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# An Employer's Conscience after *Hobby Lobby* and the Continuing Conflict between Women's Rights and Religious Freedom

*Sarah M. Stephens*

Women work. Almost half of the United States workforce is composed of women, and among professional and technical occupations, women make up a majority of the workforce.<sup>1</sup> Most women who work, about three-quarters, do so full-time,<sup>2</sup> and “[w]omen are the primary or sole breadwinners in nearly 40 percent of families with children.”<sup>3</sup> Notwithstanding their contributions to and broad participation in the American workplace, women continue to face discrimination on the basis of deeply entrenched cultural norms which limit the place of women in society.

Gender equality, whether in the workplace or elsewhere in society, remains particularly elusive as to issues related to female reproduction, including women's unique healthcare needs, and the stereotypical female role in childrearing and caregiving. The standard for the ‘ideal’ worker is still based around heterosexual male norms which presuppose a worker who will be devoted full-time to the performance of *his* job duties without the need to take time off for childrearing or family responsibilities. However, women are usually the primary caregivers in families; whereas about 40 percent of women have taken a significant amount of time off from work to care for a family member, only about 24 percent of fathers have done so.<sup>4</sup> Where women have been able to conform to the male norm, they have made great strides towards equality in the workplace. Where women

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<sup>1</sup> U.S. Census Bureau, *Current Population Survey*, DATA FERRETT, Dec. 2014, [http://thedataweb.rm.census.gov/ftp/cps\\_ftp.html](http://thedataweb.rm.census.gov/ftp/cps_ftp.html).

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

<sup>3</sup> *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace*, DATA BRIEF (Nat'l P'ship for Women and Families, Washington D.C.), Jan. 2014, at 2, <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf> [hereinafter, Nat'l P'ship for Women and Families].

<sup>4</sup> Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RESEARCH CENTER (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap>.

cannot or will not conform to the male ideal worker standard, such as when a woman becomes a mother or has to take on family responsibilities, they are often viewed through a gendered lens thereafter, to detrimental result. This is true even when women work through their pregnancies and return to work afterwards.<sup>5</sup>

Career gaps and latent sex discrimination against women, and mothers in particular, contribute to the gender pay gap and the “motherhood penalty,” along with an increasing number of claims of discrimination, despite decades-old statutory prohibitions against sex discrimination in employment. For example, women working full-time make only about “78.6 cents for every dollar a man makes[,]” even controlling for other variables,<sup>6</sup> and women with children still earn “about 5-6% less than women without children.”<sup>7</sup> Women, who return to work after having a child, report experiencing bias due to perceptions about their ability or commitment to return to work, with a resulting loss in opportunities, hours, and responsibilities.<sup>8</sup>

According to statistics published by the Equal Employment Opportunity Commission (EEOC), pregnancy discrimination claims have increased steadily over the last 15 years.<sup>9</sup> As a result, the EEOC’s strategic enforcement plan adopted in December 2012 identifies “accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)” as a priority area for enforcement.<sup>10</sup> Women’s particular healthcare needs have historically been, and continue to be, distinguished from the public market sphere and categorized as belonging in the private recesses of society.<sup>11</sup> Perhaps this can partially explain why, in the past several years, there have been numerous legislative efforts to restrict women’s access to

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<sup>5</sup> Nat’l P’ship for Women and Families, *supra* note 3, at 1.

<sup>6</sup> *The Wage Gap by State for Women Overall 2014*, NATIONAL WOMEN’S LAW CENTER (Sept. 17, 2015), <http://nwlc.org/wp-content/uploads/2015/09/Wage-gap-2015-final.pdf>

<sup>7</sup> Ipshita Pal & Jane Waldfogel, *Re-Visiting the Family Gap in Pay in the United States* (Columbia Population Research Ctr., Working Paper No. 14-02, 2014), <http://cupop.columbia.edu/publications/2014>.

<sup>8</sup> Nat’l P’ship for Women and Families, *supra* note 3, at 1, 3-4.

<sup>9</sup> See *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997-FY 2011*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited June 14, 2015).

<sup>10</sup> EEOC, *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016*, 1, 10 (2012), <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

<sup>11</sup> AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY xiii (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

fundamental reproductive healthcare in the United States,<sup>12</sup> as well as extensive legal challenges to attempt to expand women's access to reproductive healthcare through the Patient Protection and Affordable Care Act (ACA). Proponents of legislative restrictions on women's reproductive healthcare rights and challengers to the contraceptive mandate of the ACA ground their arguments in claims of religious freedom.<sup>13</sup> Those challenges came to a head in the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*<sup>14</sup>

In *Hobby Lobby*, the Court ruled that Hobby Lobby, as a privately owned corporation, has the right to refuse to comply with the ACA's mandate that health insurance offered to employees make certain contraceptives available.<sup>15</sup> Hobby Lobby objected to the provision of four particular contraceptives, which it erroneously denoted as "abortifacients"<sup>16</sup> and argued that offering an insurance policy which covered those particular contraceptives violated its rights under the First Amendment and the Religious Freedom Restoration Act (RFRA).<sup>17</sup>

The Court, ruling in favor of Hobby Lobby, held that the ACA's contraceptive mandate substantially burdens the exercise of religion provided for in RFRA and the mandate is not the least restrictive means of furthering the government's interest.<sup>18</sup> "For the first time, the Supreme Court exempted for-profit businesses from employee-protective law in the name of religion."<sup>19</sup> The majority opinion in *Hobby Lobby* singled out

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<sup>12</sup> Sarah M. Stephens, *The Search for Authenticity and the Manipulation of Tradition: Restrictions on Women's Reproductive Rights in the United States and Egypt*, 19 CARDOZO J. L. & GENDER 325, 327 (2013).

<sup>13</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>14</sup> See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>15</sup> *Id.* at 2785. The ACA does not, on its face, "require insurance plans to cover contraception." George J. Annas et al., *Money, Sex, and Religion—The Supreme Court's ACA Sequel*, 371 NEW ENG. J. MED. 862, 862 (2014). Rather, the ACA requires coverage of preventative women's healthcare "without cost sharing by patients." *Id.* The Institute of Medicine used "neutral scientific and medical criteria to" determine that preventative care coverage should include all "FDA-approved contraceptive methods." *Id.*

<sup>16</sup> See Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 424, n. 169 (2015).

<sup>17</sup> *Hobby Lobby*, 134 S. Ct. at 2761-62 (citing Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (2015), amended by Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5 (2015) (amending "RFRA's definition of the 'exercise of religion'")).

<sup>18</sup> *Hobby Lobby*, 134 S. Ct. at 2779-80. The Court did not reach Hobby Lobby's First Amendment argument. *Id.* at 2785.

<sup>19</sup> Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 28 (2014).

women's reproductive healthcare by stating, "[t]his decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage mandates, e.g., for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs."<sup>20</sup>

The Supreme Court broke from First Amendment and RFRA precedent in *Hobby Lobby* by accommodating a for-profit employer's request for a religious accommodation to female employees' statutory entitlement to reproductive healthcare. The Court's significant expansion of religious liberty doctrine in *Hobby Lobby* invites businesses to seek exemptions from nondiscrimination laws such as Title VII, the Pregnancy Discrimination Act, and the Americans with Disabilities Act, as well as other laws which provide workplace protections to women, such as the Family and Medical Leave Act, by arguing that enforcement of those laws conflict with corporate religious beliefs. Therefore, the *Hobby Lobby* decision will directly bear on not only the specific issue before the court related to the ACA's health insurance mandate, but also may have broader ramifications for women's employment protections in the context of motherhood and pregnancy. By opening the door for more discrimination against mothers, the decision exacerbates gender discrimination in the workplace more generally.

This Article examines the ongoing conflict between women's rights and religious liberty interests through the lens of the *Hobby Lobby* decision by calling into question the Supreme Court's decision in that case, identifying the danger to current antidiscrimination law created by the Court's reasoning, and arguing that antidiscrimination laws protecting women's rights in the workplace should survive a post-*Hobby Lobby* RFRA challenge. The Article begins in Part I, putting this topic in context by explaining the origins of prohibitions against sex discrimination in employment and the protections they have provided since their enactment and then examines well-established religious exemptions to anti-discrimination laws found in statutory and case law. Part II reviews the majority reasoning in *Hobby Lobby* within the anti-discrimination framework and explores how the decision in that case could expand current religious exemptions. Part III analyzes whether an employer can use RFRA

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<sup>20</sup> *Hobby Lobby*, 134 S. Ct. at 2758. Although outside the scope of this article, the Court's opinion also appears to violate the Establishment Clause precedent by favoring religion, as opposed to the absence of belief, and specifically mainstream Christianity. See generally Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014). Here, the majority opinion in *Hobby Lobby* specifically points out that medical procedures objected to on religious grounds by Jehovah's witnesses would be covered despite their religious beliefs. See *Hobby Lobby*, 134 S. Ct. at 2778-79.

as a shield to defend itself against discrimination claims brought by or on behalf of employees, and concludes that, while an employer can do so, a RFRA defense should fail when applied to anti-discrimination laws, notwithstanding the *Hobby Lobby* decision. Part IV cautions against the expansion of the corporate religious liberty interest and employer conscience exemption created in *Hobby Lobby*. Part V concludes. Throughout the Article, the role of legislation and case law examining or prohibiting workplace discrimination against women based on their reproductive capacity are used as the case study for the impact of the post-*Hobby Lobby* legal landscape.

## I. STATUTORY PROTECTIONS FROM SEX-BASED DISCRIMINATION AND EMPLOYER EXEMPTIONS PRE-*HOBBY LOBBY*

### A. Sex Discrimination Prohibitions in the Workplace

“[T]he U.S. Supreme Court created the protected class idea” more than 75 years ago “when it suggested that 'prejudice against discrete and insular minorities may be a special condition' that calls for a 'more searching judicial inquiry' on behalf of groups that are more likely to experience state-sponsored discrimination.”<sup>21</sup> “As the protected class doctrine developed,” it came to primarily protect particular classes of people who were readily identifiable as having suffered a history of disenfranchisement and discrimination (i.e., those discriminated against on the basis of race, national origin, or sex), and it moved from constitutional theory to statutory entitlement.<sup>22</sup> This Part describes current federal law protections against sex discrimination in the workplace.

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<sup>21</sup> Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 467 (2011) (citing *United States v. Carolene Products Co.*, 304 U.S. 141, 153 n. 4 (1938)); Dan T. Coenen, *The Future of Footnote Four*, 41 GA. L. REV. 797, 798-799 (2007).

<sup>22</sup> Nancy Levit, *supra* note 21, at 467. “Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.” *Chambers v. Florida*, 309 U.S. 227, 241 (1940). In the private employment context, federal protection has been extended to prohibit discrimination on the basis of age, disability, and genetic information, among other protections. See *The Age Discrimination in Employment Act of 1967 (ADEA)*, 29 U.S.C. §§ 621-634 (2015); see also *The Americans with Disabilities Act of 1990 (ADA)*, 42 U.S.C. §§ 12101-12213 (2015), amended by Pub. L. No. 110-325 (2008); see also *The Genetic Information Nondiscrimination Act of 2008 (GINA)*, 42 U.S.C. §§ 2000ff-2000ff-11 (2015).

## 1. Title VII and the Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964 put into place one of the first federal prohibitions against sex discrimination in the workplace.<sup>23</sup> Title VII arose from the Civil Rights movement and was drafted and debated as a prohibition against race discrimination in the workplace.<sup>24</sup> The day before the bill went to a vote in the House of Representatives, Representative Howard Smith introduced a floor amendment to include the prohibition against sex discrimination.<sup>25</sup> As a result, there is a limited legislative record of how this additional prohibition was meant to be interpreted. However, the record is not completely devoid of instruction. There was some debate on the prohibition against sex discrimination which reflected “an understanding of Title VII’s sex provision as a check on employment practices that reflected and reinforced traditional conceptions of men’s and women’s roles.”<sup>26</sup>

Early interpretations of Title VII’s sex discrimination prohibition focused on the concept of the protected trait and explored what types of disparate treatment were prohibited by the Act. In order to prove discrimination, in the absence of direct evidence, a woman was forced to prove that she was treated less favorably than a man who was similarly situated in every way but his sex.<sup>27</sup> Cases where the discrimination was based on a gender-related condition, such as pregnancy, or where a woman was harassed based on her sex, were not believed to violate Title VII because they related to conditions apart from biological sex.<sup>28</sup>

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<sup>23</sup> Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (2015). The first federal prohibition on sex discrimination in the workplace was the Equal Pay Act of 1963, which aimed to abolish wage disparity based on sex. 29 U.S.C. §§ 201-219 (2015).

<sup>24</sup> Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1317-18 (2012).

<sup>25</sup> Sarah M. Stephens, *What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama’s Second Term?*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 365, 371 (2013). Some say that Howard Smith was “a staunch opponent of the bill[.]” and hoped that by “adding ‘sex’ to the list of impermissible bases for employment discrimination[.]” he would be able to undermine the bill’s passage. *Id.* (citing Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J.L. & GENDER 423, 430 (2012)). Others’ accounts argue that Smith amended the bill to ensure that white women would be afforded the same legal protections as racial minorities. Franklin, *supra* note 24, at 1318 n. 36 (internal citations omitted).

<sup>26</sup> *Id.* at 1332.

<sup>27</sup> *See id.* at 1330.

<sup>28</sup> *See id.*

During this time period, “it was common for employers to categorically exclude pregnant women from the workforce or impose arbitrary restrictions on the place, time, and manner of their work.”<sup>29</sup> At the time of Title VII’s passage, more than 30 percent of employers required women to go on maternity leave before their seventh month of pregnancy and 40 percent of employers fired women who became pregnant.<sup>30</sup> Even the EEOC, in its early guidance on Title VII, issued opinion letters that indicated excluding individuals with disabilities resulting from pregnancy or childbirth and excluding maternity coverage from insurance plans did not violate Title VII.<sup>31</sup>

However, by 1969, the Commission began arguing that employer policies and practices which disparately treated “employees because of pregnancy, childbirth, or related medical conditions violate[d] Title VII.”<sup>32</sup> In 1972, the Commission issued new guidance which stated that Title VII barred the exclusion of pregnancy-related disability from employer benefit plans.<sup>33</sup> By 1975, a number of federal courts had held that pregnancy discrimination was sex discrimination under Title VII.<sup>34</sup>

The Supreme Court disagreed. Where women could establish they were just like a man, they were successful in suits alleging sex discrimination. But, many courts still were unwilling to acknowledge that Title VII might prohibit discrimination which sought to preserve culturally ingrained stereotypes of what a woman’s role in society should be – i.e.,

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<sup>29</sup> Emily Martin, *Written Testimony of Emily Martin Vice President and General Counsel National Women’s Law Center*, EEOC (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm> (citing Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 595-600 (2010)).

<sup>30</sup> 123 CONG. REC. 29,385 (1977) (statement of Sen. Williams).

<sup>31</sup> See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976) (citing EEOC Gen. Couns. Opinion Letter, App. 721-22, 735 (Oct. 17, 1966)).

<sup>32</sup> Peggy Mastroianni, *Written Testimony of Peggy Mastroianni Legal Counsel, EEOC*, EEOC, (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/meetings/2-15-12/mastroianni.cfm>; *Guidelines on Discrimination Because of Sex*, 37 Fed. Reg. 6,835 (Apr. 5, 1972) (codified at 29 C.F.R. § 1604.10 (2016)).

<sup>33</sup> *Id.* The Department of Health, Education, and Welfare issued the same guidance for interpreting Title IX of the Education Amendments of 1972. U.S. Dep’t of Health, Educ., & Welfare, *Higher Educ. Guidelines: Exec. Order 11246*, at 12-13 (1972) (discussing Title IX, 20 U.S.C. §§ 1681-1688, prohibition on discrimination against pregnant women).

<sup>34</sup> See, e.g., *Tyler v. Vickery*, 517 F.2d 1089, 1097-99 (5th Cir. 1975) (citing *Geduldig v. Aiello*, 417 U.S. 484 (1974)); see also *Comm’n Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975); see also *Hutchison v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961, 963-64 (9th Cir. 1975); see also *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1162 (W.D. Pa. 1974).



that of a wife and mother first and foremost. For example, in *Phillips v. Martin Marietta*, the Supreme Court found that a prohibition against the hiring of women with preschool age children, which did not apply to male employees with preschool age children, was legally permissible sex discrimination because “family obligations, if demonstrably more relevant to job performance for a woman than for a man, could” justify “a bonafide occupational qualification” in those circumstances.<sup>35</sup> Thus, a woman could not be treated differently from a man, unless the difference related to the woman’s reproductive role in society. In *Geduldig v. Aiello*, the Supreme Court took this line of reasoning a step further when it held that a state disability insurance system that denied benefits for disabilities resulting from pregnancy did not discriminate on the basis of sex because pregnancy was not a sex-based classification, and therefore, the denial of benefits did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>36</sup> Two years later, in *General Electric Co. v. Gilbert*,<sup>37</sup> the Court considered the same question as it related to Title VII. The plaintiff in *Gilbert* challenged her employer’s disability benefits program which provided benefits for all short-term disabilities except for pregnancy and related conditions.<sup>38</sup> Relying on the opinion and rationale of *Geduldig*, the Supreme Court found that the disability plan did not violate Title VII’s prohibition on sex discrimination because it distinguished between pregnant and non-pregnant persons rather than between men and women.<sup>39</sup> The Court relied on formalistic reasoning to conclude that “‘because of sex’ referred only to practices that divided men and women along the axis of biological sex.”<sup>40</sup> Since the discrimination in *Gilbert* had to do with a woman’s reproductive capacity – one for which there can never be a male comparator – the Court concluded there was no sex discrimination. “In its insistence on formal equality, the Court ignored the long history of discrimination against, and subordination of, women based on their reproductive capacity.”<sup>41</sup> In its opinion, the Court claimed that it was following the “traditional” understanding of sex discrimination.<sup>42</sup>

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<sup>35</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (remanding to the lower court to determine whether *Marietta Corp.* could establish sex was “a bona fide occupational qualification”).

<sup>36</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974).

<sup>37</sup> 429 U.S. 125 (1976).

<sup>38</sup> *Id.* at 127-28.

<sup>39</sup> *Id.* at 135 (citing *Geduldig*, 417 U.S. at 496-97, n. 20).

<sup>40</sup> Franklin, *supra* note 24, at 1363 (quoting *Gilbert*, 429 U.S. at 145).

<sup>41</sup> Stephens, *supra* note 16, at 414-15.

<sup>42</sup> *Gilbert*, 429 U.S. at 145; see Stephens, *supra* note 12, at 348 (discussing the ways in which the concept of “tradition” is used by conservative politicians to limit women’s reproductive rights in the United States).

The dissent rejected the majority's analysis, arguing that a rule that discriminates on the basis of pregnancy "discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."<sup>43</sup> Congress adopted the dissenting Justices' opinions when it passed the Pregnancy Discrimination Act (PDA),<sup>44</sup> explicitly overturning the result and the reasoning of *Gilbert*.<sup>45</sup> The PDA amended Title VII to prohibit sex discrimination on the basis of pregnancy and defined its scope as reaching discrimination "on the basis of pregnancy, childbirth, or related medical conditions[.]"<sup>46</sup> The PDA also overturned the Court's reasoning in *Gilbert* that a policy, which discriminates based on a condition unique to women but which only impacts some women, is not a form of sex discrimination.<sup>47</sup>

Despite this, Courts have continued to use the *Gilbert* rationale to permit sex discrimination where it relates to women's reproductive capacity or medical conditions unique to women.<sup>48</sup> These cases focus on a reproductive function which is unique to women (i.e., the ability to give birth), and compare a particular sub-group of women (i.e., mothers) against *all other employees* such that there is no evidence that men are treated more advantageously than all women.<sup>49</sup> This is despite the express abrogation of

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<sup>43</sup> *Gilbert*, 429 U.S. at 161-62 (Stevens, J., dissenting).

<sup>44</sup> 42 U.S.C. §§ 2000e-2000e-17 (2015); see 123 CONG. REC. 29,385 (1977) (statement of Sen. Williams) ("[T]he overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status with regard to career advancement and continuity of employment and wages.").

<sup>45</sup> *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983).

<sup>46</sup> 42 U.S.C. § 2000e(k) (2015).

<sup>47</sup> See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1342 (2015).

<sup>48</sup> See *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007) (rejecting the plaintiffs' claim that denial of insurance coverage for contraceptives was illegal sex discrimination under Title VII by finding that contraceptives are not related to pregnancy and that men and women were treated the same because the plan denied coverage to both men and women, despite the fact that there exists no prescription contraceptive for men); see also *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (holding that the PDA did not prohibit discrimination based on breastfeeding and relying on the reasoning of *Gilbert*).

<sup>49</sup> See *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (examining breastfeeding within the employment context and concluding that none of the district or appellate courts had determined that breastfeeding fell within the scope of gender discrimination because of the absence of a comparable class); see also *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1204 (10th Cir. 1997) ("[G]ender-plus plaintiffs can never be successful if there is no

*Gilbert* by the PDA.<sup>50</sup>

For example, no plaintiff in the American legal system has ever persuaded a court that breastfeeding discrimination violates Title VII's provision.<sup>51</sup> Courts following the reasoning of *Gilbert* have determined that if employers discriminate against breastfeeding women, but not all women, then it is not sex-based discrimination.<sup>52</sup> Courts have also held that the denial of insurance coverage for contraceptives is not related to pregnancy for purposes of the PDA and is not sex discrimination under Title VII where the plans denied coverage to both men and women, despite the fact that there exists no prescription contraceptive for men.<sup>53</sup> The erroneous rationale in *Gilbert* can even be seen in the Supreme Court's most recent pregnancy discrimination opinion, *Young v. UPS*.<sup>54</sup>

In *Young*, the plaintiff alleged her employer discriminated against her by failing to provide an in-job accommodation when her doctor limited her ability to lift heavy boxes during the final months of her pregnancy where UPS regularly provided modified work assignments to employees who were injured at work or who had a disability under the ADA.<sup>55</sup> The Fourth Circuit Court of Appeals utilized the pregnant versus nonpregnant dichotomy found in *Gilbert* to conclude that there was no pregnancy discrimination because UPS treated pregnant and non-pregnant employees the same with respect to offering accommodations even though a normal pregnancy does not result from a workplace injury and cannot be

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corresponding subclass of members of the opposite gender. Such plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender").

<sup>50</sup> "These cases settled on a specific idea about what does and does not count as sex discrimination, and that idea has become so commonplace that courts act as if it were embedded in the DNA of sex discrimination law." Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE. L.J. 891, 921 (2014).

<sup>51</sup> *Derungs*, 374 F.3d at 439; see Nancy Ehrenreich & Jamie Siebrase, *Breastfeeding on a Nickel and a Dime: Why the Affordable Care Act's Nursing Mothers Amendment Won't Help Low-Wage Workers*, 20 MICH. J. RACE & L. 65, 74 (2014).

<sup>52</sup> *Derungs*, 374 F.3d at 439.

<sup>53</sup> See *In re Union Pac. R.R.*, 479 F.3d at 942. *But cf.* EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216, 1219-20 (D. Minn. 2001) (finding employees had sufficiently alleged intentional disparate treatment and disparate impact in the exclusion of contraceptives); see also *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 981, 986 (E.D. Mo. 2003); see also *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wa. 2001) ("[T]he selective exclusion of prescription contraceptives from defendant's generally comprehensive prescription plan constitutes discrimination on the basis of sex.").

<sup>54</sup> 135 S. Ct. 1338 (2015).

<sup>55</sup> *Id.* at 1341.

considered a disability under the ADA.<sup>56</sup> On appeal, the U.S. Solicitor General and Young both argued that if an employer accommodates any non-pregnant employees, the employer must, under the PDA, accommodate pregnant employees in the same fashion.<sup>57</sup> The Supreme Court rejected this analysis, finding that employers need not treat pregnant employees the same as any other employee who is similar in his or her ability or inability to work.<sup>58</sup> Rather, in order to prove discrimination, the pregnant employee must show that she was denied an accommodation, that the employer accommodated other non-pregnant employees “similar in their ability or inability to work[,]” and that any “legitimate, nondiscriminatory reason” for denying the accommodation was pretextual, such as where a facially neutral policy imposed a “significant burden” on pregnant employees and “that the employer’s ‘legitimate, nondiscriminatory’ reasons [were] not ‘sufficiently strong’ to justify the burden.”<sup>59</sup> In the example provided by the Court, a successful plaintiff would have to show that her employer accommodated “a large percentage of non-pregnant [employees] while failing to accommodate a large percentage of pregnant [employees].”<sup>60</sup> Thus, only where a pregnant employee can meet the high burden of showing her employer effectively provided a benefit to all non-pregnant employees and denied that same benefit to multiple pregnant employees can a claim for pregnancy discrimination be made. The Court’s opinion in *Young v. UPS* did not address the effect of the Americans with Disabilities Act, as amended on pregnancy discrimination claims.

## 2. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA)<sup>61</sup> emerged from other Civil Rights Era legislation, including the Rehabilitation Act of 1973, which banned discrimination on the basis of disability by recipients of federal funds.<sup>62</sup> The ADA prohibits disparate treatment or disparate impact discrimination against individuals with disabilities in many contexts, including housing and employment, and in public places or private businesses.<sup>63</sup> Title I of the ADA prohibits employment discrimination on

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<sup>56</sup> *Id.* at 1348-49.

<sup>57</sup> *Id.* at 1351.

<sup>58</sup> *Id.* at 1350.

<sup>59</sup> *Id.* at 1354.

<sup>60</sup> *Id.*

<sup>61</sup> 42 U.S.C. §§ 12101-12213 (2015).

<sup>62</sup> The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (incorporated throughout the ADA).

<sup>63</sup> 42 U.S.C. § 12101(a)(3).

the basis of disability.<sup>64</sup> The ADA also requires that employers provide reasonable accommodations to employees with “known physical [and] mental limitations” from their disabilities, assuming accommodation would not pose an undue hardship.<sup>65</sup>

In the *Young* case, UPS had a policy of providing modified duty assignments to individuals with a disability under the ADA.<sup>66</sup> UPS refused to provide Young with an accommodation because she was not disabled under the statute.<sup>67</sup> Pregnancy alone is not considered a disability under the ADA because pregnancy is not the result of a physiological disorder.<sup>68</sup> As such, many courts have held that pregnancy-related conditions could only be considered disabilities for purposes of the ADA in extremely rare and extremely serious cases, while other courts have held that no condition related to pregnancy could ever constitute an impairment sufficient to be considered a disability.<sup>69</sup> In spite of the PDA, pregnant workers with special needs that arise from their pregnancy, such as lifting restrictions or the need for additional restroom breaks, may be treated disparately as compared to other workers with the same special needs that arise from a non-pregnancy related medical condition. The ADA did not require accommodation of these restrictions, and pregnant employees could be terminated for failing to perform their jobs as demanded by their

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<sup>64</sup> See generally 42 U.S.C. §§ 12111-12117.

<sup>65</sup> *Id.* at § 12112(b)(5)(A). To be entitled to an accommodation under the ADA, a worker must demonstrate that she has a disability; that she can perform the essential functions of the job with an accommodation; and that the employer has been given notice of the need for accommodation. See *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58, 63 (1st Cir. 2004); see also *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1515 (2d Cir. 1995); see also *Mzyk v. Ne. Indep. Sch. Dist.*, 397 F. App’x 13, 16, n.3 (5th Cir. 2010) (*per curiam*); see also *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796-97 (7th Cir. 2005). For a discussion of the interactive process required to provide a reasonable accommodation, see 29 C.F.R. § 1630.2(o)(3) (2013). Title VII also requires reasonable accommodation to prevent religious discrimination. USERRA also provides for reasonable accommodations of military personnel. See generally Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2006).

<sup>66</sup> *Young v. UPS*, 135 S. Ct. 1338, 1344 (2015).

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

<sup>68</sup> To be considered disabled under the ADA, one must have a physical or mental disorder which substantially limits one or more life activities. See 29 C.F.R. § 1630.2(h) (2013); see also 29 C.F.R. § 1630.2(h) (1996) (the more restrictive earlier version of the ADA applicable at the time *Young* brought her challenge in *Young v. UPS*).

<sup>69</sup> See, e.g., *Conley v. UPS*, 88 F. Supp. 2d 16, 19-20 (E.D.N.Y. 2000).

employers.<sup>70</sup>

This was true until the passage of the ADA Amendments Act of 2008 (ADAAA) which greatly expanded the definition of a disability under the Act, to include temporary and permanent medical conditions which substantially impact one or more major life activities or major bodily functions.<sup>71</sup> Under the amended Act, the question of whether an individual's impairment constitutes a disability is interpreted broadly and is not the focus of extensive analysis.<sup>72</sup> Pregnancy itself is still not considered a disability, but pursuant to the ADAAA and new guidance from the EEOC, it is now accepted that an individual who has a pregnancy-related impairment that substantially limits a major life activity (including a major bodily function) is an individual with a disability protected by the ADA.<sup>73</sup> Therefore, an employee who develops a disability related to pregnancy, childbirth, or related medical conditions may be entitled to a reasonable accommodation, absent undue hardship, and cannot be discriminated against on the basis of that disability.<sup>74</sup>

If the ADAAA had been in place at the time of Young's employment at UPS, then UPS's policy of providing modified work assignments to disabled employees with lifting restrictions should have applied to her, as well. And, even if UPS did not have a policy of providing modified work assignments to disabled employees, it still would have been required to engage in the interactive process with Young to determine whether allowing her to perform all of her other job functions, except lifting heavy boxes (a rare event for her anyway), would have been a reasonable accommodation.<sup>75</sup> Because it would not have imposed a substantial or undue burden on UPS to accommodate her in this fashion, such an accommodation almost certainly would have been deemed reasonable.<sup>76</sup>

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<sup>70</sup> See Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 102 (2013).

<sup>71</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101) (rejecting *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999)); see also 29 U.S.C. § 705 (2009).

<sup>72</sup> 42 U.S.C. § 12102 (4)(A); 29 C.F.R. § 1630.1.

<sup>73</sup> *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC (June 25, 2015), [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>74</sup> *Id.*; see 42 U.S.C. § 12112(b)(5)(A); see also 29 C.F.R. §§ 1630.2(h), (o)-(p); see also 29 C.F.R. § 1630.9.

<sup>75</sup> For a discussion of the interactive process required to provide a reasonable accommodation, see 29 C.F.R. § 1630.2(o)(3).

<sup>76</sup> An employer need not accommodate an employee with a disability if doing so would cause the employer to suffer an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

Likewise, if Young had required some limited amount of leave time due to pregnancy-related complications, that probably would have been deemed a reasonable accommodation. However, the ADA, as amended, would not have provided Young with an avenue to take leave to heal from a normal delivery after the baby was born. Nor does it create a right for Young to take time off from work after the baby was born to bond with or care for the child.

### 3. Family and Medical Leave Act

Under Title VII, an employer is not required to provide pregnancy-related or child care leave. As discussed *infra*, the ADA, as amended, only requires leave if the employee has a disability and leave is a reasonable accommodation. The Family and Medical Leave Act (FMLA)<sup>77</sup> is the nation's first, and only, federal law designed to address “the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest[.]”<sup>78</sup>

The FMLA applies to private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.<sup>79</sup> It allows workers who have been employed a minimum of 12 months to take up to 12 weeks of unpaid, job-protected leave to care for newborns, newly adopted or fostered children, and seriously ill family members, or to recover from their own illnesses.<sup>80</sup> In passing the FMLA, Congress expressly found that

due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and . . . employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.<sup>81</sup>

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<sup>77</sup> Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (2015).

<sup>78</sup> Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003) (holding the FMLA’s provision creates a private right of action against any employer that interferes with FMLA leave applied to state employers).

<sup>79</sup> 29 U.S.C. § 2611(4). In comparison, Title VII covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. Title VII also covers governmental entities.

<sup>80</sup> *Id.* § 2612.

<sup>81</sup> *Id.* § 2601(a).

The FMLA was expressly designed to minimize sex discrimination and promote equal employment opportunity by ensuring that leave is available for eligible medical reasons, including maternity-related disability and caregiving, and for compelling family reasons.<sup>82</sup>

Since the FMLA's enactment in 1993, employees have taken FMLA leave "more than 100 million times[,]" providing invaluable support to those who have "needed time away from work to recover from serious illnesses, welcome new babies, or care for an ill or injured family member."<sup>83</sup> The FMLA is responsible for ensuring a woman can take leave following the birth of her child without risking termination. It is also responsible for changing cultural and workplace expectations as to the abilities of mothers of young children to return to work and continue to contribute meaningfully to the workforce. The FMLA has also impacted what employees have come to expect of employer leave policies.<sup>84</sup> Unfortunately, about 40 percent of U.S. workers are ineligible for FMLA protections because their employers do not employ at least 50 people, the employee has not worked for that employer long enough, or the employee works a reduced schedule and is unable to work the requisite number of hours per year in order to earn protection.<sup>85</sup> Additionally, while the FMLA offers a significant benefit of unpaid leave time to many, a substantial number of eligible employees simply cannot afford to take unpaid time off even where their health or family needs may require it.<sup>86</sup> Nevertheless, the FMLA is a crucial protection against female reproductive discrimination because it creates the right to take leave for a serious medical condition, including reproductive related health conditions, and to bond with a newborn or newly adopted child.<sup>87</sup> Employers are required, except in unusual circumstances, to return the employee to her former position upon the conclusion of her leave and the employer is prohibited from retaliating against an employee for exercising her FMLA leave entitlement.<sup>88</sup> The FMLA is critical in insulating female employees against discrimination and

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<sup>82</sup> *Id.* § 2601(b).

<sup>83</sup> Debra L. Ness, *On its 21st Anniversary, a New Guide to the FMLA*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (Aug. 15, 2014), <http://www.nationalpartnership.org/blog/general/on-its-21st-anniversary-a-new-guide-to-the-fmla.html>.

<sup>84</sup> Debra L. Ness, *200 Million Reasons to Support Paid Family and Medical Leave*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (Feb. 5, 2015), <http://www.nationalpartnership.org/blog/general/200-million-reasons-to-support-paid-family-and-medical-leave.html>.

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

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

<sup>87</sup> *See* 29 U.S.C. § 2612(a).

<sup>88</sup> *Id.* §§ 2614-2615.



protecting them from the natural outgrowth of “descriptive bias” against mothers, “which reflects assumptions about how mothers will behave, and prescriptive bias, which reflects [the] belief that pregnant women and mothers do not belong in the workplace[.]”<sup>89</sup>

#### 4. Affordable Care Act

The most recent workplace protections for women can be found in the Patient Protection and Affordable Care Act (ACA).<sup>90</sup> Among many provisions, Section 4207 of the ACA amended the Fair Labor Standards Act (FLSA) “to require employers to provide reasonable break time for an employee to express breast milk for her nursing child” each time an employee has the need to express milk.<sup>91</sup> Importantly, the employer must provide a place, other than a bathroom, for the employee to express breast milk.<sup>92</sup> As no court has found that the denial of an accommodation request from a breastfeeding mother violates Title VII or the PDA, the ACA provides a critical new statutory entitlement to protect mothers in the workplace.<sup>93</sup>

In addition to providing workplace protection to breastfeeding mothers, the ACA helps to ensure women get an equal benefit of the bargain of their employment when it comes to employer health insurance coverage by mandating equal coverage and prohibiting sex discrimination in healthcare.<sup>94</sup> “[E]mployees trade off wages against benefits and earn a compensation package that includes both. In effect, employees ‘buy’ benefits – including health insurance—with their wages.”<sup>95</sup> Women are often discriminated against in their wages in both their actual pay and the benefits received from employer-provided health insurance coverage. In

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<sup>89</sup> Williams, *supra* note 70, at 102-03.

<sup>90</sup> See 29 U.S.C. § 207(r)(1)-(4) (2010). Currently, 24 states, Puerto Rico, and the District of Columbia also have legislation setting workplace requirements related to breastfeeding. See Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, table 3 (2011).

<sup>91</sup> 29 U.S.C. § 207(r)(1)-(4); *Break Time for Nursing Mothers*, UNITED STATES DEP'T OF LABOR, <http://www.dol.gov/whd/nursingmothers/>. The amendment went into effect March 23, 2010. *Id.*

<sup>92</sup> 29 U.S.C. § 207(r)(1)(B).

<sup>93</sup> Franklin, *supra* note 24, at 1311, n.19 (citing *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004)).

<sup>94</sup> See 42 U.S.C. § 18116 (2012) (prohibiting a denial of benefits on the basis of sex and prohibiting sex discrimination under any health program or activity which is receiving Federal financial assistance).

<sup>95</sup> Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 203-04 (2015).

enacting the ACA, Congress responded to evidence that women pay sixty-eight percent more in out-of-pocket health costs as compared to men, in large part because they bear the costs of contraception and other reproductive healthcare.<sup>96</sup> Under the ACA, Congress established minimum coverage standards for various insurance plans, and one of the essential benefits that must be provided under the ACA, without cost sharing, is preventative service coverage, including annual gynecological exams or mammograms.<sup>97</sup> The Department of Health and Human Services developed comprehensive guidelines for determining what services must be provided under the preventative care and screenings provision of the Act. They included in the mandatory essential benefits preventative services category all FDA approved contraceptive methods, sterilization procedures, and patient education and counseling, for all women with reproductive capacity.<sup>98</sup> In addition to addressing disparities in the cost of healthcare as between men and women, Congress also intended to ban the longstanding exclusion of services needed only by women from health care coverage and ensure meaningful access to all methods of contraception as tools to ensure greater equality for women. By mandating employer health insurance coverage without cost sharing and banning discrimination in healthcare, the ACA took another step in protecting women against reproductive discrimination in the workplace.

The guarantees set out in Title VII, the PDA, the ADA, and the FMLA have helped to ensure that female reproductive discrimination does not force women out of work. The past forty years have seen a significant shift as more women have continued to work during their childbearing years, while they are pregnant, through later stages of pregnancy, and after they have given birth.<sup>99</sup> Nevertheless, women still face discrimination at work and as will be discussed *infra*, the ACA's attempt to reduce discrimination against women in the workplace has ignited an expansive backlash from conservatives pitting women's rights against a newly invented corporate religious liberty interest.

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<sup>96</sup> See INST. OF MED. OF THE NAT'L ACADS., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20 (2011); see also Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, 1 GUTTMACHER REP. ON PUB. POL'Y 5, 5 (1998).

<sup>97</sup> 42 U.S.C. § 300gg-13(a) (2012).

<sup>98</sup> See 45 C.F.R. § 147.130 (2014).

<sup>99</sup> In 2013, 70 percent of mothers with children under the age of 18 were in the labor force. Women's Bureau, *Latest Annual Data*, UNITED STATES DEP'T OF LABOR (last visited Aug. 15, 2015), <http://www.dol.gov/wb/stats/recentfacts.htm#mothers>.

### B. Religious Organization Exemptions to Anti-Discrimination Law

The U.S. Constitution recognizes the importance of religion in America's history and in American society by protecting the right of free exercise in the First Amendment.<sup>100</sup> Both statutory and case law provide exemptions from anti-discrimination laws for religious employers in certain circumstances to protect that right of free exercise and prevent religious organizations from being forced to hire employees of alternative faiths.<sup>101</sup> For example, Title VII's prohibition against religious discrimination does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<sup>102</sup> However, Title VII does not define "religious corporation, association, educational institution, or society," and the exemption is not limited to actors performing religious duties.<sup>103</sup> The Supreme Court has unanimously held that religiously affiliated non-profits and faith-based service providers can make employment decisions based on religion, even where the position related to nonreligious activity of the organization.<sup>104</sup>

Anti-discrimination laws, on their face, do not permit religious

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<sup>100</sup> U.S. CONST. amend. I.

<sup>101</sup> Title VII exempts *any* employer from its prohibition against discrimination on the basis of religion, sex, or national origin if those factors are "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1); *see, e.g.*, *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1201 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (allowing an employer to require that helicopter pilots convert to Islam in order to be hired for air surveillance over Mecca because Saudi Arabian law prohibited any non-Muslim from entering the holy area, a violation punishable by death).

<sup>102</sup> 42 U.S.C. § 2000e-1(a).

<sup>103</sup> The U.S. Supreme Court upheld this exemption by allowing a religiously affiliated, non-profit entity to make employment decisions based on religion, even if the position related to nonreligious activity of the organization. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987). Faith-based service providers are also eligible for the exemption, but if they receive government funding, the funds cannot be used to directly advance the organization's religious practices. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

<sup>104</sup> *Amos*, 483 U.S. at 339. "[A]n entity is eligible for the section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (*per curiam*).

organizations to discriminate on any other basis protected by Title VII, the PDA, or the ADA.<sup>105</sup> However, where an employee of a religious organization asserts that discrimination is based on some other protected characteristic, the organization may argue that the discrimination was in fact based on religion.

In several cases, religious employers, particularly religious schools, have invoked their beliefs to justify the termination of female employees after they became pregnant.<sup>106</sup> In *Hamilton v. Southland Christian School, Inc.*, the school claimed that it did not violate Title VII in terminating a teacher who became pregnant outside of marriage because of the school's religiously based opposition to premarital marriage.<sup>107</sup> The Eleventh Circuit overturned the district court's grant of summary judgment in the school's favor, finding that the religious justification was likely pretext.<sup>108</sup> In *Boyd v. Harding Academy of Memphis, Inc.*, the Sixth Circuit accepted a similar justification from a religious school where the employer claimed that the termination was based on a violation of an organization policy against extra-marital sex, stemming from the religion's teachings, rather than the employee's pregnancy.<sup>109</sup> The Sixth Circuit Court of Appeals affirmed the district court's determination that the employer had not discriminated against the employee on the basis of her pregnancy, holding that the organization's religious policy rationale for termination was not mere pretext, in part because the employer was able to proffer decades old evidence that a male employee had been terminated under the same

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<sup>105</sup> As the PDA amended Title VII, the statutory exemptions apply to the PDA as well. The ADA does not provide a statutory exemption for religious employers. Moreover, if a religious entity receives federal funds, it is subject to the Rehabilitation Act of 1973, which prohibits disability discrimination in federally assisted programs. See 29 U.S.C. § 794(a).

<sup>106</sup> See, e.g., *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350, 358-59 (E.D.N.Y. 1998) (holding the religious school could not rely on religion as a pretext for sex discrimination); see also *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (rejecting free exercise challenge to Title VII by religious school who terminated a librarian for becoming pregnant outside of marriage and concluding that it was sex discrimination because only women can become pregnant).

<sup>107</sup> *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1317-18, 1320 (11th Cir. 2012) (reversing summary judgment in favor of the school).

<sup>108</sup> *Id.* at 1319-21.

<sup>109</sup> *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 412, 414 (6th Cir. 1996); see Cynthia Brougher, CONG. RESEARCH SER., RS22745, RELIGION AND THE WORKPLACE: LEGAL ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS IT APPLIES TO RELIGION AND RELIGIOUS ORGANIZATIONS 3-4 (2011), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1809&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1809&context=key_workplace).

policy.<sup>110</sup>

In other cases where an employee has alleged sex discrimination, courts have refused to analyze the legal claims for fear of violating the religious interpretation doctrine derived from the First Amendment's Establishment Clause, which prohibits courts from examining religious matters or doctrine.<sup>111</sup> In *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc., et al*, an employee was terminated for signing a petition supporting the Supreme Court's holding in *Roe v. Wade*<sup>112</sup> that there is a constitutional right to legal abortion.<sup>113</sup> The employee alleged that even if her outside of work activities and personal feelings violated church doctrine, male employees were treated less harshly for engaging in similar conduct.<sup>114</sup> The court refused to examine her contention that she was treated more harshly than male employees for fear that it would have to examine the school's religious beliefs. Instead, the court found that the only appropriate comparator would be a "male employee[] at Ursuline who engaged in public pro-choice advocacy."<sup>115</sup> This severely limited the employee's ability to show that she was discriminated against on the basis of her sex and related reproductive activities.<sup>116</sup>

The courts' hesitancy to analyze matters of religious interpretation also can be seen in the judicial exemption of religious organizations from anti-discrimination law as it applies to their ministerial employees. "[T]he Courts of Appeals have uniformly recognized . . . a 'ministerial exception,'" arising from "the First Amendment, that precludes application of [Title VII] to claims concerning the employment relationship between a religious institution and its ministers."<sup>117</sup> In 2012, the Supreme Court

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<sup>110</sup> *Boyd*, 88 F.3d at 414; *see generally* *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) (explanation parenthetical needed). Contrast this with *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-70 (9th Cir. 1986) (holding that the religious school violated Title VII's prohibition on sex discrimination by giving family health benefits only to male employees because of the school's belief that only men are "heads of households").

<sup>111</sup> *See Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006); *see also Emp't Div. v. Smith*, 494 U.S. 872, 887-88 (1990) (indicating that the prohibition against judicial resolution of religious questions should be understood to apply broadly and absolutely).

<sup>112</sup> 410 U.S. 113 (1973).

<sup>113</sup> *Curay-Cramer*, 450 F.3d at 132.

<sup>114</sup> *Id.* at 139.

<sup>115</sup> *Id.* at 139, n. 7.

<sup>116</sup> *Id.* (The Court makes explicit that the only appropriate comparator would be a "male employee[] at Ursuline who engaged in public pro-choice advocacy.").

<sup>117</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012) (citing *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578

confirmed this exemption in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>118</sup> In *Hosanna-Tabor*, the Supreme Court unanimously held that the First Amendment provides a ministerial exception that protects religious schools from retaliatory firing suits under the Americans with Disabilities Act.<sup>119</sup> This decision expanded the scope of religious liberty under the Free Exercise Clause and departed from prior precedent. In *Employment Division v. Smith*, the Court had held that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"<sup>120</sup> However, in *Hosanna-Tabor*, the Court recognized that the EEOC sued *Hosanna-Tabor* to enforce "a valid and neutral law of general applicability," and denied *Smith* "foreclose[d] recognition of a ministerial exception rooted in the Religion Clauses[.]"<sup>121</sup>

The Court declined to define who might qualify as a minister under the exception holding, "[e]very Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister."<sup>122</sup> The Court found Respondent teacher Cheryl Perich qualified as a minister, despite the fact that she spent "six hours and fifteen minutes

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(1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204-09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-07 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800-01 (4th Cir. 2000); *Combs v. Central Tex. Annual Conference*, 173 F.3d 343, 345-50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 655-57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996)).

<sup>118</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

<sup>119</sup> *Id.* The same reasoning found in *Hosanna-Tabor* and the Title VII cases may also apply to the FMLA. While the FMLA's statutory language contains no exemptions for religious organizations, the ministerial exemption may allow a religious organization to deny FMLA leave where it violates religious doctrine such as an employer-church's denial of FMLA leave related to caring for the employee-minister's same-sex spouse, stepchild (i.e. child of the employee's same-sex spouse), or stepparent (i.e. parent of the employee's same-sex spouse). See, e.g., *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253, at \*10-11 (E.D. Pa. Oct. 5, 2005).

<sup>120</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>121</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.

<sup>122</sup> *Id.*

of her seven hour day teaching secular subjects” and performed the same religious tasks as lay teachers.<sup>123</sup> Instead, the Court focused on the fact that Hosanna-Tabor held Perich out as a minister by virtue of her title, “Minister of Religion, Commissioned,” that Perich had “a significant degree of religious training followed by a formal process of commissioning,” and that Perich's job, like that of a lay teacher, involved “conveying the Church's message and carrying out its mission.”<sup>124</sup>

In his concurrence, Justice Alito explained that a minister is “the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.”<sup>125</sup> In *Hosanna-Tabor*, the Court expanded who the ministerial exception might be applied to when it found fourth grade teacher Perich to be a minister against whom the school could discriminate. It seems, in light of *Hosanna-Tabor*, many employees of religious organizations could be subject to the exception. While the Court did not rule whether the exception would bar other types of suits, “courts of appeal [] have used the ministerial exception to protect religious organizations from suits brought under all varieties of employment-related law: intentional infliction of emotional duress, breach of contract, age discrimination, Title VII hostile work environment, state minimum wage law, and the Fair Labor Standards Act.”<sup>126</sup> By establishing the ministerial exception as a subset of the protections offered by the First Amendment, *Hosanna-Tabor* limited *Smith*, significantly altering the contemporary Free Exercise doctrine and revitalizing protections for “decisions that affect the faith and mission of the church itself.”<sup>127</sup>

The question of whether *Hosanna-Tabor* was a church was not at

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<sup>123</sup> EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780-781 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694; *see Hosanna-Tabor*, 132 S. Ct. at 708.

<sup>124</sup> *Hosanna-Tabor*, 132 S. Ct. at 707-08.

<sup>125</sup> *Id.* at 716 (Alito, J., concurring).

<sup>126</sup> Elliott Williams, *Resurrecting Free Exercise in Hosanna-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), 36 HARV. J.L. & PUB. POL'Y 391, 399 (2013) (citing *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 940-41 (6th Cir. 1992) (intentional infliction of emotional distress); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997) (breach of contract); *Skryzpczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1240-41 (10th Cir. 2010) (age discrimination and Title VII hostile work environment); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1293 (9th Cir. 2010) (state minimum wage law); *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301 (4th Cir. 2004) (FLSA)).

<sup>127</sup> Williams, *supra* note 126, at 402 (internal quotations omitted).

issue in that case and the Court did not define a “religious organization.”<sup>128</sup> Nevertheless, the Court’s broad language about protecting the “interest of religious groups in choosing who will preach their beliefs, teach their faiths, and carry out their mission,” opened the door to an even more expansive application of the Free Exercise clause beyond churches to all religious groups and the “right to shape its own faith and mission through its appointments.”<sup>129</sup> “[E]ven before *Hosanna-Tabor*, the courts of appeals had applied the ministerial exception to hospitals, universities, and nursing homes with religious missions.”<sup>130</sup> The Supreme Court still went further two years later in *Burwell v. Hobby Lobby* when it broadened the definition of religious institution to include any organization, in whatever form, that states it pursues religious goals.<sup>131</sup>

## II. HOBBY LOBBY: FROM RELIGIOUS ORGANIZATIONS TO RELIGIOUS FOR-PROFIT CORPORATIONS

The ACA, like Title VII and other laws, established an exemption for religious employers.<sup>132</sup> The ACA exempted “churches, their integrated auxiliaries, and conventions or associations of churches[]” from complying with the contraceptive mandate of the ACA.<sup>133</sup> This means that churches can choose to be exempt from the requirement if they have religious objections and their employees and their dependents will not have access to some or all FDA approved contraceptive methods through their employer’s insurance plan.<sup>134</sup> The ACA also provided an accommodation for nonprofit organizations that hold themselves out as religious organizations and which object on religious grounds to the coverage of contraceptive services.<sup>135</sup>

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<sup>128</sup> See generally, Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. 181, 204-22 (2014) (discussing the failure of the Court in *Hosanna-Tabor* to define “religious institution” and proposing a framework for distinguishing religious organizations as those which have as their purpose: protection of individual conscience, protection of group rights, and provision of desirable societal structures).

<sup>129</sup> *Hosanna-Tabor*, 132 S. Ct. at 706, 710.

<sup>130</sup> Williams, *supra* note 126, at 400 (citing *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361 (8th Cir. 1991); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006); *Shalihsabou v. Hebrew Home of Greater Wash., Inc.* 363 F.3d 299, 301 (4th Cir. 2004)).

<sup>131</sup> 134 S. Ct. 2751 (2014).

<sup>132</sup> 45 C.F.R. § 147.131(a) (2014).

<sup>133</sup> *Id.* (citing 26 U.S.C. § 6033(a)(3)(A) (2015)).

<sup>134</sup> See 45 C.F.R. § 147.131(a).

<sup>135</sup> 45 C.F.R. § 147.131(b)(1)-(3). A religious employer, eligible for this exemption, is required to certify that it is eligible for the exemption and notify the



Under the accommodation, religiously-affiliated nonprofits can opt-out of providing contraceptive coverage by electing the accommodation.<sup>136</sup> The insurance carrier for the nonprofit employer will continue to provide contraceptive insurance coverage for the nonprofit's employees and their dependents, but the nonprofit incurs no cost associated with the coverage.<sup>137</sup> The ACA did not provide any such exemption or accommodation for for-profit corporations.<sup>138</sup>

Hobby Lobby Stores, Inc. and Conestoga Wood Specialties, Inc., along with many other for-profit corporate employers sued, arguing that the government violated the Religious Freedom Restoration Act (RFRA)<sup>139</sup> and the First Amendment by requiring them to comply with the contraceptive mandate.<sup>140</sup> In mounting their challenge, Hobby Lobby and Conestoga Wood (collectively referred to as "Hobby Lobby") argued that the contraceptive mandate substantially burdened their free exercise of religion, guaranteed by RFRA and the First Amendment, by requiring it to provide, facilitate, or pay for coverage for healthcare for its female employees when that coverage was in direct conflict with their sincerely held religious beliefs.<sup>141</sup>

#### A. Defining a "Person" and the "Exercise of Religion"

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group health insurance issuer who will continue to provide coverage for the employees without imposing any cost-sharing requirements on the organization, its insurance plan, or its employee beneficiaries. 45 C.F.R. § 147.131(c).

<sup>136</sup> 45 C.F.R. § 147.131(c).

<sup>137</sup> *Id.*

<sup>138</sup> "The Senate voted down [a] so-called 'conscience amendment' which would have enabled any employer or insurance provider to deny coverage based on its asserted 'religious beliefs or moral convictions.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2789 (2014) (Ginsburg, J., dissenting).

<sup>139</sup> 42 U.S.C. §§ 2000bb-2000bb-4 (passed in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) that neutral rules of general applicability do not violate an individual's First Amendment rights).

<sup>140</sup> *Hobby Lobby*, 134 S. Ct. at 2759. The Court did not reach the First Amendment arguments. *Id.* at 2785.

<sup>141</sup> *Id.* at 2765. Hobby Lobby, of course, was not required by law to provide any healthcare coverage at all or meet the minimum healthcare coverage requirements of the ACA. But, employers receive "significant tax benefits . . . for compensating employees with health benefits [in lieu] of wages." Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1485 (2015). "In seeking religious exemptions[,] . . . employers effectively demand" these benefits, despite offering insurance that does not meet the minimum requirements of the ACA, and instead foist the cost of doing so on the government. *Id.*; see Sepper, *supra* note 95, at 219, n. 142 ("In the absence of the religious exemption, Hobby Lobby would effectively lose the subsidy in the sense that the subsidy would be dwarfed by the taxes for providing non-ACA-compliant insurance plans[.]").

The RFRA restored the strict scrutiny analysis set out by the Supreme Court in *Sherbert v. Verner*<sup>142</sup> and *Wisconsin v. Yoder*,<sup>143</sup> free exercise cases that preceded the Court's limiting decision in *Employment Division v. Smith*.<sup>144</sup> The strict scrutiny test adopted by RFRA provides: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>145</sup> The RFRA expressly "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by government."<sup>146</sup>

The Court's first task in the *Hobby Lobby* case was to decide whether RFRA applied to for-profit employers. The RFRA protects a "person's" exercise of religion, but the statute does not define "person."<sup>147</sup> The *Hobby Lobby* court referred to the Dictionary Act which defines the word "person" to include corporations.<sup>148</sup> Relying on the near universal acceptance that RFRA's use of the word "persons" includes non-profit corporations, the Court determined "persons" should equally encompass for-profit corporations.<sup>149</sup> It concluded that—like religious non-profits—closely held, secular for-profit corporations equally "further[] individual religious freedom" of individuals united in the enterprise.<sup>150</sup>

Thus, the Court in *Hobby Lobby* easily dispatched the question of whether a for-profit corporate employer could be a "person" under RFRA. It then analyzed whether a for-profit corporation could "exercise

<sup>142</sup> 374 U.S. 398 (1963) (holding that religious objectors are usually entitled to religious exemptions from generally applicable laws and articulating the strict scrutiny test).

<sup>143</sup> 406 U.S. 205 (1972) (holding that individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade).

<sup>144</sup> 494 U.S. at 879.

<sup>145</sup> 42 U.S.C. § 2000bb-1(b).

<sup>146</sup> *Id.* at § 2000bb(b).

<sup>147</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (citing 42 U.S.C. §§ 2000bb-1(a)-(b)).

<sup>148</sup> *Hobby Lobby*, 134 S. Ct. at 2768 (citing The Dictionary Act, 1 U.S.C. § 1 (2015)).

<sup>149</sup> *Hobby Lobby*, 134 S. Ct. at 2769 ("No known understanding of the term 'person' includes *some* but not all corporations . . . no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.").

<sup>150</sup> *Id.*

religion.”<sup>151</sup> The Court was not persuaded by lower courts’ holdings that a for-profit corporation could not exercise religion for purposes of RFRA because the primary objective of such a company is to make money.<sup>152</sup> Nor was the Court persuaded by the lack of pre-*Smith* Free Exercise precedent which did not grant religious freedom protection to for-profit corporations.<sup>153</sup> Instead, the Court determined that “there is no apparent reason why [for-profit corporations] may not further religious objectives,”<sup>154</sup> and indeed, might be formed for the very purpose of pursuing religious goals.<sup>155</sup>

### B. Applying RFRA

Having determined, for the first time, that a for-profit corporation is a person capable of exercising religion, the Court set to work applying RFRA’s strict scrutiny test.<sup>156</sup> First, the Court determined that the ACA’s “contraceptive mandate ‘substantially burden[ed]’ the exercise of religion.”<sup>157</sup> The Court found that the owners of Hobby Lobby held “a sincere religious belief that life begins at conception[,]” and that they “object on religious grounds to providing health insurance that covers [certain] methods of birth control[.]”<sup>158</sup> The Court then found this religious belief was substantially burdened by the contraceptive mandate because

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<sup>151</sup> *Id.* There was a circuit split as to whether a for-profit corporation can exercise religion. See Sepper, *supra* note 95, at 196-97.

<sup>152</sup> *Hobby Lobby*, 134 S. Ct. at 2770, n. 23.

<sup>153</sup> *Id.* at 2772 (finding that RFRA went farther than the Court’s pre-*Smith* Free Exercise Clause precedent).

<sup>154</sup> *Id.* at 2771.

<sup>155</sup> *Id.* at 2771-72. The majority in *Hobby Lobby* tried to limit this interpretation by stating, in *dicta*, that it is unlikely that a large and/or publicly held corporation would assert RFRA claims, if for no other reason than it is unlikely “that unrelated shareholders . . . would agree to run a corporation under the same religious beliefs[.]” *Id.* at 2774. However, this is precisely what has happened with conscience exemptions in the healthcare industry. See Elizabeth Sepper, *Healthcare Exemptions and the Future of Corporate Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 305, 305, 313 (Micah Schwartzman et al. eds., 2016) (“Through leases, admitting privilege agreements, employment contracts, and purchase agreements, healthcare systems require doctors to restrict the care they provide patients based on religious or moral positions they may not share.”).

<sup>156</sup> See Sepper, *supra* note 155, at 444-47; see also 42 U.S.C. § 2000bb-1(b).

<sup>157</sup> *Hobby Lobby*, 134 S. Ct. at 2775.

<sup>158</sup> *Id.* The sincerity of this religious belief went without question despite scientific consensus that the birth control methods at issue are not “abortifacients,” as alleged by Hobby Lobby and seemingly accepted by the majority of the Court. See Stephens, *supra* note 16, at 424, n. 169.

Hobby Lobby would be subjected to financial penalties if it refused to provide a health insurance plan compliant with the ACA and because it might also be subjected to significant financial penalties if it declined to offer a health insurance plan at all.<sup>159</sup> The Court refused to acknowledge the attenuated nature between the asserted belief (abortion is wrong) and the action required of the employer (offering a health care plan that covers all FDA-approved contraceptives). Instead, the Court found that to analyze whether the action was reasonably related to the proffered belief would require the Court to impermissibly decide whether the belief asserted was reasonable in violation of the religious interpretation doctrine.<sup>160</sup> The Court said that so long as the objecting companies “sincerely believe that providing the insurance coverage demanded by the HHS regulations” violates their religious beliefs, “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 [a RFRA plaintiff’s assertion that the governmental action at issue violates their religious beliefs] reflects ‘an honest conviction[.]’”<sup>161</sup>

Next, the Court assumed, without deciding, “the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.”<sup>162</sup> Finally, the Court applied the last prong of the test to determine whether the mandate to provide an insurance policy which includes coverage of all contraceptives approved by the Food & Drug Administration was the least restrictive means to achieve the government’s compelling interest in ensuring cost-free access to reproductive healthcare.<sup>163</sup> Taking into consideration that the Department of Health and Human Services had already granted an accommodation from the contraceptive mandate to religious non-profit organizations, the Court found there was a less restrictive alternative which should be applied to Hobby Lobby.<sup>164</sup> The Court, ruling in favor of *Hobby Lobby*, held that the Affordable Care Act’s contraceptive mandate substantially burdens the exercise of religion provided for in RFRA, and the mandate is not the least restrictive means of furthering the government’s interest.<sup>165</sup>

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<sup>159</sup> *Hobby Lobby*, 134 S. Ct. at 2776.

<sup>160</sup> *Id.* at 2778.

<sup>161</sup> *Id.* at 2779 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

<sup>162</sup> *Hobby Lobby*, 134 S. Ct. at 2780.

<sup>163</sup> *Id.* at 2782.

<sup>164</sup> *Id.* at 2780-82.

<sup>165</sup> *Id.* at 2780. The Court did not reach Hobby Lobby’s First Amendment argument. *Id.* at 2785.

### C. Hobby Lobby Religious Accommodation Implications

The *Gilbert* rationale can be seen lurking within the Court's reasoning in *Hobby Lobby*, allowing it to single out women for discrimination with respect to their reproductive capacity and unique medical needs. The Court "treat[ed] birth control as different and less worthy of health coverage than other basic preventative health care services[.]"<sup>166</sup> by limiting its decision only to the contraceptive mandate, and underlining that challenges to other types of mandated coverage, such as vaccinations or blood transfusions, would fail.<sup>167</sup> The Court clearly regarded reproductive healthcare as less valuable than other healthcare needs and indicated to employers they "may discriminate against women in their medical care, but the Court's opinion should not be read to apply where it might impact men or non-reproductive related issues."<sup>168</sup> Focusing on the free exercise of corporate religion allowed the majority to ignore the sex discrimination that underlies that free exercise.<sup>169</sup>

In doing so, the Court greatly expanded the reach of religious exceptionalism and created a new religious liberty interest for corporations which could have a wide-reaching impact on anti-discrimination laws promulgated to protect women. In *Hobby Lobby*, "[f]or the first time, the Supreme Court exempted for-profit businesses from employee-protective law in the name of religion."<sup>170</sup> Not only did the Supreme Court establish a religious liberty doctrine for businesses, but it also found that a for-profit corporation can be exempted from a neutral regulation, generally applicable to all employers. Contrast this with the Court's prior holding in *United States v. Lee*,<sup>171</sup> where it rejected a request for a religious-based exemption for for-profit employers from social security payments due to the burdens on employees, and its holding in *Newman v. Piggie Park*<sup>172</sup> describing as "patently frivolous," the claim that anti-discrimination laws interfered with the religious liberty of the Piggie Park barbecue chain and its owner.

In expanding the concept of who can exercise religion, the Court opened the door for for-profit employers to claim that Title VII's exemption for religious organizations, which allows them to discriminate against

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<sup>166</sup> Gretchen Borchelt, *The Hobby Lobby Majority Opinion: It Can't Be Sex Discrimination if Women Aren't in the Picture*, NATIONAL WOMEN'S LAW CENTER (July 8, 2014), <http://www.nwlc.org/our-blog/hobby-lobby-majority-opinion-it-cant-be-sex-discrimination-if-women-arent-picture>.

<sup>167</sup> *Hobby Lobby*, 134 S. Ct. at 2783.

<sup>168</sup> Stephens, *supra* note 16, at 425.

<sup>169</sup> See Borchelt, *supra* note 166.

<sup>170</sup> Sepper, *supra* note 19, at 28.

<sup>171</sup> *United States v. Lee*, 455 U.S. 252, 254 (1982).

<sup>172</sup> *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402, n. 5 (1968).

employees of a different religious background, should be applied where the religion of a corporation or its shareholders conflicts with a trait, characteristic, or behavior of an applicant or an employee. The *Hobby Lobby* case also might be used to argue that the ministerial exception set forth in *Hosanna-Tabor* is broad enough to cover corporate officers and other high-ranking employees in for-profit corporations which have a “religious objective.”<sup>173</sup> Indeed, the Court set the stage for many new conflicts over the reach of RFRA as applied to prohibitions against sex-based discrimination in employment.

### III. APPLYING *HOBBY LOBBY*: EMPLOYER CONSCIENCE VERSUS WOMEN’S RIGHTS

The Supreme Court majority in *Hobby Lobby* and other courts faced with challenges to the contraceptive mandate across the country missed an opportunity to acknowledge and hear from the women who would be harmed by an exemption or accommodation from the mandate.<sup>174</sup> While the majority in *Hobby Lobby* acknowledged RFRA’s application “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[,]”<sup>175</sup> the Court failed to consider the dignitary harm that it has previously recognized in discrimination cases, such as the dignitary harm women suffer because their reproductive healthcare is treated differently than all other healthcare; the harm inherent in determining that an employer’s religious beliefs should outweigh a law of general applicability when that law works to the benefit of women; or the enduring harm to equal rights jurisprudence the decision could have.<sup>176</sup> Furthermore, as a result of the *Hobby Lobby* decision, closely held corporations with religious objections to contraceptive coverage were completely exempt from the contraceptive mandate until the federal government was able to issue new regulations more than a year later which extended the accommodation available to religiously affiliated nonprofit employers to closely held for profit corporations for the 2016 insurance plan year, meaning that thousands of employees and their dependents went

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<sup>173</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

<sup>174</sup> See *Sepper*, *supra* note 95, at 211. “The fact that coverage will, in some cases, be provided by another entity does not undo the discrimination.” *Id.*

<sup>175</sup> *Hobby Lobby*, 134 S. Ct. at 2781, n. 37.

<sup>176</sup> The majority in *Hobby Lobby* seemed to believe that *Hobby Lobby*’s female employees would experience “zero” harm because it believed the government should pay for their reproductive healthcare coverage as a “lesser restrictive means.” See *id.* at 2786-87 (Kennedy, J., concurring).

without contraceptive coverage for eighteen months.<sup>177</sup>

By failing to affirmatively decide that the government has a compelling interest in women's reproductive healthcare or ending discrimination in healthcare costs, the majority opinion in *Hobby Lobby* had the adverse effect of implying that the Court might not find such a thing to be true if challenged in another case.<sup>178</sup> In her dissent, Justice Ginsburg warned that RFRA could be used to challenge generally applicable laws which prohibit discrimination and referenced a number of cases where business owners sought to discriminate on the basis of race, sex, and sexual orientation in public accommodations and in hiring.<sup>179</sup> Justice Alito responded to this criticism in the majority opinion stating,

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.<sup>180</sup>

Justice Alito strongly conveys that a RFRA challenge to Title VII's prohibition on race discrimination would surely fail. However, his omission of any reference to sex discrimination, prohibited primarily by the same statute, is greatly concerning considering this was a case about sex discrimination. His failure to speak affirmatively seems to indicate that the government's interest in providing an equal opportunity to participate in the workforce without regard to sex is not as compelling and that a RFRA challenge to a claim of sex discrimination in employment could be

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<sup>177</sup> See 45 C.F.R. § 147.131(b)(4); see also Laurie Sobel & Alina Salganicoff, *Round 2 on the Legal Challenges to Contraceptive Coverage: Are Nonprofits "Substantially Burdened" by the "Accommodation"?*, HENRY J. KAISER FAMILY FOUNDATION (Nov. 2015), <http://kff.org/womens-health-policy/issue-brief/round-2-on-the-legal-challenges-to-contraceptive-coverage-are-nonprofits-substantially-burdened-by-the-accommodation/>.

<sup>178</sup> "In making an assumption[,] . . . the majority [avoids] any discussion of the benefits of birth control to women, including . . . its value in furthering women's equality by addressing discrimination in health care and promoting women's social and economic opportunities. In fact, the majority opinion puts these interests *in quotations*, suggesting that they are questionable or invalid." Borchelt, *supra* note 166.

<sup>179</sup> *Hobby Lobby*, 134 S. Ct. 2804-05 (Ginsburg, J., dissenting).

<sup>180</sup> *Id.* at 2783.

successful.

The Supreme Court has the opportunity to address this concern in 2016. Many schools, hospitals, and other religiously-affiliated nonprofit organizations have challenged the accommodation to the contraceptive mandate, arguing that the notice requirement to elect an accommodation to the contraceptive coverage requirement substantially burdens their religious exercise because the notice facilitates the provision of insurance coverage for contraceptive services and “allow[s] their health plans to be used as a vehicle to bring about a morally objectionable wrong.”<sup>181</sup> On March 23, 2016, the Court held oral argument on seven consolidated cases challenging the accommodation and the contraceptive mandate itself.<sup>182</sup> In deciding the consolidated accommodation cases, the Court could reach a decision as to whether the government’s interest in ending sex discrimination in healthcare and in employment is compelling and whether that interest is as compelling as the government’s interest in ending race discrimination.<sup>183</sup>

Since the *Hobby Lobby* decision, the majority’s reasoning in *Hobby Lobby* and RFRA have been used to argue for greater religious accommodations or conscience exemptions in a variety of circumstances. Litigants have argued that the protections provided for in RFRA should exempt them from laws that protect women, LGBTQ individuals, and students from discrimination, laws which allow employees to unionize, and

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<sup>181</sup> Emergency Application to Recall and Stay Mandate or Issue Injunction Pending Resolution of Certiorari Petition at 17, *Zubik v. Burwell*, \_\_\_ U.S. \_\_\_ (2016) (No. 14-1418); see *Geneva Coll. v. Health & Human Servs. Sec’y*, 778 F.3d 422 (3d Cir. 2015), cert. granted, 84 U.S.L.W. 3096 (U.S. Nov. 6, 2015) (No. 15-191); see also *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), cert. granted, 84 U.S.L.W. 3050 (U.S. Nov. 6, 2015) (No. 15-35); see also *Little Sisters of the Poor Home v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), cert. granted, 84 U.S.L.W. 3056 (U.S. Nov. 6, 2015) (No. 15-105); see also *Priests for Life v. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), cert. granted, 83 U.S.L.W. 3918 (U.S. Nov. 6, 2015) (No. 14-1453).

<sup>182</sup> *Geneva Coll.*, 778 F.3d 442, cert. granted; *E. Tex. Baptist Univ.*, 793 F.3d 449, cert. granted; *Little Sisters*, 794 F.3d 1151, cert. granted; *Priests for Life*, 772 F.3d 229, cert. granted.

<sup>183</sup> Alternatively, the Court may decide that the accommodation itself substantially burdens the organizations’ religious exercise and that the accommodation is not the least restrictive means of achieving the government’s compelling interest. The Court could also decide that the accommodation substantially burdens the organizations’ religious exercise and that the government has no compelling interest in providing contraceptive coverage. If the Court reaches either conclusion and grants an exemption from the mandate to religious nonprofits, then such an exemption would necessarily have to apply to religious for-profit corporations, and the Court might very well strike down the contraceptive mandate in its entirety.



even criminal laws.<sup>184</sup> For example, following the Court's ruling in *Hobby Lobby*, a military judge issued an order blocking female guards at Guantanamo Bay from performing their regular duties after a detainee claimed that having female guards escort and shackle him violated his free exercise of religion under RFRA.<sup>185</sup> "The judge's interim order accepted the idea that one person's beliefs could determine which jobs women are allowed to have, undermining their right to be free of discrimination in the work place."<sup>186</sup>

In another case, the United States Conference of Catholic Bishops (USCCB), relying on RFRA and the *Hobby Lobby* decision, demanded exceptions from Executive Order 11246 which prohibits U.S. government contractors from engaging in discriminatory hiring and employment practices.<sup>187</sup> The USCCB argued that they should be allowed to discriminate against applicants and employees on the basis of sex as it relates to birth control coverage, abortion, sexual orientation, and gender identity.<sup>188</sup> Likewise, the Family Research Council and Alliance Defending Freedom issued a letter in which they stated they would not abide by the D.C. Reproductive Health Non-Discrimination Amendment Act, which prohibits discrimination against employees based on their personal reproductive health care decisions, including decisions about whether and when to utilize birth control or abortions, because the groups believed the law violated RFRA.<sup>189</sup> It seems likely that RFRA will also be used by for-

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<sup>184</sup> *The Hobby Lobby "Minefield": The Harm, Misuse, and Expansion of the Supreme Court Decision*, NATIONAL WOMEN'S LAW CENTER, 1, 1 (2015), [http://www.nwlc.org/sites/default/files/pdfs/nwlc\\_hobbylobbyreport2015.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlc_hobbylobbyreport2015.pdf).

<sup>185</sup> See Interim Order at 1-2, *United States v. Abd Al Hadi Al-Iraqi* (Military Comm'n's Trial Judiciary Guantanamo Bay Nov. 7, 2014) (No. AE021B).

<sup>186</sup> *The Hobby Lobby "Minefield," supra* note 184, at 3-4. "The female guards [] filed an EEO complaint" alleging sex discrimination. *Id.* at 4.

<sup>187</sup> See *id.* at 4 (citing Memorandum from United States Conference of Catholic Bishops to the Office of Fed. Contract Compliance Programs (Mar. 30, 2015) (<http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf>)); see also Kayla Higgins, *Stemming the Hobby Lobby Tidal Wave: Why RFRA Challenges to Obama's Executive Order Prohibiting Federal Contractors from Discriminating against LGBT Employees Will Not Succeed*, 25 B.J. GENDER L. SOC. POL'Y (2016) (arguing the executive order does not impose a substantial burden and the government has a compelling interest in workplace equality).

<sup>188</sup> Memorandum from United States Conference of Catholic Bishops to the Office of Fed. Contract Compliance Programs (Mar. 30, 2015) (<http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf>).

<sup>189</sup> *The Hobby Lobby "Minefield," supra* note 184, at 4 (citing Casey Mattox et al., *Joint Statement Regarding District of Columbia Reproductive Health Non-*

profit employers, like Hobby Lobby, to argue they should be exempt from laws which prohibit employment discrimination against women in much the same way they argued they should be exempt from the contraceptive mandate. The next section explores whether RFRA would apply in this context.

*A. Does RFRA Apply in a Civil Discrimination Suit?*

The RFRA allows “[a] person whose religious exercise has been burdened in violation of this section [to] assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>190</sup> Because the statutory language specifically references relief against the government, there has been some dispute as to whether the language in the statute limits RFRA claims to suits where the government is a party, or whether it can be used as a defense in civil litigation between private parties. In *Hankins v. Lyght*, the Second Circuit Court of Appeals found that in a discrimination suit between private parties, a defendant can argue that RFRA prohibits the application of the anti-discrimination statute at issue.<sup>191</sup>

In *Hankins*, a clergyman who had been forced into retirement alleged discrimination in violation of the Age Discrimination in Employment Act (ADEA).<sup>192</sup> The ADEA is enforced by the EEOC in the same way as Title VII/PDA and the ADA. A claimant must exhaust his or her administrative remedies by first filing a Charge of Discrimination with the EEOC.<sup>193</sup> The EEOC will attempt to mediate the claim and then it will

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*Discrimination Amendment Act* (May 4, 2015), <http://www.adfmedia.org/files/RHNDASTatement.pdf>.

<sup>190</sup> 42 U.S.C. § 2000bb-1(c).

<sup>191</sup> *Hankins v. Lyght*, 441 F.3d 96, 102 (2d Cir. 2006).

<sup>192</sup> *Id.* at 99.

<sup>193</sup> See generally 42 U.S.C. § 2000e-5; see also EEOC Compliance Manual, EEOC (last visited Aug. 1, 2015), [http://www.eeoc.gov/policy/docs/threshold.html#N\\_169\\_](http://www.eeoc.gov/policy/docs/threshold.html#N_169_) (Under Title VII, the ADEA, and the ADA, a charging party must file a charge with the EEOC within either 180 days or 300 days of the alleged unlawful employment practice, depending upon whether the alleged violation occurred in a jurisdiction that has a state or local fair employment practices agency (FEPA) with the authority to grant or seek relief. Where the alleged violation arose in a state or locality that does not have a FEPA with the authority to grant relief, a charge must be filed with the EEOC within 180 days of the violation. Where the alleged violation arose in a state or locality that does have a FEPA, a charge must be filed with the EEOC or a FEPA within 300 days of the violation. Federal courts do not have jurisdiction to hear discrimination claims

investigate the Charge.<sup>194</sup> Once the EEOC concludes its investigation, it may reach a determination that the employer discriminated against the employee.<sup>195</sup> If so, the EEOC may take up the case and attempt to reach conciliation with the employer.<sup>196</sup> If conciliation fails, the EEOC will file a discrimination complaint.<sup>197</sup> Alternatively, after it completes its investigation, the EEOC may decline to take up the case either because it does not make a discrimination determination or because it does not have the resources to pursue the claim.<sup>198</sup> In the latter case, the employee is issued a Right to Sue Letter and may file a suit against the employer in federal court.<sup>199</sup> In *Hankins*, the Second Circuit found that declaring RFRA inapplicable to private discrimination suits would render defendants in discrimination cases subject to different legal standards, depending on whether the plaintiff was the United States (i.e., the EEOC) or a private person.<sup>200</sup> In the ACA cases, the Department of Justice also has taken the position that RFRA can be raised as a defense in suits brought by private parties.<sup>201</sup>

The Sixth and Seventh Circuits, on the other hand, have held that Congress did not intend RFRA to apply in suits between private parties.<sup>202</sup> In *General Conference Corporation of Seventh-Day Adventists v. McGill*, a trademark infringement case, the Sixth Circuit distinguished *Hankins* by explaining that “the *Hankins* majority limited its holding to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and*

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which allege a violation of the ADA, Title VII/PDA, or the ADEA (among others) until the plaintiff has exhausted his or her administrative remedies.).

<sup>194</sup> See EEOC Compliance Manual, *supra* note 193.

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006).

<sup>201</sup> “[I]f plaintiff were sued by a plan participant or beneficiary in the future, plaintiff, in its defense of such an action, would have an opportunity to raise its contention that the contraceptive coverage requirement violates the Religious Freedom Restoration Act[.]” Defendants’ Reply in Support of Their Motion to Dismiss at 4, *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (No. 12-01169).

<sup>202</sup> See generally *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402 (6th Cir. 2010); see also *Listecky v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). A second panel of the Second Circuit has also called the opinion in *Hankins* into question. See *Rweyemamu v. Cote*, 520 F.3d 198, 203-04, n.2 (2d Cir. 2008) (explaining in *dicta*, “we do not understand how [RFRA] can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue[.]”).

the government. . . . There is no EEOC-like agency that can bring trademark-enforcement actions.”<sup>203</sup> Rather, the *McGill* court read the statutory reference to relief against a government as limiting RFRA to proceedings involving the government.<sup>204</sup> The Sixth Circuit pointed out that (i) RFRA requires the government to demonstrate that the statute's “compelling governmental interest” test is satisfied, (ii) “the findings and purposes sections of RFRA” similarly and repeatedly refers to the government, and (iii) the “RFRA's legislative history supports” a conclusion that the statute should not apply to private parties.<sup>205</sup>

As *McGill* acknowledged, the nature of a discrimination claim brought under federal laws enforced by government agencies is fundamentally different than a claim brought under trademark law.<sup>206</sup> A claim brought under Title VII, the PDA, or the ADA could be brought by the EEOC, or if the EEOC elects not to act, by a private plaintiff stepping into the shoes of the government to enforce federal law. It is clear that a defendant can raise RFRA in an anti-discrimination suit where the EEOC argues the case on behalf of the claimant.<sup>207</sup> Barring the employer from utilizing RFRA defense where the EEOC declines to act, could mean that an employer will be subject to differing obligations as to its employees depending upon the resources or the strategic choices of the EEOC. In order to avoid disparate outcomes, the same rule of law should apply regardless of whether the EEOC seeks to enforce an employee's private remedy or the employee acts to enforce his or her private remedy under Title VII and other anti-discrimination laws enforced by the EEOC.<sup>208</sup>

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<sup>203</sup> *McGill*, 617 F.3d at 411.

<sup>204</sup> *Id.* at 410.

<sup>205</sup> *Id.* at 410-11.

<sup>206</sup> See, e.g., *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-21 (9th Cir. 2000) (discussing the likelihood that Congress did not envision that RFRA would apply to copyright suits between private parties).

<sup>207</sup> See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (pre-*City of Boernes*, analyzing RFRA and determining that it precluded application of Title VII to a nun alleging gender discrimination).

<sup>208</sup> Note that under the pre-*Smith* case law, Free Exercise claims, similar in nature to RFRA claims, would have applied to private lawsuits. See Eugene Volokh, *Many Liberals' (Sensible) Retreat from the Old Justice Brennan/ACLU Position on Religious Exemptions*, THE WASHINGTON POST (Apr. 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/01/many-liberals-sensible-retreat-from-the-old-justice-brennanacu-position-on-religious-exemptions/>.

*B. Should a RFRA Defense be Successful?*

Pursuant to the holdings of *Hobby Lobby*, a for-profit corporation can now seek an exemption under RFRA from anti-discrimination laws if its owners have religious objections. Assuming that a RFRA defense could be used by employers to defend discriminatory employment decisions, such a defense should not be successful. To meet the substantial burden test outlined in *Hobby Lobby*, all the business' owners need to do is truthfully assert that they believe their faith calls on them not to employ persons who have certain characteristics or engage in certain conduct. Then, the government or the single plaintiff stepping into the shoes of the government must show that the government has a compelling interest in eliminating discrimination in employment and that the anti-discrimination prohibition at issue meets the "exceptionally demanding" least-restrictive-means test.<sup>209</sup> The RFRA defense in the employment context should not be successful because any religious beliefs held by for-profit employers are not substantially burdened by current federal anti-discrimination law. Even if that were the case, the government has a compelling interest in prohibiting sex discrimination in employment and current law is the least restrictive means of effectively ending sex discrimination in employment.

Private employers are not substantially burdened by anti-discrimination law. In *Hobby Lobby*, the majority failed to analyze whether the petitioners' sincerely held beliefs were substantially burdened by the neutral application of the ACA. Instead, it conflated the determination that the petitioners had a sincerely held belief with the Court's required inquiry into whether the law substantially burdened that belief. The majority simply accepted as fact the petitioner's assertion that the law substantially burdened their beliefs because if they failed to conform to the law they could face significant financial penalty.<sup>210</sup> The majority's conclusion that *Hobby Lobby's* beliefs were substantially burdened cannot be reconciled with the Court's pre-*Smith* jurisprudence which required the free exercise claimant to show that he or she was forced to violate a command or prohibition of the claimant's faith.<sup>211</sup> Pre-*Smith*, the Court refused to grant

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<sup>209</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

<sup>210</sup> *Id.* at 2775-76.

<sup>211</sup> *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that the government did not impair Native Americans' free exercise of religion by assigning a Native American child a Social Security number despite the Native Americans' stated belief to the contrary); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (permitting the federal government to build a logging road through government land that Native Americans had long held sacred and used for worship because the severe adverse effects on the Native Americans' practice of their

exemptions where the effect on free exercise was indirect, even where it made religious practice much more difficult, particularly if granting an exemption would interfere with the government's ability to operate.<sup>212</sup>

Rather than focusing on the burden of potential financial penalties imposed on Hobby Lobby if it broke the law, Justice Ginsburg analyzed whether complying with the law itself would substantially burden Hobby Lobby's religious beliefs.<sup>213</sup> Concluding it would not, Justice Ginsburg opined, "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."<sup>214</sup> While private employers may be burdened directly by antidiscrimination laws, that burden is not substantial when weighed against the employer's election to engage in a secular, for-profit enterprise. Anti-discrimination laws are limited so they do not reach small employers, such as family businesses where the application of anti-discrimination law might legitimately create a serious and significant disruption.<sup>215</sup> For others to which the law applies, an employer's sincerely held beliefs, whether they sound in a recognized religion or purely as a matter of personal conviction,<sup>216</sup> are not unduly burdened by the uniform prohibition of discrimination applied to all private employers.<sup>217</sup> Requiring a private employer "to do something in the commercial sphere that is required of nearly all such businesses ordinarily does not require the owner to abandon his religious tenets, to endorse conduct or express an opinion that is contrary to his religious beliefs, or to modify his private conduct as a religious observant."<sup>218</sup>

Even assuming *arguendo* that an employer's sincerely held beliefs were substantially burdened by anti-discrimination law, a RFRA challenge in the employment context should still fail. Given the long history of sex discrimination in this country, the government has a compelling interest in promoting women's equal citizenship in American society, whether that is

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religion was incidental and not out of any attempt to coerce Native Americans to act in violation of their beliefs).

<sup>212</sup> See *Lyng*, 485 U.S. at 465.

<sup>213</sup> *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

<sup>214</sup> *Id.*

<sup>215</sup> Anti-discrimination laws, such as Title VII/PDA and the ADA, only apply to employers with 15 or more employees.

<sup>216</sup> "Separating moral convictions from religious beliefs would be of questionable legitimacy." *Hobby Lobby*, 134 S. Ct. at 2789, n.6 (Ginsburg, J., dissenting) (citing *Welsh v. United States*, 398 U.S. 333, 357-58 (1970) (Harlan, J., concurring in result)).

<sup>217</sup> See *Hobby Lobby*, 134 S. Ct. at 2783 (stating in *dicta* that "prohibitions on racial discrimination [in hiring] are precisely tailored to achieve that critical goal").

<sup>218</sup> *Grote v. Sebelius*, 708 F.3d 850, 860 (7th Cir. 2013) (Rovner, J., dissenting).

in the area of public accommodation, equal access to governmental programs, or in private employment. Women have been excluded “from key sites of citizenship for most of American history . . . accomplished in significant part by requiring that they occupy the role of caregivers, not breadwinners.”<sup>219</sup> Reproductive freedom, such as the ability to control whether and when to bear children, has increased the ability of women in the U.S. to become more educated, to participate in the labor force, to increase their average earnings, and to help close the wage gap between men and women.<sup>220</sup> The Supreme Court has recognized “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>221</sup>

The Supreme Court also has clearly held that the government has a compelling interest in ending sex discrimination.<sup>222</sup> In *Roberts v. United States Jaycees*, the Supreme Court held that Minnesota’s prohibition of gender discrimination in places of public accommodation did not violate the Jaycees’ First Amendment rights because the rights arising from the First Amendment, there, the right to associate, are not “absolute,” and that “[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive[.]”<sup>223</sup> The Court explained,

this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their

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<sup>219</sup> Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1037 (2015).

<sup>220</sup> See generally Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of U.S. Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION J. 465 (April 2013).

<sup>221</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>222</sup> See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); see also *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); see also *United States v. Virginia*, 518 U.S. 515, 532 (1996) (noting that fundamental principles are violated when “women, simply because they are women[.]” are denied “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities[.]”); see also *Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento Cnty.*, 85 P.3d 67, 92 (Cal. 2004) (“The [contraceptive coverage law] serves the compelling state interest in eliminating gender discrimination.”).

<sup>223</sup> *Roberts*, 468 U.S. at 623.

individual dignity and denies society the benefits of wide participation in political, economic, and cultural life. . . . Assuring women equal access to [leadership skills, business contacts, and employment promotions] clearly furthers compelling state interests.<sup>224</sup>

Courts have also recognized that prohibitions on sex discrimination in employment serve a compelling state interest. In *McLeod v. Providence Christian School*, the Michigan Court of Appeals determined that a religious school's policy of not employing on a full-time basis women with preschool-age children was an obvious violation of Title VII because there was no similar policy which prohibited male employees with preschool-age children from full-time work.<sup>225</sup> The school challenged the application of Title VII, alleging that it violated the school's First Amendment right to religious expression.<sup>226</sup> The court declined to grant an exemption to Title VII, holding "[j]ust as ending employment discrimination is a compelling state interest, elimination of discrimination on the basis of sex is a compelling state interest. [Title VII] is expressly designed to further these purposes."<sup>227</sup> Likewise, other anti-discrimination laws which have as their purpose and effect to end sex discrimination in employment, such as the PDA, the ADA, and the FMLA, serve this compelling state interest.

Further, there is no less restrictive means to accomplish the equal opportunity goals set forth in anti-discrimination law. As Justice Ginsburg pointed out in her dissent in *Hobby Lobby*, "[f]ederal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes."<sup>228</sup> Likewise, the fact that there currently exist some exemptions from anti-discrimination law for religious employers should not open the floodgates to a tidal wave of exemptions that would eradicate the purpose and effect of anti-discrimination law. Religious business owners are not different than any other business owner "who must, in compliance with a variety of statutory mandates, take actions that may be inconsistent with their" personal

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<sup>224</sup> *Id.* at 625-26.

<sup>225</sup> *McLeod v. Providence Christian Sch.*, 408 N.W.2d 146, 150 (Mich. Ct. App. 1987).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 151-52; *see generally* *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (holding that the state Human Rights Act imposed a burden on the business owners' free exercise of religion but that the burden was justified by the state's compelling interest in prohibiting discrimination in employment).

<sup>228</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2800 (2014) (Ginsburg, J., dissenting).



beliefs.<sup>229</sup> Thus, even where a private employer may experience some burden by being forced to comply with statutes which prohibit discrimination on the basis of sex, that burden should be viewed as minimal when weighed against the employer's decision to enter into a secular, for-profit business, or it should be outweighed by the state's compelling interest in eradicating sex discrimination in employment which "cannot be achieved through means significantly less restrictive[.]"<sup>230</sup>

#### IV. THE IMPACT OF EMPLOYER CONSCIENCE EXEMPTIONS

*Hobby Lobby* represents a departure from the general rule that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."<sup>231</sup> The law at issue in *Hobby Lobby* sought to mitigate sex discrimination in healthcare by reducing the amount women pay out of pocket to cover reproductive related healthcare. It also sought to remedy the harm caused by employers who, by failing to offer adequate insurance, imposed externalities on their employees, other employers (as workers with inadequate insurance enrolled in spousal plans), and society at large (as workers turned to public insurance).<sup>232</sup> Instead of upholding this generally applicable law, the majority of the Court created a corporate religious liberty doctrine that might exempt for-profit employers from generally applicable anti-discrimination laws.

Courts have previously recognized a religious exemption "cannot

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<sup>229</sup> *Grote v. Sebelius*, 708 F.3d 850, 859 (7th Cir. 2013) (Rovner, J., dissenting); see *McLeod*, 408 N.W.2d at 148-52 (holding that the application of Title VII did not unduly interfere with the school's religious belief that "a woman's place is in the home raising children"). The court went on to find that Title VII "employs the least [restrictive] means to further" the state's compelling interest in eradicating sex discrimination. *Id.* at 152. Indeed, there is no less restrictive means of ending sex discrimination in employment than laws which expressly prohibit it (Title VII/PDA) and laws which expressly prohibit discrimination and retaliation against women who engage in reproductive activity (FMLA, ADA). There is no alternative which will guarantee participation in the economy or prevent the dignitary harms imposed by sex discrimination. See *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

<sup>230</sup> *Roberts*, 468 U.S. at 623.

<sup>231</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982) ("Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States v. Lee*[.]” *Hobby Lobby*, 134 S. Ct. at 2803 (Ginsburg, J., dissenting)).

<sup>232</sup> Sepper, *supra* note 141, at 1463.

be accommodated<sup>233</sup> with prevention of discrimination, and an exemption “would seriously undermine the means chosen by Congress to combat discrimination.”<sup>234</sup> The employer conscience exemption set forth in *Hobby Lobby* should not be expanded to accommodate new religious objections to anti-discrimination law. In *Roberts v. United States Jaycees*, the Court emphasized “the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”<sup>235</sup> Anti-discrimination laws have the aim of remedying the societal and individualized harms caused by employers who unfairly treat women based on stereotypes about their role in society.<sup>236</sup>

Many religious beliefs form the basis for the sex stereotypes that have held women back from equal treatment in society and which have historically been used to justify discrimination in the workplace.<sup>237</sup> Religious beliefs have long been invoked to justify restrictions on women’s roles in employment and to control their sexuality, often because of the belief that it is “the law of the Creator” that “[t]he paramount destiny and mission of woman [is] to fulfill the noble and benign offices of wife and mother.”<sup>238</sup> These beliefs are embedded in American culture and can be seen whenever the courts turn a blind eye to the reality that discrimination on the basis of contraceptive use, abortion, pregnancy, or any other female reproductive function, is sex discrimination.<sup>239</sup> Anti-discrimination laws which have challenged those stereotypes and opened opportunities to those

<sup>233</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

<sup>234</sup> *EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

<sup>235</sup> *Roberts*, 468 U.S. at 626 (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam)).

<sup>236</sup> See generally Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL’Y 705, 708-16 (2014) (arguing harm to dignity from accommodations in anti-discrimination laws); see also Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177 (2015) (countering four rationales for religious accommodations).

<sup>237</sup> Brief Amici Curiae of Julian Bond, the ACLU et al. in Support of the Government, at 20-26, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356).

<sup>238</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring); see generally Sarah M. Stephens, *The Search for Authenticity and the Manipulation of Tradition: Restrictions on Women’s Reproductive Rights in the United States and Egypt*, 19 CARDOZO J.L. & GENDER 325 (2013) (analyzing how politicians use religious rhetoric to limit women’s reproductive rights and access to reproductive healthcare).

<sup>239</sup> See *supra* Part I.A.; see also Stephens, *supra* note 16, at 414-15.

who have historically been excluded should not be undermined by religious accommodations that will once again legitimize discrimination against women.

## V. CONCLUSION

The creation of an employer conscience exemption in *Hobby Lobby* has opened the door for employers to avoid the promise of equality set forth in anti-discrimination laws. Accommodating for-profit employers in this way will undermine the gains achieved by anti-discrimination law over the last fifty years since their enactment, ripping hard won gains from the hands of women who have still not yet achieved equality in the workplace. In order to stop the tide of this new corporate religious liberty interest, courts must distinguish the majority's reasoning in *Hobby Lobby* and recognize that the state's compelling interest in ending sex discrimination outweighs the arguable burden on an employer's beliefs. For employers who have willingly entered the marketplace, offering equal employment opportunities to women simply must be the cost of doing business.