty claims is dangerous because a person's faith and the beliefs that stem from that faith are wholly intangible and unable to be proven or even challenged.

B. Creation of RFRA in Response to *Employment Division v. Smithy*

The United States Supreme Court re-examined the issue of applying neutral, generally applicable laws to religiously motivated action in *Employment Division v. Smith*.[21] In this case, the respondents were fired by a private organization because they ingested peyote during a sacramental ceremony of their Native American Church.[22] They were then denied unemployment compensation by the State of Oregon under a state law that disqualified employees who were discharged for work-related misconduct.[23] The Oregon Supreme Court confirmed that Oregon prohibited the religious use of peyote, but held that the prohibition was invalid under the Free Exercise Clause as applied to these individuals.[24] The effect of the Court's decision was that the state could not deny unemployment benefits to respondents for having engaged in the practice of ingesting the drug for sacramental use.[25] The Supreme Court granted certiorari to determine whether the Free Exercise Clause permitted Oregon's prohibition of the religious use of peyote.[26]

19. *Id.* at 406.
20. *Id.* at 410.
21. 494 U.S. 872 (1990).
22. *Id.* at 874.
23. *Id.*
24. *Id.* at 876.
25. *Id.* at 872.
26. *Id.* at 874.

The late Justice Antonin Scalia delivered the majority opinion in this case and relied heavily on precedent—especially *Sherbert*. He emphasized that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"[27] The opinion distinguishes between religious beliefs and religious physical acts.[28] This distinction is crucial to understanding that the Free Exercise Clause protects the right of individuals to believe whatever they wish, but does not necessarily protect the right to act on those beliefs. The dicta following the Court's discussion of the respondent's arguments is interesting because it speaks directly to the issue that religious freedom cannot put a person, or an organization for that matter, above a religiously neutral law.[29] The Court stated, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[30] This quote is especially pertinent in today's society under RFRA, as the government has now allowed for such lack of compliance in the context of women's healthcare rights, which will be discussed at greater length below.

The *Smith* opinion goes on to warn, "[r]espondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."[31] If the respondents had presented a stronger case for such a holding, the Court might have found in their favor, which would have allowed most illegal conduct to be free from legal imposition when it falls within a religious reason. The Court went on to use even stronger language about the use of the *Sherbert* test within this context. The Court explained, "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[32] The Court declared that, when using this test, they have never invalidated any governmental action except the denial of unemployment compensation.[33]

27. *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).
28. *Id.*
29. *Id.* at 878.
30. *Id.* at 878–79.
31. *Id.* at 882.
32. *Id.* at 883.
33. *Id.*

The passage of RFRA essentially codified the *Sherbert* test as federal law. This is especially fascinating because the Court in *Smith* appears adamant that the compelling governmental interest requirement should not be the test in cases such as this.[34] The Court went on to argue that there is a stark contrast between the government according different treatment based on race or regulating speech and the facts of this case.[35] The Court stated:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[36]

The Court's opinion recognized that the *Sherbert* test essentially creates a loophole for disobeying laws and engaging in socially harmful conduct through freedom of religion. The Court ultimately held that the decision of the Oregon Supreme Court should be reversed "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law."[37] Due to that prohibition being constitutional, the Supreme Court held that Oregon lawfully denied respondents unemployment compensation and that action was consistent with the Free Exercise Clause.[38] The Court abandoned the compelling interest test from *Sherbert* and adopted a nondiscrimination standard in its place.[39] Although disconcerting to agree with the Court, as the members of this small Native American religion did not prevail in this case, the use of a nondiscrimination standard is preferable to a principle of strict scrutiny as the latter is very difficult to overcome. This case made it more difficult for people to win claims of religious discrimination, which is arguably why Congress decided to enact RFRA three years later.

34. *Id.* at 885–86.
35. *Id.*
36. *Id.* at 885 (citations omitted).
37. *Id.* at 890.
38. *Id.*
39. *Id.*

C. Passage of the Religious Land Use and Institutionalized Persons Act

This section will discuss why Congress decided to pass the Religious Land Use and Institutionalized Persons Act of 2000[40] ("RLUIPA") to help remedy some of the issues within RFRA that were pointed out by the Supreme Court. RFRA was enacted in order to "creat[e] a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability."[41] Congress stated that in order to violate the statute, "government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen" and that the test only applies "whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion."[42]

City of Boerne v. Flores pushed Congress into passing this law.[43] In this case, the plaintiff, Archbishop Flores, brought suit against the City of Boerne under RFRA after denial of his church's application for a building permit to make necessary expansions to its current building.[44] The dispute called into question Congress's power to enact RFRA in the first place.[45] The Court held that Congress had exceeded its authority under the Constitution and that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[46] The Court appears to have reached this decision because of the burden that RFRA's strict scrutiny requirement puts upon individual states when presented with such claims. The opinion blatantly states, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[47] The strict scrutiny test, to see if there has been a substantial burden on the exercise of freedom, is ultimately placing a burden on the states to prove they have a compel-

40. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §2000cc (2000)).

41. H.R. REP. NO. 103-88, at 1 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1893.

42. *Id.* at 6.

43. 521 U.S. 507 (1997).

44. *Id.* at 511.

45. *Id.*

46. *Id.* at 536.

47. *Id.* at 534.

ling interest and that the least restrictive means to achieve that interest have been implemented.

The dictum in this case and the Court's reliance on *Smith* is fascinating as there seems to be a consensus in the majority that strict scrutiny should not be used when dealing with matters of religion. The Court stated:

> If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest.[48]

The Supreme Court itself recognized that claiming a law substantially burdens the exercise of freedom, such as a RFRA claim, is almost impossible for the government to overcome.[49] The opinion then refers back to *Smith* by quoting, "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[50] Thus, a central concern with a RFRA claim is that it is nearly impossible to argue with what a person asserts is central to their faith. In this case, the Court made a point of stating, "the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution."[51] As mentioned above, the Court did ultimately hold that Congress exceeded its authority in applying RFRA to the states and there is an underlying sentiment of distrust in RFRA at the federal level as well.[52] It seemingly remains federal law because the Court's language in *City of Boerne* explicitly addresses RFRA's unconstitutionality in regard to the states.[53] However, there is language in the decision that arguably questions RFRA's constitutionality at every governmental level. The Court stated, "[s]weeping coverage ensures [RFRA's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[54] This statement created an opportunity for a new claim contending the constitutionality of RFRA at the federal level.

After *City of Boerne*, Congress enacted RLUIPA to protect individuals, houses of worship, and other religious institutions from discrimi-

48. *Id.* at 533–34.
49. *Id.* at 534.
50. *Id.* (quoting Emp't Div. v. Smith, 497 U.S. 872, 887 (1990)).
51. *Id.* at 536.
52. *Id.*
53. *Id.*
54. *Id.* at 532.

nation in zoning and landmarking laws.[55] RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious institutions absent the least restrictive means of furthering a compelling governmental interest.[56] Congress also chose to amend RFRA through RLUIPA by adding to the definition of "religious exercise." RLUIPA's new definition includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[57] This appears to be Congress's way of broadening RFRA by allowing numerous practices to be protected under it. There is no longer a requirement that the exercise of religion be central to the individual's religious belief.[58] This will be discussed more within the *Hobby Lobby* analysis as the holding of that case allows for more employers and corporations to hide behind religious beliefs that may not be essential to the specific religion when it comes to RFRA violation claims.

II. Federal Contraceptive Coverage Rule Under the Affordable Care Act

Congress enacted the ACA with the intent to incentivize the uninsured to obtain more affordable health insurance. One of the legislation's more controversial aspects is that, through the contraception converge mandate, it requires most employer-supported health plans to include certain preventive care without copayments, deductibles, or cost-sharing.[59] This preventive care includes vaccinations, HIV screening, and all FDA-approved contraceptive methods and sterilization procedures prescribed for women except for abortion-inducing substances.[60] Small businesses, purely religious employers, and certain religious non-profits such as universities and hospitals are largely exempt from this mandate.[61] The ACA implements governmental

55. *Religious Land Use and Institutionalized Persons Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act (last visited Jan. 11, 2017) [https://perma.cc/47TC-6CME].

56. 42 U.S.C. § 2000cc(a)(1) (2018).

57. 42 U.S.C. § 2000cc–5(7)(A) (2018).

58. *Id.*

59. Jamila Taylor & Nikita Mhatre, *Contraceptive Coverage Under the Affordable Care Act*, CTR. FOR AM. PROGRESS (Oct. 6, 2017, 5:09 PM) https://www.americanprogress.org/issues/women/news/2017/10/06/440492/contraceptive-coverage-affordable-care-act/ [https://perma.cc/WC7P-GY3N].

60. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN., https://www.hrsa.gov/womensguidelines/ (last visited Feb. 13, 2017) [https://perma.cc/P7DS-WZDC].

61. *Id.*

penalties against companies that fail to provide this coverage.[62] This requirement represented a legal victory for women as it reduced discrimination regarding reproductive health coverage.[63] The U.S. Department of Health and Human Services ("HHS") commissioned an independent Institute of Medicine ("IOM") study to review what preventive services were necessary for women's health and well-being.[64] The Health Resources and Services Administration supported the health plan coverage guidelines, developed by IOM through the study, in order to "help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible."[65] The IOM recommendations included covering all FDA-approved contraceptive services for women with childbearing capacity, as prescribed by a provider, because of health benefits for women that come from using contraception.[66] It was not surprising that many for-profit companies proclaimed outrage over the mandate and the new requirement that they must provide insurance with contraception coverage.[67]

A. Religious Employer Exemption

Under final rules issued in July 2013, group health plans of religious employers are exempt from having to provide coverage for contraception.[68] The Centers for Medicare and Medicaid Services gives a clear explanation of the criteria for the religious employer exemption from the contraceptive coverage requirement under the ACA:

> The definition of "religious employer" for purposes of the exemption is based solely on section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which primarily concerns churches and other houses of worship. A house of worship is exempt even if it provides charitable social services to, or employs, persons of different religious faiths.[69]

62. John Kraemer, *The ACA's Contraception Coverage Mandate: Constitutional Limits On Exempting Employers*, HEALTH AFFAIRS (Mar. 20, 2014) https://www.healthaffairs.org/do/10.1377/hblog20140320.037972/full/ [https://perma.cc/P4Y3-S559].

63. *See generally Women's Preventive Services Guidelines*, *supra* note 60 (listing the type of preventive services that "generally must be covered with no cost sharing").

64. *Id.*

65. *Id.*

66. *Id.*

67. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

68. *Women's Preventive Services Coverage and Non-Profit Religious Organizations*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/womens-preven-02012013.html (last visited Feb. 13, 2017) [https://perma.cc/3LU6-GFMD].

69. *Id.*

It is noteworthy that the Obama Administration attempted to protect houses of worship that employ persons of different religious faiths. It would appear that this was a way to block any legal action against a house of worship for projecting that specific religion's beliefs on others by enforcing or denying certain conduct.

The ACA also provides an accommodation for other non-profit religious organizations that object to providing contraceptive coverage based on religious grounds. An eligible organization is one that:

> 1. on account of religious objections, opposes providing coverage for some or all of any contraceptive services otherwise required to be covered;
> 2. is organized and operates as a nonprofit entity;
> 3. holds itself out as a religious organization; and
> 4. self-certifies that it meets these criteria in accordance with the provisions of the final regulations.[70]

The important distinction between strictly religious employers, churches and houses of worship, and eligible non-profit religious organizations is that the latter must provide a copy of self-certification to their health insurance issuers to be eligible for the accommodation.[71] The issuers must then give separate payments for contraceptive services through the organization's health plan at no cost to the women covered or to the organization.[72] Some may argue that this is a win for women as they still receive coverage for their contraceptive services. However, the separate payments suggest that the services are taboo, not entirely necessary, and somewhat abhorrent. These non-profit religious organizations go out of their way to make sure that their employee health insurance plans do not directly deal with contraceptive services, which arguably sends a discriminatory message to their female employees. This led many for-profit corporations to seek ways to be eligible for this accommodation as well, which led to many lawsuits.[73]

III. RFRA and ACA Meet in Court: The Impact of the *Hobby Lobby* Case

Burwell v. Hobby Lobby Stores, Inc. was the first case where a closely held for-profit corporation claimed that the contraceptive coverage mandate for employers violated constitutional and statutory protections of religious freedom. The first paragraph of Justice Samuel Al-

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

ito's majority opinion immediately lays out the issue and the Court's holding; the issue being whether RFRA permitted HHS to demand that three closely held corporations provide health insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners, and the Court indeed decided that the regulations enforcing the obligations violated RFRA.[74]

A. Discussion of the Majority Opinion in *Hobby Lobby*

The Court looked closely at the arguments brought forward by the Hahn family and their company, Conestoga Wood Specialties, as well as the Green family and their company, Hobby Lobby. One of David Green's sons started an affiliated business, Mardel, also named in this lawsuit.[75] All three companies are organized as for-profit corporations under the laws of their respective states.[76] The Court mentioned that all three of the corporations take religious issue with certain contraceptive methods, which they consider to be abortion-inducing.[77] The Hahns and the Greens all believe that life begins at conception, and that it would violate their religion and religious beliefs to enable access to certain contraceptive methods that operate after that point.[78] Such methods include two forms of emergency contraception: morning after pills and two types of intrauterine devices.[79] The Hahns sued HHS under RFRA and the Free Exercise Clause "seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg."[80] The Greens, Hobby Lobby, and Mardel also sued HHS "to challenge the contraceptive mandate under RFRA and the Free Exercise Clause."[81]

The first issue that the Court addressed is whether RFRA applies to regulations that govern activities of for-profit corporations like the companies in this case. One of the main arguments brought by HHS in *Hobby Lobby* in defense of the contraception regulations was that RFRA does not apply to Hobby Lobby, Conestoga, and Mardel.[82] HHS

74. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).
75. *Id.* at 2765.
76. *Id.*
77. *Id.* at 2759.
78. *Id.* at 2766.
79. *Id.* at 2765.
80. *Id.*
81. *Id.* at 2766.
82. *Id.* at 2767.

argued that corporations cannot exercise religion and therefore should not be protected under RFRA.[83] Unfortunately, the Court decided that HHS did not make a strong enough argument to back this claim.[84] HHS had already conceded that non-profit corporations are protected by RFRA, but still attempted to argue that for-profit corporations should be left unprotected.[85] The Court tore apart every argument that HHS presented,[86] but there are a few arguments that should be discussed in more depth. One of the arguments presented before the Court is that the United States "lacks a tradition of exempting for-profit corporations from generally applicable laws."[87] The majority did not agree as they confuted that Congress tends to declare with specificity when it intends a religious accommodation not to extend to for-profit corporations such as in Title VII and similar laws.[88]

HHS lastly argued that Congress could not have intended for "RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation."[89] HHS mistakenly pointed to proxy battles over religious identity of publicly traded corporations, which the Court was quick to distinguish from the facts of this case.[90] The Court responded, "[t]he companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."[91] The lack of persuasive arguments led the Court to hold that a federal regulation's restriction on the activities of a closely held for-profit corporation must comply with RFRA.[92] The next logical question is how exactly can someone dispute the sincerity of another's religious beliefs? Again, religious beliefs and faith are so innately personal and nearly impossible to challenge. It is concerning that the Court acted as though such an argument would be possible and potentially persuasive, especially after previous Supreme Court decisions have mentioned how difficult it would be to question an individual's religious beliefs.

83. *Id.* at 2769.
84. *Id.*
85. *Id.* at 2771.
86. *Id.* at 2771–73.
87. *Id.* at 2773.
88. *Id.* at 2773–74.
89. *Id.* at 2774.
90. *Id.*
91. *Id.*
92. *Id.* at 2775.

The next issue the Court had to decide was whether the contraceptive mandate "substantially burdened" the exercise of religion, and the Court had little trouble deciding that it did.[93] HHS primarily argued that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated."[94] It is likely that many of the women who have health insurance through the three corporations will never have to take either of the morning after pills, and that many women will choose birth control methods other than either of the intrauterine devices. The fact that Hobby Lobby, Conestoga, and Mardel all vehemently oppose the four specific contraceptive options means that their beliefs are then imposed onto their employees. This is dangerous as it could potentially lead to for-profit corporations requiring notice of what contraceptive methods their employees have chosen so they would not have to cover any of the four that they oppose. The Court interpreted HHS's argument as stating that the federal courts should address whether the religious belief asserted in a RFRA case is actually reasonable.[95] The Court asserted,

> [I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulation[ ] lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction" and there is no dispute that it does.[96]

This dictum from the Court leads into its discussion and ultimate decision that the contraceptive mandate does impose a substantial burden on the exercise of religion.[97] Again, the Court's inability to recognize the incredible difficulty in proving dishonesty when concerning a person's religious beliefs is particularly troubling.

Lastly, the Court had to decide "whether HHS has shown that the mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[98] HHS maintained that the contra-

93. *Id.*

94. *Id.* at 2777.

95. *Id.* at 2778.

96. *Id.* at 2779 (internal citation omitted) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981)).

97. *Id.*

98. *Id.*

ceptive mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing.[99] The Court moved quickly from this point by assuming that the interest in ensuring cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.[100] It seemed as though the Court gave HHS this point, as it already knew that it would not meet the least restrictive means requirement.[101] The Court asserted, "[t]he most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[102] Apparently this would have been a less restrictive means when it came to the plaintiffs' religious freedom and liberty. The Court focused on the fact that HHS was unable to show that this would not be a possible alternative.[103] The Court also focused on the fact that non-profit religious organizations were able to qualify for an accommodation and that for-profit corporations could be found eligible as well.[104]

This is a lengthy decision as it touches on many important issues regarding how to analyze such a claim. It is alarming that the Court did not take into account that closely held for-profit corporations will now be able to cherry-pick which contraceptive methods they do not believe in, and then subsequently preclude those methods from their employees' health insurance plans. The Court focused on the four specific companies that were party to the case, but did not acknowledge the fact that many other corporation owners may have religious beliefs against other contraceptive options deemed necessary for women in IOM's report.

B. Justice Ruth Bader Ginsburg's Dissent

Justice Ginsburg's dissent[105] focuses on the impact this decision will have on women's reproductive lives and choices. She brought attention to the IOM report and the concerns that were expressed within it.[106] The report noted that there is a disproportionate burden

99. *Id.*
100. *Id.* at 2780.
101. *Id.* at 2801.
102. *Id.* at 2780.
103. *Id.*
104. *Id.* at 2782.
105. *Id.* at 2787 (Ginsburg, J., dissenting).
106. *Id.* at 2788–90.

on women when it comes to comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing.[107] As Justice Ginsburg stated in her dissent,

> 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 and Conestoga or dependents of persons those corporations employ.[108]

She hinted at the discrimination that women will face if they do not share the same religious beliefs as their employers and the fact that their personal contraceptive coverage will suffer because of it.[109] She also mentioned an issue with this ruling that will be discussed later in this Comment: The logic of the Court's decision could and likely will extend to corporations of any size no matter if they are private or public.[110]

Justice Ginsburg intensely focused on the fact that this was the first decision that created a religious exemption for a profit-making, commercial entity. She stated,

> Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations.[111]

It is troubling that the majority was so quick to dismiss this important argument, as there has been a pattern of respecting one's individual religion and beliefs. Seemingly, a corporation where the owners and board members' personal religious beliefs instill a strong opposition to specific employee actions is crossing the line and is actually restricting the work force. For example, in this specific case, the employer's religious beliefs are restricting their female workforce, as contraception and reproductive health play an integral role in a woman's life and, by extension, her work life. Judges can easily argue that employees can simply quit their jobs and find other ones if their current employer's religious beliefs impede their rights to privacy and reproductive health. However, that burden should not be placed on the

107. *Id.*
108. *Id.* at 2787 (Ginsburg, J., dissenting).
109. *Id.* at 2797–98.
110. *Id.* at 2797.
111. *Id.* at 2795.

women of the workforce. When making their employment decisions, female employees should not be forced to rely on accommodating their employer's religious beliefs.

IV. Complicity-Based Conscience Claims

Following the *Hobby Lobby* ruling, numerous articles have been published in legal journals discussing the implications of the Supreme Court's decision on citizens of the United States. Douglas NeJaime and Reva B. Siegel authored one such article, published in the Yale Law Journal.[112] Their article sets out two important aspects to complicity-based conscience claims: The claim concerns the third party's conduct, such as a woman's use of contraception, and it concerns the claimant's relationship to the third party, such as a religious organization's employment of that woman.[113] The article focuses on the impact these claims for accommodation have on the third parties, i.e., the women who work for companies such as Hobby Lobby.[114]

Professors NeJaime and Segal write, "[w]hen a religious claim objecting to others' sinful conduct is based on a traditional norm that is reiterated by a mass movement over time and across social domains, accommodating the claim has the distinctive power to stigmatize and demean third parties."[115] The *Hobby Lobby* Court never discussed these potential repercussions that female employees of accommodated closely held for-profit corporations might endure.[116] Another issue with the majority opinion is that the rights and beliefs of the female employees were never truly discussed at all; the Court almost strictly focused on the for-profit corporations and their desire for religious liberty.[117] The opinion did mention the holding in *Griswold v. Connecticut*, when the Court held that women have a constitutional right to obtain contraceptives.[118] In *Hobby Lobby*, HHS argued that studies have shown that "even moderate copayments for preventive services can deter patients from receiving those services"[119] despite their constitutional right to do so.

112. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

113. *Id.* at 2519.

114. *Id.*

115. *Id.* at 2566.

116. *Id.* at 2580.

117. *Id.* at 2532.

118. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

119. *Id.*

It appears the Court decided to bypass these arguments completely as they came in stark opposition to the for-profit corporation's desire for religious freedom. If the Supreme Court seeks to protect the religious freedom of corporations without analyzing the potential hardships and discrimination that female employees will face when it comes to their health insurance, then it is crucial for citizens, scholars, medical professionals, and government agents to bring attention to such discrimination.

Professors NeJaime and Segal also point out that the corporate claimant's opposition to providing their female employees with certain insurance in *Hobby Lobby* effectively labels those women who use these types of contraception as sinners.[120] Again, as discussed earlier in this Comment, these actions—or rather refusal to act—imply that contraception is taboo and abysmal. The Court ultimately decided the case on the fact that it believed there were multiple less restrictive means available.[121] Yet, as Professors NeJaime and Segal note, "[t]he Court never considered whether accommodating the employers' belief—that paying for employee health insurance would make the employers complicit in the employees' sinful practices of contraception—might create harmful social meaning that undermine individual and societal interests the statute promotes."[122]

The ACA's contraceptive coverage mandate serves to provide women with life-saving reproductive services without worrying about paying extra for such coverage.[123] HHS's lawyers did not provide strong enough arguments, especially when it came to the discrimination that these women faced due to their employers' religious hostility toward their reproductive healthcare. These closely held for-profit corporations are actively imposing on their female employees and their personal healthcare decisions. For some women, oral birth control pills might not work due to various hormones and side effects, making intrauterine devices a more suitable option.[124] These for-profit corporations are now stating that their religious beliefs prevent them from allowing certain contraceptives to be included in their employee health insurance plans.[125] The corporations are creating a stigma on women who choose these devices or drugs, labeling them as women

120. NeJaime & Siegel, *supra* note 112, at 2575–76.

121. *Hobby Lobby*, 134 S. Ct. at 2780.

122. NeJaime & Siegel, *supra* note 112, at 2581.

123. *Hobby Lobby*, 134 S. Ct. at 2754.

124. *Types of Birth Control*, GIRLSHEALTH.GOV, https://www.girlshealth.gov/body/sexuality/bc_types.html (last visited Feb. 13, 2018) [https://perma.cc/Q8H7-YTDT].

125. *Hobby Lobby*, 134 S. Ct. at 2755.

who condone abortion and even partake in ending a life.[126] This stigma can inflict emotional and societal harm upon the women who make these deeply personal decisions.

The Court never discussed issues with the accommodation for religious non-profit organizations. It just mentioned that it is possible for corporations to vehemently oppose a specific type of contraception and that health insurers would have to separately accommodate the women who wanted to have such contraception covered.[127] This is one of the least restrictive means of furthering the government's interest—one that the Court believed is available as an option. There is no mention of the fact that this accommodation and the necessary separate payments could immediately draw attention to the women employees. Employers would then logically know which of their employees has required contraceptive coverage, although it is unclear whether they would know exactly which type of device or drug the employee received.

As previously mentioned, the majority opinion in *Hobby Lobby* posited a less restrictive means of furthering the compelling interest, which was for the government to assume the cost of providing contraception options to women "unable to obtain them under their health-insurance policies due to their employers' religious objections."[128] The Court's sole focus here, however, was the monetary cost for the government to assume the payments for the specified contraceptives at issue.[129] It never looked at the decision's impact on the women who must go through different channels to acquire such contraceptives. Would these women have to reach out to their employer's health insurance issuer to inform the insurer that they have chosen to take one of the drugs or devices?

This would almost certainly give their employers notice of the type of contraceptive that these employees had elected. This could also promote discrimination in the workplace since not only do the employers not want to cover the devices, but they also believe that such devices are equivalent to abortion-inducing substances. How will female employees be treated in the workplace once their employers know they have chosen such a contraceptive? It is discouraging that the majority opinion never looks at the actual effects this decision could and likely will have on these women.

126. *Id.*
127. *Id.* at 2782.
128. *Id.* at 2780.
129. *Id.* at 2780–81.

These complicity-based conscience claims are founded in religious faith and work to outlaw the actions of people who go against the religion's practices and teachings. It is understood that many religions condemn abortion, but that condemnation has now extended to different types of contraception, as *Hobby Lobby* reveals. The *Hobby Lobby* decision leaves room for other religious corporations and organizations to denounce all types of contraception, even though the Court seemed to act as though only these four methods are the core issue.

What could stop another corporation that criticizes all types of birth control from bringing a claim in honor of their religion? Under the precedent of *Hobby Lobby*, such a corporation could easily claim that the entirety of the contraceptive mandate substantially burdens their exercise of religion if they believe that all contraception goes against their religious beliefs. How will the Supreme Court rectify this loophole that it has created? The decision could create an overbroad standard and may lead to many larger corporations flooding the courts with similar claims. Again, this leads to a possibility of extreme discrimination against women who only want to be proactive in their health choices.

V. The Danger of *Hobby Lobby* Extending to Protect Discrimination of Other Marginalized Social Groups

An additional concern that *Hobby Lobby* raises is that it will lead religious organizations or institutions to argue that they should be exempt from antidiscrimination laws that protect certain groups, like the Lesbian, Gay, Bisexual, Transgender, and Queer (and/or Questioning) ("LGBTQ") community. The organizations would, of course, deny that these exemptions amount to discrimination. In fact, there have already been cases where religious entities have argued that they do not have to follow antidiscrimination laws when it comes to the LGBTQ community as their religious beliefs lead them to oppose same-sex marriage. *Elane Photography v. Willock* provides one such example.[130]

In this case before the New Mexico Supreme Court, Willock contacted Elane Photography to inquire about the photographer's availability for her commitment ceremony to another woman.[131] The owner of Elane Photography responded to Willock that the company does not photograph same-sex weddings and only photographs "traditional

130. Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53.
131. *Id.* ¶ 7.

weddings."[132] The New Mexico Human Rights Act ("NMHRA") prohibits places of public accommodation from discriminating against people based on their sexual orientation.[133] Elane Photography argued that NMHRA violated its right to freely exercise religion.[134]

The New Mexico Supreme Court addressed the claims under the following categories: (1) "that the law in question is not a 'neutral law of general applicability,'" or (2) "that the challenge implicates both the Free Exercise Clause and an independent constitutional protection," also known as the hybrid-rights argument.[135] The court first found that NMHRA is a neutral law of general applicability. The court declared that neither of the religious exemptions to NMHRA would permit a religious organization to act as Elane Photography did, and that the exemptions do not prevent NMHRA from being generally applicable.[136] Then, the court did not consider Elane Photography's hybrid-rights argument as it was only three sentences and was not adequate to permit review as a matter of New Mexico law.[137] The court also emphasized that NMHRA prohibits public accommodations from refusing to offer their services to a person based on that person's sexual orientation.[138] Elane Photography was not protected because enforcing NMHRA against them did not violate the Free Speech or the Free Exercise Clause.[139]

The decision in *Hobby Lobby* will likely lead to many more cases such as *Elane Photography* because companies will feel as though they can hide behind their owner's religious beliefs. The *Hobby Lobby* decision has created a dangerous precedent when it comes to the for-profit workforce. As Justice Ginsburg mentioned, the Supreme Court did not seem to worry about opening the door to claims from public companies that also feel as though following certain federal laws will substantially burden their exercise of religion.[140]

Beliefs surrounding reproduction, especially contraception and artificial insemination, gay marriage, race, and other topics change drastically from religion to religion. It is concerning that RFRA and

132. *Id.*
133. N.M. STAT. ANN. § 28-1-7(F) (1978).
134. *Elane Photography*, 2013-NMSC-040, ¶ 11.
135. *Id.* ¶ 60.
136. *Id.* ¶ 67.
137. *Id.* ¶ 71.
138. *Id.* ¶ 79.
139. *Id.* ¶ 64–67.
140. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting).

Hobby Lobby allow for entities, from religious institutions to for-profit corporations, to argue that following neutral federal laws of general applicability will deny them their free exercise of religion. As the Court mentioned in *City of Boerne*, it is nearly impossible for the government or a court to question the faith of an individual and attempting to do so would create an unparalleled precedent. The courts and Congress need to protect the rights of countless citizens who are at risk of being discriminated against due to another's religious beliefs.

Conclusion

When it comes to the contraceptive coverage mandate, there must be a way to accommodate religious beliefs other than complete denial of coverage for certain contraceptive methods. It is essential that Congress try to find a remedy that will adequately protect women's privacy and reproductive rights if Congress is going to remain adamant about the utmost importance of religious freedom. Currently, the two do not go hand-in-hand and women continue to face discrimination in the workplace due to their employer's religious beliefs. Since the ACA remains the law of the land, there is no doubt that many more corporations will come forward with similar claims as those in *Hobby Lobby*, potentially wanting to expand the contraceptive choices that they do not want to cover. It will be interesting to see which federal law, enacted to protect a large number of citizens, will be the next one to be chipped away at by religion and when Congress or the courts will choose to draw the line.