

# RELIGIOUS LIBERTY, IMMIGRATION SANCTUARY, AND UNINTENDED CONSEQUENCES FOR REPRODUCTIVE AND LGBTQ RIGHTS

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## *Abstract*

*The idea that people in the United States are free to exercise their religion has existed as long as the country itself. Presently, in the aftermath of the presidential election of Donald Trump, there has been renewed interest among religious congregations in providing sanctuary for undocumented immigrants at risk of deportation. This note considers the idea that potential religious liberty claims could be made by faith-based communities to provide sanctuary. It pays particular attention to potential unintended consequences those claims could have for reproductive and LGBTQ rights. This note proposes that any religious liberty claims made in the name of sanctuary should 1) be evaluated in the domain of antidiscrimination law and not analogized to much broader “conscience clauses”; 2) advocate for a narrower construction of religious liberty jurisprudence and religious liberty-protecting statutes; and 3) push courts to evaluate the sincerity of sincerely held religious beliefs.*

## INTRODUCTION

Jeanette Vizguerra, a forty-five-year-old mother of four, walked into a Colorado church in February 2017, a few weeks after the inauguration of President Donald Trump. Vizguerra went back to her Colorado home—eighty-six days later.

Vizguerra spent three months between two Denver churches, First Unitarian Society and First Baptist, avoiding Immigration and Customs Enforcement (ICE) officers.<sup>1</sup>

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<sup>1</sup> Noelle Phillips, *Jeanette Vizguerra leaves sanctuary after 86 days avoiding immigration authorities*, DENVER POST (May 12, 2017), <https://www.denverpost.com/2017/05/12/jeanette-vizguerra-arturo-hernandez->

Vizguerra, an undocumented immigrant, has lived in the United States since 1997. Three of her children—ages six, ten, and twelve at the time—were born in the United States.<sup>2</sup> Her adult daughter has Deferred Action for Childhood Arrivals (DACA) status<sup>3</sup> and a two-year-old son. Vizguerra had been granted multiple stays of removal, postponing her deportation, since pleading guilty to using a fake social security number in an attempt to work in 2009.<sup>4</sup> Her lawyer applied for a renewal of her stay on December 6, 2016, but her stay of removal expired on February 7, 2017.<sup>5</sup> Rather than going to a scheduled meeting with ICE officials, Vizguerra went to church.<sup>6</sup> She declared sanctuary at First Unitarian Society. After eighty-

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garcia-stay-deportation/ [https://perma.cc/KWF7-U2D9].

2 Kieran Nicholson, *Mother of four fears deportation, declares sanctuary at Denver church*, DENVER POST (Feb. 15, 2017), <https://www.denverpost.com/2017/02/15/mother-deportation-sanctuary-at-denver-church/> [https://perma.cc/W7NQ-A3RF].

3 DACA was established under President Barack Obama on June 15, 2012, as then-Secretary of Homeland Security Janet Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” establishing the DACA program. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), <https://www.dhs.gov/topic/deferred-action-childhood-arrivals-daca> [https://perma.cc/9VF8-G4CM]. Certain people who came to the United States as children (prior to age 16) and met several guidelines could request consideration of deferred action for a period of two years, subject to renewal. They were also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status. CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [https://perma.cc/BMC7-8544]. DACA has been a target of the Trump administration. On September 5, 2017, Attorney General Jeff Sessions announced that President Trump was rescinding DACA, which meant nearly 800,000 young adults who had been brought to the United States as children would become eligible for deportation as of early March 2018. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [https://perma.cc/3BDK-TUN2]. On January 9, 2018, Judge William Alsup of the Northern District of California granted a preliminary injunction ordering the Trump administration to “maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollment.” *Regents of Univ. of California v. United States Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 339144, at \*27 (N.D. Cal. Jan. 9, 2018). No new applications for DACA status are being accepted at this time.

4 Nicholson, *supra* note 2; Joel Rose, *Sanctuary Churches Brace For Clash With Trump Administration*, NPR (Feb. 16, 2017), <https://www.npr.org/2017/02/16/515510996/colorado-church-offers-immigrant-sanctuary-from-deportation> [https://perma.cc/5TWY-BLKD].

5 Nicholson, *supra* note 2.

6 *Id.*

six days, she was granted another stay of deportation, valid through March 15, 2019.<sup>7</sup>

For First Unitarian Society’s Reverend Mike Morran, the duty to shelter Vizguerra was a moral one. “It is our position as a people of faith that this is sacred and faithful work,” he said at the press conference in which Vizguerra announced her decision to seek sanctuary.<sup>8</sup> The fact that offering sanctuary to Vizguerra and helping her evade immigration authorities violated federal law did not deter Morran from fulfilling what he saw as his moral duty.<sup>9</sup>

Vizguerra is not the only undocumented immigrant who has sought sanctuary rather than face deportation, and the two churches in Denver are part of a much larger network of faith communities willing to defy the law to help this population.<sup>10</sup> More than 800 religious congregations—up from about 400 pre-election—in the United States are engaged in supporting the sanctuary movement in some way.<sup>11</sup>

The federal government does not have to respect a claim for sanctuary, though ICE official policy calls for avoiding enforcement actions, like arrests and searches, at “sensitive locations” like schools, hospitals, and places of worship.<sup>12</sup> There is no guarantee the

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7 Phillips, *supra* note 1.

8 Rose, *supra* note 4.

9 8 U.S.C. § 1324(a)(1)(A)(iii) (2012) criminalizes any person who “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place” or engages in a conspiracy or aids and abets any of the previous acts.

10 See, e.g., Jenn Fields, *Colorado now has more immigrants in church sanctuary than any other state*, DENVER POST (Oct. 25, 2017), <https://www.denverpost.com/2017/10/25/colorado-undocumented-immigrants-in-church-sanctuary/> [<https://perma.cc/52MB-82PV>] (listing five people in Colorado, four people in Arizona, and three each in New Mexico, North Carolina, Illinois, and Massachusetts as known sanctuary seekers in religious spaces at the time); Martha Quillin, *The US ordered this undocumented worker out. Now a Raleigh church has taken him in*, RALEIGH NEWS & OBSERVER (Oct. 10, 2017), <http://www.newsobserver.com/news/politics-government/article178135416.html> [<https://perma.cc/MN37-TG2R>] (detailing Eliseo Jimenez’s sanctuary in Umstead Park United Church of Christ in Raleigh, N.C.).

11 Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES (Dec. 27, 2016), <https://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html> [<https://perma.cc/CH79-L746>]; Dwyer Gunn, *The sanctuary movement: how religious groups are sheltering the undocumented*, GUARDIAN (Feb. 8, 2017), <https://www.theguardian.com/us-news/2017/feb/08/sanctuary-movement-undocumented-immigrants-america-trump-obama> [<https://perma.cc/S3VP-5C44>].

12 U.S. IMMIGRATION & CUSTOMS ENF’T, POLICY NO. 10029.2, ENFORCEMENT ACTIONS AT OR FOCUSED ON

Trump administration will continue to follow the policy.<sup>13</sup> Given the unpredictability of the current administration, more undocumented immigrants might opt for sanctuary in a house of worship rather than risk deportation with ICE.

The intersection of religious liberty and immigration pits two of the Trump administration's prominent policy goals against each other. The administration has issued executive orders focused on both the promotion of religious liberty<sup>14</sup> and increased immigration enforcement and deportation.<sup>15</sup> The idea of freedom of religious exercise in the United States has existed as long as the country itself. And we have been debating exactly what that means for just as long.<sup>16</sup> Opinions on the place of religion in secular society have changed significantly over time. In 1971, Chief Justice Burger wrote for the Court when he said, "The Constitution decrees that religion must be a private matter for the individual, the family, and institutions of private choice," such as churches, mosques, and temples.<sup>17</sup> This view has eroded over time, with religious liberties seeping further and further into secular spaces.<sup>18</sup>

This Note considers the idea that potential religious liberty claims could be made by faith-based communities to provide sanctuary for undocumented immigrants and pays par-

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SENSITIVE LOCATIONS (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> [<https://perma.cc/XK4H-A6K9>].

13 Indeed, on at least one occasion ICE officers disregarded the policy, as they arrested a ten-year-old with cerebral palsy after her emergency gallbladder surgery finished. *See* Vivian Yee & Caitlin Dickerson, *10-Year-Old Immigrant Is Detained After Agents Stop Her on Way to Surgery*, N.Y. TIMES (Oct. 25, 2017), <https://www.nytimes.com/2017/10/25/us/girl-cerebral-palsy-detained-immigration.html> [<https://perma.cc/G4HY-ERNJ>].

14 Establishment of a White House Faith and Opportunity Initiative, 83 Fed. Reg. 20715 (May 8, 2018); Promoting Free Speech and Religious Liberty, 82 Fed. Reg. 21675 (May 4, 2017).

15 Affording Congress an Opportunity To Address Family Separation, 83 Fed. Reg. 29435 (June 25, 2018); Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

16 *See* Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 140 (2009) [hereinafter Laycock, *Religious Exemption*] (noting that debates swirled in the seventeenth century as the government exempted Quakers from swearing oaths).

17 *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

18 *See, e.g.,* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding that the Missouri Department of Natural Resources policy of not granting government funds to religious organizations violated the free exercise rights of a church); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (holding that town's practice of opening board meetings with a prayer did not violate the Establishment Clause).

particular attention to potential unintended consequences those claims could have in the areas of reproductive and LGBTQ rights. Arguments to justify religious liberty in the name of sanctuary could be used in the future by different parties in attempts to limit reproductive rights<sup>19</sup> and discriminate against LGBTQ persons.<sup>20</sup> The announcement by President Trump of the creation of a new oversight entity in the Department of Health and Human Services, the Conscience and Religious Freedom Division, is an example of this religious-liberty-as-discrimination phenomenon.<sup>21</sup> This Note proposes that any religious liberty claims made in the name of sanctuary should 1) be evaluated in the domain of antidiscrimination law and not analogized to much broader “conscience clauses”;<sup>22</sup> 2) advocate for a narrower construction of religious liberty jurisprudence and religious liberty-protecting statutes, such as the Religious Freedom Restoration Act (RFRA); and 3) push courts to evaluate the sincerity of sincerely held religious beliefs.

Part I establishes the First Amendment protections afforded to religion through the Free Exercise Clause and the Establishment Clause, which also act to make sure that no one religion receives preferential treatment to others. It then turns to the relevant history of the original sanctuary movement of the 1980s and the subsequent renewal in interest

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19 See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding contraceptive mandate imposes substantial burden on religious exercise of for-profit closely held corporations); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47838 (Oct. 13, 2017); *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47792 (Oct. 13, 2017) (rolling back the Affordable Care Act’s contraception mandate).

20 See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (vacating lower court ruling that the First Amendment does not grant a retail bakery the right to violate Colorado’s equal-service requirement by refusing to sell a wedding cake of any kind to any same-sex couple); *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (vacating and remanding lower court decision, in light of *Masterpiece Cakeshop*, that used rational basis review to deny free exercise challenge to Washington’s neutral and generally applicable antidiscrimination law); *Complaint at 1, Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (challenging the state’s practice of permitting state-funded child placement agencies to use religious criteria to turn away lesbian and gay prospective foster and adoptive parents).

21 The move expands the right of health care workers to object to performing procedures like abortion and gender reassignment surgery. It is not hard to imagine a doctor denying a lesbian couple fertility treatments or pharmacists refusing to fill prescriptions for contraceptives. See Robert Pear & Jeremy W. Peters, *Trump Gives Health Workers New Religious Liberty Protections*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/health-care-office-abortion-contraception.html> [<https://perma.cc/562V-Y7XH>].

22 Conscience clauses allow doctors and other health professionals to avoid providing or assisting in reproductive activities, most commonly sterilization, abortion, and contraception. See Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 42 (2015) [hereinafter Tebbe, *Religion and Marriage*]; *infra* quote accompanying note 243.

in protecting religious liberties in the 1990s after the Supreme Court's decision in *Employment Division v. Smith*.<sup>23</sup> This upwelling of interest resulted in the Religious Freedom Restoration Act of 1993 (RFRA), a widely supported bipartisan effort that codified the idea that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.”<sup>24</sup> A compelling government interest is protecting “third-parties”—“persons who derive no benefit from an exemption because they do not believe or engage in the exempted religious practices”<sup>25</sup>—from burdens as a result of an exemption.<sup>26</sup> This Note then chronicles the subsequent modifications to RFRA, including the Court’s decision that it was unconstitutional as applied to the states,<sup>27</sup> and outlines the status of religious freedom jurisprudence now. RFRA applies to the federal government, and the twenty-one states that passed their own RFRA-like laws<sup>28</sup> have a similar governing standard. Otherwise, the Court’s free exercise line of cases, including *Smith*, remains the relevant standard.<sup>29</sup> RFRA was universally praised at the time it was passed, but that support splintered a few years later as the idea of marriage equality for LGBTQ persons began to gather more support

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23 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability not itself directed against religion—in other words, judges no longer needed to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws because the fact that the law was constitutional barred any free exercise challenge).

24 42 U.S.C. § 2000bb-1(a), (b)(2) (2012).

25 Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 323, 323 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

26 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2781 n.37 (“It is certainly true that in applying RFRA courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries. That consideration will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.”) (internal citations and quotations omitted); Gedicks & Van Tassell, *supra* note 25, at 327.

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

28 *See infra* note 136.

29 *See Laycock, Religious Exemption, supra* note 16, at 142–43 (“*Smith* is still the law of the federal Free Exercise Clause”). It is possible that a state’s judicial decision has mandated a standard falling between *Smith* and RFRA for evaluating religious exemption claims, but an analysis of the state of religious liberty law in each of the fifty states is beyond the scope of this Note.

and opponents of marriage equality began using claims of religious freedom to resist it.<sup>30</sup>

Part II looks at how RFRA has developed into a sword to attack reproductive and LGBTQ rights. To do so, this Note closely examines the decision in *Burwell v. Hobby Lobby*,<sup>31</sup> which brought an unprecedented expansion to RFRA's protection by holding that closely held<sup>32</sup> for-profit companies were "persons" that could have sincerely held religious beliefs covered under RFRA. The decision, which allowed those companies to claim an exemption from the Affordable Care Act of 2010's contraception mandate,<sup>33</sup> set the groundwork for further erosion of birth control coverage for women and provided a blueprint for businesses to challenge antidiscrimination provisions protecting LGBTQ persons. Of all the issues with the *Hobby Lobby* decision, the Court gutting the third-party burden analysis of its importance could be the most damaging going forward. By discussing, in detail, the reasoning and implications of *Hobby Lobby*, this Note provides an example of a religious liberty claim extended too far, and *Hobby Lobby* should be fresh in the minds of any litigator or activist preparing to use religious liberty claims to attempt to help undocumented immigrants. A case decided by the Supreme Court in June 2018, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>34</sup> threatens to further expand religious freedom in the future at the expense of third parties and allow for-profit companies to refuse to serve the LGBTQ community.

Part III offers a proposed framework, as stated above, for any potential religious liberty claims made in the name of sanctuary. Such claims are not merely theoretical. An Arizona man volunteering with No More Deaths, a humanitarian organization affiliated with the Unitarian Universalist Church of Tucson, has asserted RFRA as a defense<sup>35</sup> to crimi-

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30 See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 159–160 (2014); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 846 (2014) [hereinafter Laycock, *Culture Wars*].

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

32 The IRS defines a corporation as "closely held" if "1. It is not a personal service corporation" and "2. At any time during the last half of the tax year, more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals." "Individual" includes certain trusts and private foundations. Corporations, I.R.S. Pub. No. 542, Cat. No. 150720 (Jan. 8, 2017), <https://www.irs.gov/pub/irs-pdf/p542.pdf> [https://perma.cc/Z6PS-NDPL].

33 42 U.S.C. § 300gg-13(a)(4) (2012).

34 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

35 Motion to Dismiss Counts 2 and 3, *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. April 2, 2018).



nal charges of violating the anti-harboring provision of Immigration and Nationality Act (INA)<sup>36</sup> for allegedly providing two undocumented migrants food, water, beds, and clean clothes at a private residence that serves as an aid station in the desert over an approximate three-day period.<sup>37</sup> His trial is set for May 29, 2019.<sup>38</sup> This Note’s suggestions for potential religious liberty claims should help prevent any further erosion of antidiscrimination law or reproductive rights in the name of religious liberty. Properly framed religious liberty claims could also re-insert the proper weighing of third-party burdens into the free exercise and the RFRA analysis.

### I. Sanctuary and Religious Liberty: A Guided History

This part establishes the Constitutional framework for the freedom of religion found in the Free Exercise and Establishment Clauses of the First Amendment. Section I.A. traces the origins of the sanctuary movement in the immigration context. Section I.B. details the rise of religious liberty claims in the 1990s, focusing on RFRA as the crowning achievement of that movement. A close analysis of RFRA is provided, including its subsequent modifications, as many scholars and courts have disagreed over the rigor of its test and what behaviors it should cover. Section I.C focuses on the splintering of the RFRA coalition that had come together to support it.

It is true that many scholars consider the religious freedom jurisprudence in the United States “muddled” and “incoherent” and any solutions “patternless.”<sup>39</sup> Indeed, the doctrine

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36 8 U.S.C. § 1324(a)(1)(a)(iii) (2012); *see supra* text accompanying note 9.

37 Criminal Complaint, United States v. Warren, No. 4:18-cr-00223-RCC-BPV (D. Ariz. Jan 18, 2018).

38 Status Conference, United States v. Warren, No. 4:18-cr-00223-RCC-DTF (D. Ariz. Jan. 29, 2019). Warren’s motion to dismiss based on RFRA was denied due to unresolved issues of fact. United States v. Warren, No. 4:18-cr-00223-RCC-BPV, 2018 WL 4403753, at \*4–5 (D. Ariz. Sept. 17, 2018). The court did not reach the merits of his RFRA defense. *Id.* at \*5.

39 *See* Nelson Tebbe, *How to Think About Religious Freedom in an Egalitarian Age*, 93 U. DET. MERCY L. REV. 353, 353–54 (2016) [hereinafter Tebbe, *How to Think*] (“Academic works about religious freedom in the United States often begin with a warning that the jurisprudence is in a state of crisis . . . . A group of skeptics has been arguing that a rational approach to religious freedom is *necessarily* impossible. They believe that the American discourse on free exercise and nonestablishment is broken and cannot be fixed. All we can do is muddle through, on this view, seeking patternless solutions to particular, ground-level disputes.”); *see also* STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 10 (2014) (noting that the jurisprudence on religious freedom is widely seen to be “incoherent”); Stanley Fish, *Where’s the Beef?*, 51 SAN DIEGO L. REV. 1037, 1043 (2014) (arguing that there is no satisfactorily rational way of dealing with cases concerning free exercise and nonestablishment).



shifts as the composition of the Court changes, and sometimes those shifts produce seemingly inconsistent results when looking to past precedent.<sup>40</sup> This Note will aim to provide a brief introduction to the Constitutional framework to establish a baseline knowledge for the discussion of RFRA that follows.

The First Amendment states in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>41</sup> From this sentence comes both the Establishment Clause and the Free Exercise Clause. Under the First Amendment’s Establishment Clause, the government may choose to lift regulatory burdens from religious actors, but not if providing those accommodations shifts burdens onto third parties—this type of shift would improperly impose the faith of one private party onto another, violating the government’s obligation to not favor one religion over another.<sup>42</sup> Additionally, believers of any religion cannot be favored over nonbelievers.<sup>43</sup> The Court has affirmed this interpretation of the Establishment clause: “The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”<sup>44</sup>

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40 A comparison of *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *United States v. Lee*, 455 U.S. 252 (1982) is illustrative. In *Yoder*, a Wisconsin state law requiring school attendance up until age sixteen was held to violate the Free Exercise Clause when challenged by members of the Amish religion. The families argued that their religion required their children to focus on uniquely Amish values and beliefs during their formative adolescent years. The Court held that the government’s interest in universal education was not compelling enough to override the free exercise rights. *Lee* dealt with the same religious interest—but came out the opposite way. In *Lee*, the court ruled against an Amish employer, with only Amish employees, who objected to both withholding social security taxes from his employees and paying the employer’s share of such taxes, claiming that both the payment and receipt of such benefits violated his Amish faith and thus violated his right to practice his religion under the Free Exercise Clause. The Court held that this limitation the social security system put on religious liberty was constitutional because of the overriding governmental interest in a sound tax system (it took some mental gymnastics to decide that social security taxes could not be distinguished from general taxes). “Wisconsin’s interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes.” *Lee*, 445 U.S. at 263 n.3 (Stevens, J., concurring); see also *infra* Section II.A and its discussion of the problems with *Hobby Lobby* and *Lee*.

41 U.S. CONST. amend. I.

42 Tebbe, *Religion and Marriage*, *supra* note 22, at 52.

43 *Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (“ . . . a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.”).

44 *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (internal citations omitted).

The Free Exercise Clause is also concerned with religious accommodations relieving government-imposed burdens on the exercise of religion by shifting those burdens onto others.<sup>45</sup> Exercise includes belief and, since 1940, limited types of conduct.<sup>46</sup> The Court has long held that government may accommodate religious practices without violating the Establishment Clause.<sup>47</sup> Additionally, the Court has held that not all burdens on religion are unconstitutional.<sup>48</sup> “There is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”<sup>49</sup>

Religious accommodation under the Free Exercise Clause can be “mandatory” or “permissive.”<sup>50</sup> Accommodation is mandatory when religion is singled out for special burdens not imposed on comparable secular conduct.<sup>51</sup> These mandatory accommodations are required by the Constitution (under the Free Exercise Clause) and thus not subject to Establishment Clause scrutiny. These cases are rare, and the leading case is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>52</sup>

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45 See *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When 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. Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”).

46 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–89 (1990). *Cantwell v. Connecticut*, 310 U.S. 296 (1940), marked the first time the Supreme Court included religiously motivated conduct under the umbrella of the Free Exercise Clause, and, even then, only to a limited degree. *Id.* at 303–04 (“Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”).

47 *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144–145 (1987)).

48 *Lee*, 455 U.S. at 257.

49 *Cutter*, 544 U.S. at 713 (internal citations and quotations omitted).

50 Gedicks & Van Tassell, *supra* note 25, at 327.

51 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

52 *Id.* at 523 (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”). In *Church of the Lukumi*, a Florida city tried to prevent the Santeria religion from establishing a house of worship in the city by enacting ordinances specifically aimed at prohibiting religious animal sacrifice, which was central to the practice of the religion. *Id.* at 524–26. The statutes excluded kosher slaughter and all lawful secular animal killing from

Much more common are permissive accommodations. Given that these accommodations are, necessarily, optional, they are subject to the limitations of the Establishment Clause.<sup>53</sup> A leading case is *Estate of Thornton v. Caldor*.<sup>54</sup> In *Caldor*, a Connecticut state statute provided every Sabbath observer an absolute right to be excused from working on his or her Sabbath.<sup>55</sup> The Court held this unconstitutional under the Establishment Clause, noting that the statute favored some religions over others and Sabbath observers over those who do not observe. Significant burdens would be placed on the employees—the third parties—that had to work in place of Sabbath observers.<sup>56</sup>

This religious freedom jurisprudence played a role in the original sanctuary movement and the later passage of RFRA.

### A. The Birth of the Immigration Sanctuary Movement in the 1980s

The idea of sanctuary has origins that date back to both biblical times and ancient secular societies.<sup>57</sup> The term “sanctuary” first appeared in the immigration context in the 1980s, as churches and cities made efforts to provide various forms of assistance to asylum applicants from Central America.<sup>58</sup> The sanctuary concept had different meanings in the public and private domains. Local governments made their cities sanctuary cities, for instance, by passing measures indicating they would not inquire about a person’s citizenship

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its reach. *Id.* at 535–538. In a 9–0 decision, the Court held the ordinances unconstitutional under the Free Exercise Clause.

53 Gedicks & Van Tassell, *supra* note 25, at 328; *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 11 (1998) (“Congress does not have a free hand to supplement [religious] liberty. The Establishment Clause provides a ceiling that does not permit the government significant room within which to expand religious liberties.”).

54 *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

55 *Id.* at 704–06.

56 *Id.* at 708–09.

57 ANN CRITTENDEN, *SANCTUARY* 62 (1988) (noting the biblical roots of sanctuary); Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. CN. L. REV. 747, 761–67 (1986) (noting that the Greek, Roman, and Anglo-Saxon societies had concepts of sanctuaries).

58 Rose Cuison Villazor, *What is a Sanctuary*, 61 S.M.U. L. REV. 133, 134–35 (2008). Immigrants from El Salvador and Guatemala were forced to leave their countries due to violence and civil war. *Id.* at 139. An estimated 500,000 to 750,000 Central Americans arrived in the United States between 1980 and 1983. CRITTENDEN, *supra* note 57, at xvi; *see infra* note 63 and accompanying text.

status, and, in the private sector, churches provided sanctuary by offering asylum seekers from El Salvador and Guatemala food, clothing, and shelter as they resisted deportation.<sup>59</sup> This Note will focus on the private actor form of sanctuary.

In 1980, Congress enacted the Refugee Act, which allowed for the discretionary granting of asylum to refugees who met the requisite standard.<sup>60</sup> Thousands of immigrants from El Salvador and Guatemala, countries in political, social, and civil turmoil, applied for political asylum in the United States.<sup>61</sup> However, many of these claims were rejected on the basis that the fears of persecution were not specific enough to the individual applicant. For example, between June 1983 and September 1986, only 528 out of 19,207 applications from El Salvador were approved (2.6%).<sup>62</sup> Critics of the large number of rejections argued that the United States was partly responsible for Central American asylum seekers' situations on account of the United States government's assistance and support to their military governments.<sup>63</sup> In 1982, citing wrongful denial of Central American claims for asylum,<sup>64</sup> a number of churches declared themselves "sanctuaries" in an effort to offer refuge to immigrants from El Salvador and Guatemala, and the sanctuary movement was born.<sup>65</sup>

The churches felt a religious and moral obligation to assist the asylum seekers, who

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59 Villazor, *supra* note 58, at 137.

60 See 8 U.S.C. § 1101(a)(42) (2012) (defining a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .").

61 Villazor, *supra* note 58, at 139.

62 CRITTENDEN, *supra* note 57, at 21–22. Many of the applications were rejected on the on the basis of citing to just a "generalized climate of terror" rather than the required showing of "specific threats" to a person's life.

63 Douglas L. Colbert, *The Motion in Limine: Trial Without Jury, A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 24–34 (1986) (reviewing reports issued by international bodies detailing the brutal killings and violence faced by civilians in El Salvador and Guatemala at the hands of their military governments and the different forms of support the United States provided to these governments).

64 Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382 (2006) (explaining that the churches and other private groups formed the sanctuary movement because they believed that Guatemalans and Salvadorans were wrongly denied asylum to further American foreign policy objectives).

65 Villazor, *supra* note 58, at 140.

were suffering because of the United States government, and drew parallels between the plight of the asylum seekers and that of Jews escaping Nazi Germany.<sup>66</sup> In a declaration to the United States Attorney General, the leaders of the movement declared that the immigration policy of denying the Central American asylum claims was “illegal and immoral.”<sup>67</sup> The leaders declared that, until the policy was changed, they would “not cease to extend the sanctuary of the church to undocumented people from Central America.”<sup>68</sup>

The movement offered a range of assistance to Central American immigrants, including food, clothing, shelter, and transportation, as well as legal services through representation during deportation hearings.<sup>69</sup> At its peak, “an estimated 20,000 to 30,000 church members<sup>70</sup> and more than 100 churches and synagogues participated in the sanctuary movement.”<sup>71</sup>

The morally grounded sanctuary contention ultimately led to legal clashes that were framed as conflicts between the church and state. In 1984 and 1985, the federal government prosecuted several individuals involved with the sanctuary network under section 274 of the Immigration and Nationality Act (INA) for violating the anti-harboring prohibition, as well as other provisions.<sup>72</sup> Some defendants were convicted, while others were acquitted.<sup>73</sup> The case that drew the most attention involved the prosecution of eleven defendants,

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66 *Id.*; see also HILARY CUNNINGHAM, *GOD AND CAESAR AT THE RIO GRANDE: SANCTUARY AND THE POLITICS OF RELIGION* 25 (1995) (explaining the view of those in the sanctuary movement on the parallels with Nazi persecution, which led participants in the sanctuary movement to feel that they could not “look the other way”).

67 See CRITTENDEN, *supra* note 57, at 74.

68 *Id.*

69 IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* 12–13 (1985).

70 Charles Austin, *More Churches Join in Offering Sanctuary for Latin Refugees*, N.Y. TIMES (Sept. 21, 1983), <http://www.nytimes.com/1983/09/21/us/more-churches-join-in-offering-sanctuary-for-latin-refugees.html> [<https://perma.cc/G8HV-WM7W>].

71 Villazor, *supra* note 58, at 141; see also Colbert, *supra* note 63, at 44.

72 8 U.S.C. § 1324 (2012); Villazor, *supra* note 58, at 141.

73 For example, Stacey Merkt, a sanctuary worker at Casa Oscar Romero, affiliated with the Catholic diocese in Brownsville, Tex., was convicted in a jury trial of conspiring to transport and move, and transporting and moving, two illegal aliens within the United States under 8 U.S.C. § 1324(a)(2), but her sentence was overturned on appeal for improper jury instructions, *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985). The government declined to re-prosecute. However, Merkt was then arrested again and this

including the founders of the movement, in Tucson, Arizona.<sup>74</sup> Eight of the eleven were convicted—two priests, one nun, and one minister among them<sup>75</sup>—of charges including conspiracy, harboring undocumented immigrants, and aiding and abetting unauthorized immigrants.<sup>76</sup> One of their many defenses included the idea that the conduct of the sanctuary workers was protected under the Free Exercise Clause of the First Amendment.<sup>77</sup> The government, however, was granted a motion *in limine* to bar the defendants from raising this defense in court.<sup>78</sup> Despite their convictions, the defendants received overwhelming support from the public, including forty-seven members of Congress, who argued for leniency.<sup>79</sup> Eventually, the convicted defendants had their sentences suspended.<sup>80</sup>

The government—in stark contrast to how RFRA is applied and free exercise claims are evaluated by courts today<sup>81</sup>—refused to honor the defendants’ claims that their sanctu-

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time was convicted of conspiracy. This was upheld on appeal. *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986). Jack Elder, the director of Casa Oscar Romero, was convicted of two counts of conspiracy, two counts of bringing in and landing illegal aliens, in violation of 8 U.S.C. § 1324(a)(1), two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2), and served a five-month sentence in a San Antonio halfway house. *Id.* His successor, Lorry Thomas, was convicted and sentenced to two years in prison. Wayne King, *Church Sanctuary Worker Gets 2-year Term*, N.Y. TIMES (June 21, 1985), <http://www.nytimes.com/1985/06/21/us/church-sanctuary-worker-gets-2-year-term.html> [<https://perma.cc/G75W-HRTL>].

74 CUNNINGHAM, *supra* note 66, at 55–59.

75 Hilary Cunningham, *Sanctuary and Sovereignty: Church and State Along the U.S.-Mexico Border*, 40 J. CHURCH & ST. 371, 372 (1998).

76 *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); CUNNINGHAM, *supra* note 66, at 59.

77 Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 139 (1993).

78 Colbert, *supra* note 63, at 62–63. The government did not challenge the legitimacy of the defendants’ firmly held religious beliefs but argued that the defense was not available as a matter of law. The government cited *Wisconsin v. Yoder*, where the Court established the rule that “only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” 406 U.S. 205, 215 (1972). The government argued in its motion *in limine* that enforcement of the immigration law was an “interest of the highest order,” which could not be overridden by First Amendment rights to free exercise of religion. The court agreed and granted the motion, keeping the free exercise defense out of the trial.

79 CUNNINGHAM, *supra* note 66, at 60.

80 *Id.* at 61.

81 See *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715 (1981) (courts are not to question where an individual “dr[aws] a line” in defining which practices run afoul of her religious beliefs).

ary was religiously motivated.<sup>82</sup> Instead, the government was insistent that the movement's motivation was political, under the guise of religion:

Government contempt for the sincerity of sanctuary workers' religious motivations reached its apex when federal agents posing as co-workers and co-believers in the Arizona Sanctuary Movement made tape recordings and gathered information at church meetings and religious events. In court, the Government made every effort to suggest that what sanctuary workers called religious gatherings were in fact "press conferences" or "conspiratorial meetings."<sup>83</sup>

Eventually, the sanctuary movement wound down with the enactment of amendments to the INA that made asylum seekers from El Salvador and Guatemala eligible for special refugee status.<sup>84</sup>

It is important to note that ICE officers have the authority to "arrest any alien in the United States,"<sup>85</sup> and there is not a geographic constraint on this power. After obtaining a warrant, the only thing preventing ICE from raiding religious spaces that have designated themselves as sanctuaries is, as mentioned previously, a policy directing ICE to avoid enforcement actions at sensitive locations like churches.<sup>86</sup> This has led some religious leaders, such as Cardinal Donald Wuerl of Washington, D.C., to caution their congregations from using the word sanctuary to avoid "holding out false hope" about the type of protection they can provide.<sup>87</sup> Despite this concern, others maintain that, even in violation of

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82 Loken & Bambino, *supra* note 77, at 135.

83 *Id.*

84 Villazor, *supra* note 58, at 142 n.58. Additionally, in 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACAR"), Pub. L. No. 105-100, 111 Stat. 2160, 2193–2201 (1997), which allowed some immigrants from El Salvador and Guatemala to apply for cancellation of their removal. *Id.*

85 8 U.S.C. § 1357 (2012). The statute nominally says the ICE officer must have "reason to believe that the alien so arrested is in the United States in violation of any such law or regulation," but since entering the United States without inspection by immigration officers is a crime, 8 U.S.C. § 1325 (2012), this does not erect a barrier to ICE arresting undocumented persons.

86 See U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 12.

87 Julie Zauzmer, *Cardinal Wuerl voices Catholic support for immigrants but urges caution about sanctuary churches*, WASH. POST (Mar. 2, 2017) <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/02/cardinal-wuerl-voices-catholic-support-for-immigrants-but-urges-caution-about-sanctuary->



federal law, sanctuary works: “I can tell you from our own experience that all nine people who lived here have kept their families together, have been able to raise their children, have been able to go back to their jobs,” said Seth Kaper-Dale, pastor of the Reformed Church of Highland Park in New Jersey, which offered sanctuary to nine Indonesian immigrants in 2012.<sup>88</sup> After nearly a year of living in the church, ICE granted them stays of deportation.<sup>89</sup> And, more recently, sanctuary worked for Vizguerra, the Denver mother of four.

## B. The Introduction of RFRA and its rise Through the 1990s and 2000s

It is hard to imagine a free exercise defense—asserted by a priest, nun, or minister, no less—being dismissed so readily today as it was in *Aguilar* in the 1980s. One year after the Ninth Circuit affirmed the convictions in *Aguilar*, the Supreme Court, too, tried to curb the reach of free exercise claims (in an opinion written by the famously conservative Justice Scalia).<sup>90</sup> The decision in *Employment Division v. Smith* was roundly criticized and led to a bipartisan response widely praised at the time: the Religious Restoration Act of 1993.

### 1. Jurisprudence Prior to RFRA

It is worth understanding the religious liberty jurisprudence prior to the passage of RFRA. For many years, free exercise claims were governed by a balancing test derived from *Sherbert v. Verner*<sup>91</sup> and *Wisconsin v. Yoder*.<sup>92</sup> To determine whether challenged government actions violated the Free Exercise Clause, the Court weighed whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest.<sup>93</sup> Inherent in this test was the idea that any religious accommodation for one group cannot burden any third-party group as this would improperly impose the faith of one private party onto another, violating the

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churches [<https://perma.cc/U2LE-X9SY>]. Wuerl went on: “With separation of church and state, the church really does not have the right to say, ‘You come in this building and the law doesn’t apply to you.’ But we do want to say we’ll be a voice for you.”

88 Rose, *supra* note 4.

89 *Id.*

90 *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

91 374 U.S. 398 (1963).

92 406 U.S. 205 (1972).

93 *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2760 (2014).

government's obligation not to favor one religion over any other.<sup>94</sup>

The actual level of scrutiny used in the “compelling interest” test in the religious liberty context has long been a matter of debate. The test was originally developed outside of the religious exemption cases<sup>95</sup>—it emerged primarily in response to laws that interfered with freedom of expression<sup>96</sup> and disadvantaged racial minorities.<sup>97</sup> In those contexts, only an extremely powerful government interest allows a government restriction to survive. Christopher Eisgruber and Lawrence Sager note that the compelling interest test was first applied to the question of religious accommodation in *Sherbert*, which dealt with unemployment benefits.<sup>98</sup> Some scholars maintain that the pre-*Smith* test employed strict scrutiny for free exercise claims.<sup>99</sup> Others disagree.<sup>100</sup> The Court itself has said that the pre-*Smith* jurisprudence did not use a strict scrutiny standard.<sup>101</sup> Other than three additional

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94 Tebbe, *Religion and Marriage*, *supra* note 22, at 52–53.

95 Kent Greenawalt, Hobby Lobby, *Its Flawed Interpretive Techniques and Standards*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 125, 132 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

96 *E.g.*, *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

97 *E.g.*, *NAACP v. Button*, 371 U.S. 415, 438 (1963).

98 Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 445 (1994). In *Sherbert*, the Court held that the South Carolina Unemployment Compensation Act violated the Free Exercise Clause by denying benefits to a woman who refused to work on Saturday, the Sabbath day of her faith. The woman had been fired from her previous job for refusing to work on Saturdays, too.

99 Jeremy Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1995–96 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1465 (2015) (describing the *Sherbert* application of the compelling interest test as strict scrutiny).

100 Greenawalt, *supra* note 95, at 132–33; Eisgruber & Sager, *supra* note 98, at 445–48 (“*Sherbert*’s promise of the ruthless compelling state interest test proved remarkably toothless.”); Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182–85, 222–23 (1995) (arguing for a construction of RFRA that mimics the Court’s weaker application of the scrutiny test before *Smith* was decided).

101 *City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997) (“Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law . . . [RFRA] imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify.”)

unemployment benefits cases following *Sherbert* (“the *Sherbert* quartet”),<sup>102</sup> and *Yoder*,<sup>103</sup> free exercise claims failed.<sup>104</sup> This includes *all* free exercise cases, before and after *Sherbert*.<sup>105</sup> Sometimes the Court even decided not to apply the compelling interest test to a free exercise claim. In *Bowen v. Roy*,<sup>106</sup> the Court declined to apply the compelling interest test to a government regulation requiring welfare recipients have a social security number, as the Court reasoned the number was “purely a matter of internal government procedure and hence could not burden religious beliefs.”<sup>107</sup> While *Sherbert* and *Yoder* came out in favor of those claiming a violation of the Free Exercise Clause, both cases emphasized that the exemptions did not burden any other person’s religious liberties.<sup>108</sup>

Then, in 1990, the Court rejected the balancing test from *Sherbert* in *Employment Division v. Smith*.<sup>109</sup> *Smith* curbed the free exercise protection provided by prior Court rulings by holding that no valid, constitutional free exercise claim can be made by those whose religious exercise is impaired by a generally applicable law not itself directed against religion.<sup>110</sup> In other words, under *Smith*, judges no longer need to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws—the fact that the law was constitutional barred any free exercise challenge. The Court distinguished

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102 See *Frazee v. Illinois Dep’t of Emp’t Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

103 See *supra* text accompanying note 40 for a discussion of the facts and holding in *Yoder*.

104 *Eisgruber & Sager, supra* note 98, at 445–46; *see, e.g., Goldman v. Weinberger*, 475 U.S. 534 (1986) (upholding a military rule against wearing headgear as applying even to an Orthodox Jewish psychologist at a mental health clinic); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying Free Exercise claim of religiously focused university that lost its tax exemption due to its engaging in a form of racial discrimination by prohibiting interracial dating); *United States v. Lee*, 455 U.S. 252, 261 (1982) (denying an exemption to an Amish employer objected to paying social security taxes on his employees, claiming that both the payment and receipt of such benefits violated his faith).

105 *Eisgruber & Sager, supra* note 98, at 446.

106 476 U.S. 693, 700–01 (1986).

107 *Eisgruber & Sager, supra* note 98, at 446 n.33.

108 *Sherbert v. Verner*, 374 U.S. 398, 409 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

109 494 U.S. 872, 883 (1990).

110 *Id.* at 878–79, 881–82.

*Sherbert*<sup>111</sup> and rejected the free exercise claim of two members of the Native American Church whom had been fired from their jobs with a private drug rehabilitation organization because they had ingested peyote for sacramental purposes at a Church ceremony. They were further denied unemployment compensation because they had been discharged for work-related “misconduct,” violating an Oregon criminal statute that forbade the use of a “controlled substance.”<sup>112</sup> The majority, written by Justice Scalia, upheld this denial since the Oregon criminal statute prohibiting drug use was constitutional and not specifically directed at their religious practice.<sup>113</sup> This decision was wildly unpopular with academics, civil rights lawyers, and politicians.<sup>114</sup> The critics of *Smith* organized to lobby Congress to pass a law protecting religion in the way the Court had refused.<sup>115</sup> They were quickly successful.

## 2. RFRA’s Passage, Celebrated by the Right, Left, and the *New York Times*

The Religious Freedom Restoration Act of 1993 was introduced on March 11, 1993, by Representatives Charles Schumer, Democrat of New York, and Christopher C. Cox, Republican of California, in the House of Representatives, and a companion bill was introduced on the same day in the Senate by Senators Ted Kennedy, Democrat of Massachusetts, and Orrin G. Hatch, Republican of Utah.<sup>116</sup> The bill had wide bipartisan support, as it was adopted by a 97–3 vote in the Senate and by a House voice vote (which, in and of itself, indicates virtually no opposition).<sup>117</sup> It was signed into law by President Bill Clinton,

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111 Even though both *Sherbert* and *Smith* involved unemployment compensation eligibility, the Court found a way to distinguish the two. Those that think the religious freedom jurisprudence is muddled might point to this as an example. The *Sherbert* quartet “involved employees being treated differently according to whether their reason was religious or non-religious, and employees whose religious practice was legal.” Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL’Y REV. 129, 134 (2015) [hereinafter Hamilton, *Bad Public Policy*]. *Smith*, in contrast, involved laws that applied equally to religious and non-religious actors, and the religious practices themselves were illegal.” *Id.*

112 *Smith*, 494 U.S. at 874–75.

113 *Id.* at 890.

114 Eisgruber & Sager, *supra* note 98, at 440.

115 *Id.*

116 Peter Steinfeld, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html> [https://perma.cc/H89C-3TZ8].

117 Greenawalt, *supra* note 95, at 131.

who proclaimed that RFRA affirmed, “the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished.”<sup>118</sup> Vice President Al Gore added that RFRA, “is something that all Americans can support” and dubbed it “one of the most important steps to reaffirm religious freedom in my lifetime.”<sup>119</sup> The *New York Times* piled on, writing, “[t]he Religious Freedom Restoration Act reasserts a broadly accepted American concept of giving wide latitude to religious practices that many might regard as odd or unconventional,” and hailing it as “a welcome antidote to the official insensitivity to religion the Court spawned in 1990.”<sup>120</sup>

With RFRA, Congress explicitly adopted what it considered the appropriate constitutional standard.<sup>121</sup> Congress reinstated the prior First Amendment law that preceded *Smith*, as the prior standard would have supported the free exercise claim in that case.<sup>122</sup> To that point, RFRA provides that “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,”<sup>123</sup> which explicitly rejects the holding of *Smith*. According to the Senate Report, RFRA’s purpose was “only to overturn the Supreme Court’s decision in *Smith*.”<sup>124</sup> The statute’s stated objective was to “restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*.”<sup>125</sup> According to RFRA, the compelling interest test, as established in prior federal court rulings, is “a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”<sup>126</sup> As originally enacted, RFRA applied to any branch of federal or state government, to all officials, and to other persons acting under color of law.<sup>127</sup> Its universal coverage included “all Federal and State law, and the imple-

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118 Eisgruber & Sager, *supra* note 98, at 438 (internal citations omitted).

119 *Id.*

120 Editorial, *Congress Defends Religious Freedom*, N.Y. TIMES (Oct. 25, 1993), <http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html> [<https://perma.cc/SRV5-33QV>].

121 Greenawalt, *supra* note 95, at 126.

122 *Id.* at 131.

123 42 U.S.C. § 2000bb-1 (2012).

124 S. REP. NO. 103-111, 12 (1993).

125 42 U.S.C. § 2000bb(b)(1) (2012).

126 42 U.S.C. § 2000bb(a)(5) (2012).

127 Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107

mentation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]."<sup>128</sup>

Congress, and President Clinton, blindly signed off on a Pandora's box of religious accommodations—nothing in the law points to particular believers, conduct, or potential harm.<sup>129</sup> *Smith* had dealt with the Native American Church's use of peyote. The legislative history for RFRA only contemplated a small number of exemptions for religious practices, such as exemptions for the Hmong people and Orthodox Jews from state laws that require autopsies in cases of suspicious death and for Orthodox Jews, who must walk to prayer, from land use laws that forbid the establishment of houses of worship in residential areas.<sup>130</sup> No one involved in passing RFRA appeared to contemplate consequences for health care, for-profit corporations, LGBTQ rights in general, or immigration. This would prove regrettable.

### 3. The Subsequent Modification and Interpretation of RFRA

In 1997, the Supreme Court held in *City of Boerne v. Flores* that RFRA was an unconstitutional use of Congress's Enforcement Clause powers under the Fourteenth Amendment<sup>131</sup> and therefore did not apply to the states generally. Congress, the Court held, had not shown a pattern of religious discrimination meriting such a far-reaching remedy and does not have the power to 1) enforce a constitutional right against the states by changing what that right is or 2) intrude into the states' traditional prerogatives and general authority to regulate the health and welfare of their citizens.<sup>132</sup> In response, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") in part to correct the constitutional infirmities of RFRA,<sup>133</sup> as the RLUIPA's Section 7 amended RFRA by

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Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

128 *Id.*

129 Hamilton, *Bad Public Policy*, *supra* note 111, at 148.

130 See 139 CONG. REC. H2356-03 (daily ed. May 11, 1993); 146 CONG. REC. E1564-01 (daily ed. Sept. 22, 2000); Hamilton, *Bad Public Policy*, *supra* note 111, at 150, 155.

131 The Fourteenth Amendment's design "has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary, depriving Congress of any power to interpret and elaborate on its meaning by conferring self-executing substantive rights against the States and thereby leaving the interpretive power with the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

132 *Id.*

133 Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act: Recent Developments in*

removing all references to the states from the statute.<sup>134</sup> The Court implicitly affirmed these changes in 2006, as it applied RFRA to the federal government without questioning its constitutionality.<sup>135</sup> Additionally, after the Court held RFRA unconstitutional as applied to the states, twenty-one states passed state versions of the federal RFRA law to restore pre-*Smith* scrutiny to their own laws that burden religious exercise.<sup>136</sup>

RFRA states that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “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>137</sup> Amended by the RLUIPA, RFRA covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>138</sup> The RLUIPA further states that religious exercise should “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”<sup>139</sup> RFRA kept the broad definition of government, providing that “the term ‘government’ includes a branch, department, agency, instrumentality, and official

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*RLUIPA’s Land Use Jurisprudence*, 44 *URB. LAW.* 647 (2012).

134 Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat 803 (2000).

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

136 State Religious Freedom Restoration Acts, Nat’l Conference of State Legislatures (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/8X68-5RM5>]; see also Alabama Religious Freedom Amendment, ALA. CONST. ART. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01; Arkansas Religious Freedom Restoration Act, ARK. CODE ANN. § 16-123-401 (2015); CONN. GEN. STAT. § 52-571b; Religious Freedom Restoration Act of 1998, FLA. STAT. § 761.01, *et seq.*; IDAHO CODE § 73-402; Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. § 35/1, *et seq.*; [Indiana] Religious Freedom Restoration Act, IND. CODE ANN. § 34-13-9 (2015); KAN. STAT. ANN. § 60-5301, *et seq.*; KY. REV. STAT. ANN. § 446.350; Preservation of Religious Freedom Act, LA. STAT. ANN. § 13:5231, *et seq.*; Mississippi Religious Freedom Restoration Act., MISS. CODE ANN. § 11-61-1; MO. REV. STAT. § 1.302; New Mexico Religious Freedom Restoration Act, N.M. STAT. ANN. § 28-22-1, *et seq.*; OKLA. STAT. tit. 51, § 251, *et seq.*; 71 PA. CONS. STAT., § 2403; Religious Freedom Restoration Act, R.I. GEN. LAWS § 42-80.1-1, *et seq.*; South Carolina Religious Freedom Act, S.C. CODE ANN. § 1-32-10, *et seq.*; Preservation of Religious Freedom, TENN. CODE ANN. § 4-1-407; TEX. CIV. PRAC. & REM CODE § 110.001, *et seq.*; VA. CODE ANN. § 57-2.02.

137 42 U.S.C. § 2000bb-1(a)(b) (2012).

138 42 U.S.C. § 2000cc-5(7)(A) (2012).

139 42 U.S.C. § 2000cc-3(g) (2012).



(or other person acting under color of law) of the United States, or of a covered entity.”<sup>140</sup>

The way it works is as follows. To invoke RFRA, a plaintiff must show that a governmental action places a “substantial burden” on the plaintiff’s exercise of a sincerely held religious belief.<sup>141</sup> If the plaintiff meets the “substantial burden” requirement, the burden shifts to the government to show a “compelling government interest” that is accomplished by the “least restrictive means.”<sup>142</sup> RFRA’s power is still bound by the Establishment and Free Exercise Clauses, as a statute cannot grant rights in conflict with the Constitution. Any court evaluating a RFRA claim must consider burdens shifted onto third parties.<sup>143</sup>

As noted previously, the strictness of the compelling interest test prior to *Smith*—which is the standard RFRA explicitly adopts<sup>144</sup>—is a subject of great debate. Typically, “when people assert a constitutional right to an exemption from an otherwise valid statute, they seek special treatment not afforded to others. Courts generally have not insisted on an overpowering government interest to reject such claims; a genuine substantial interest suffices.”<sup>145</sup> The *Sherbert* and *Yoder* compelling interest test could properly be summed up as “strict in theory, feeble in fact.”<sup>146</sup> The test necessarily had to work like this. Religious obligations can clash with the public interest in myriad ways. Enforcing manslaughter

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140 42 U.S.C. § 2000bb-2(1) (2012).

141 42 U.S.C. § 2000bb-1(a) (2012).

142 42 U.S.C. § 2000bb-1(b) (2012).

143 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2781 n.37 (2014) (“It is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)).

144 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (“[RFRA] adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.”).

145 Greenawalt, *supra* note 95, at 132.

146 Eisgruber & Sager, *supra* note 98, at 447 (crediting the strict in theory, fatal in fact phrase to Gerald Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)); see also *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 888 (1990)) (“If ‘compelling interest’ really means what it says . . . many laws will not meet the test . . . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”).

and child neglect laws,<sup>147</sup> eliminating racial discrimination,<sup>148</sup> adhering to minimum wage laws,<sup>149</sup> and paying taxes<sup>150</sup> are just a few examples. Religious beliefs don't have to be "founded in reason, guided by reason, or governed in any way by the reasonable."<sup>151</sup> To let any religious liberty claim defeat all but the most compelling government interests would create an untenable situation—or, in other words, be "courting anarchy."<sup>152</sup>

Since courts had not previously applied the most rigorous standard to religious claims prior to *Smith*, and since RFRA explicitly adopted the approach taken prior to *Smith* and refers to the prior test as "striking sensible balances," the "compelling interest" standard in the RFRA context ought to be understood as a type of intermediate scrutiny,<sup>153</sup> more than rational basis but less than the compelling interest test used against laws impacting racial discrimination or interfering with protected speech.<sup>154</sup> Weighing third-party burdens—a fundamental part of the pre-*Smith* free exercise balancing test—factors into constituting a compelling government interest under RFRA's balancing test.<sup>155</sup> When passing RFRA, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance."<sup>156</sup> They should follow that directive.

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147 See, e.g., *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim.App. 1988) (upholding conviction of the parents of three-month-old infant who died from complications arising from pneumonia, as the parents, knowing he was sick, did not seek medical help and instead relied on prayer and divine intervention to heal him, as their faith instructed them to do).

148 *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

149 *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (holding associates, mostly rehabilitated drug addicts, who received food, shelter, and clothing but no cash wages were employees for purposes of the Fair Labor Standards Act).

150 See, e.g., *United States v. Lee*, 455 U.S. 252 (1982).

151 *Eisgruber & Sager*, *supra* note 98, at 447.

152 *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990).

153 *Greenawalt*, *supra* note 95, at 132–33.

154 See *Goldman v. Weinberger*, 475 U.S. 534 (1986) (protected speech); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (racial discrimination).

155 *Gedicks & Van Tassell*, *supra* note 25, at 327.

156 S. REP. NO. 103-111, 8 (1993).

### C. The Splintering of the RFRA Coalition

For years, it was taken for granted that religion was “a good thing” deserving of accommodation.<sup>157</sup> Some point to the fight for gay rights and same-sex marriage as the cause of the weakening consensus on religious accommodation.<sup>158</sup> By the second decade of the twenty-first century, the idea of religious accommodation, for some, had become code for discrimination.<sup>159</sup> The coalition that gave RFRA near universal support in Congress—religious conservatives, religious liberals, and secular civil libertarians—broke apart by the late 1990s over the question whether civil rights in general, and gay rights in particular, are such compelling interests that they universally eclipse any claim of religious liberty without regard to the facts of individual cases.<sup>160</sup> And in the early part of the twenty-first century, gay marriage saw its support grow with “extraordinary rapidity.”<sup>161</sup> The 2003 Massachusetts Supreme Judicial Court decision requiring the state to allow same-sex marriages sparked a fierce response from conservative religious organizations<sup>162</sup> and then-President George W. Bush.<sup>163</sup> This decision kicked off a campaign at the federal and state levels by the religious right against same-sex marriage, marking a point of no return for an alliance with those who valued equality over religiously motivated discrimination.

Early marriage equality statutes included accommodations for actors who opposed gay

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157 Horwitz, *supra* note 30, at 159 (quoting ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 78 (2013)).

158 *E.g., id.* at 159–160.

159 *Id.* at 172.

160 Laycock, *Religious Exemption*, *supra* note 16, at 149.

161 Laycock, *Culture Wars*, *supra* note 30, at 866 n.62 (citing a 2013 Washington Post-ABC poll that reported that fifty-eight percent of Americans say same-sex marriage should be legal, and thirty-six percent say it should be illegal, almost exactly reversing the results from the same question in 2003). Of course, the right for same-sex couples to marry was recognized by the Court in 2015 with the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

162 *Goodridge v. Dep’t of Public Health*, 440 Mass. 309 (2003); *see, e.g.,* MARCI A. HAMILTON, GOD VS. THE GAVEL 52 (2005) (quoting the American Family Association’s statement that “[t]his decision is on an order of magnitude that is beyond the capacity of words. The court has tampered with society’s DNA, and the consequent mutation will reap unimaginable consequences for Massachusetts and our nation.”).

163 HAMILTON, *supra* note 162, at 52 (“Marriage is a sacred institution between a man and a woman . . . . If activist judges insist on re-defining marriage by court order, the only alternative will be the constitutional process. We must do what is legally necessary to defend the sanctity of marriage.”) (internal citations omitted).

marriages on religious grounds.<sup>164</sup> Every single state that passed a marriage equality law, beginning with Connecticut, New Hampshire, Vermont, and the District of Columbia in 2009,<sup>165</sup> prior to the Court's decision in *Obergefell v. Hodges*,<sup>166</sup> included exemptions for those with religious objections.<sup>167</sup> While these were included in an effort to get the bills passed,<sup>168</sup> the accommodations allowed for the erosion of civil rights principles.<sup>169</sup> For example, the accommodation provision that allowed religious actors to refuse to open their facilities for a same-sex wedding extended beyond just places of worship themselves into public accommodations owned by religious groups and nonprofits. Buildings routinely rented out to a wide selection of consumers can now be closed to gay couples wishing to hold a wedding reception.<sup>170</sup> It was the marriage equality movement that saw the religious right begin to attempt to turn RFRA from a shield protecting free exercise into a sword for inflicting discrimination.

## II. From Shield to Sword: How the RFRA Claims Have Emerged to Threaten Reproductive Rights and LGBTQ Equality

This part provides a close analysis of *Hobby Lobby*, the case that extended RFRA into

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164 Tebbe, *Religion and Marriage*, *supra* note 22, at 25–26, 29. Those accommodations included solemnization provisions (clarifying clergy are not required to solemnize marriages to which they are religiously opposed), accommodations provisions (exempting religious organizations from providing goods, services, accommodations, or privileges for a wedding ceremony or reception), promotion of marriage provisions (clarifying that certain religiously-affiliated organizations need not involve themselves in the “promotion of marriages” to which they have theological objections), and adoption provisions (specifying that adoption agencies and other child placement organizations need not place children in ways that contravene their faith).

165 Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1247 (2014).

166 135 S. Ct. 2584 (2015).

167 Tebbe, *Religion and Marriage*, *supra* note 22, at 25.

168 Wilson, *supra* note 165, at 1168–69 (arguing that religious accommodations had an important causal role in passage of marriage equality laws).

169 Tebbe, *Religion and Marriage*, *supra* note 22, at 26.

170 *Id.*; see also *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, 339 Fed. Appx. 232, 235 (3d Cir. 2009) (summarizing facts of religious organization's refusal to make the boardwalk it owned on the New Jersey Shore—which was open to the public and available to rent for wedding ceremonies—available for a civil union ceremony, and the resulting civil rights investigation by state agency).

the secular marketplace to an unprecedented degree. *Hobby Lobby* should serve as a warning and example of the danger in asserting broad religious liberty claims, which should be avoided in the sanctuary context. The analysis shows how far of a reach RFRA can have if interpreted in the same way as the *Hobby Lobby* majority, and it also examines Justice Ginsburg's dissent to show an alternate interpretation of how RFRA should be applied. The majority, written by Justice Alito, provides a blueprint for those who want to use RFRA to discriminate, and it is vital that those who want to advocate for a narrower construction of RFRA in the sanctuary context understand the weaknesses of the majority's argument. Part II.B then evaluates how this post-*Hobby Lobby* expanded understanding of religious liberty is impacting antidiscrimination protection against LGBTQ persons in a case recently before the Court, *Masterpiece Cakeshop*.

### **A. *Hobby Lobby* and the Clash of Religious Liberty and Women's Reproductive Health**

In 2014, the Court held in *Hobby Lobby* that closely held,<sup>171</sup> for-profit corporations count as a "person" within the meaning of RFRA's protection of a person's exercise of religion.<sup>172</sup> According to the Court, protecting the free-exercise rights of closely held, for-profit corporations protect the religious liberty of the humans who own and control those companies.<sup>173</sup> This extension of RFRA came at the expense of women's reproductive rights by striking down the contraception mandate of the Patient Protection and Affordable Care Act of 2010 (ACA),<sup>174</sup> which required that employers provide health insurance that covered contraception without any cost sharing. At the time *Hobby Lobby* was decided, fifty-two percent of Americans were employed by closely held corporations.<sup>175</sup>

In *Hobby Lobby*, the two families that controlled the closely held, for-profit companies

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171 See *supra* text accompanying note 32 for a definition of "closely held."

172 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2769 (2014).

173 *Id.* at 2768.

174 42 U.S.C. § 300gg-13(a)(4) (2012). The majority's decision was premised on the fact that the female employees of these corporations would still have access to contraception: The insurance company would pay for it instead of their employers. However, just three days after the *Hobby Lobby* decision, the Court called this assumption into question with its decision in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014).

175 Aaron Blake, *A LOT of People Could be Affected by the Supreme Court's Birth Control Decision-Theoretically*, WASH. POST. (June 30, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/> [https://perma.cc/59DP-K4U8].

at issue held religious convictions that human life begins once an egg is fertilized.<sup>176</sup> To them, an emergency contraceptive pill taken after unprotected sex or the presence of an intrauterine device (IUD) that prevents the growth of such an egg by inhibiting its attachment to the uterus constitutes an abortion.<sup>177</sup> Based on this conviction that abortion constitutes wrongful death, the families sought an exemption for their companies from the requirement of regulations issued under the ACA<sup>178</sup> to provide employee insurance that covers these four types of contraception methods that had been approved by the Federal Food and Drug Administration (FDA).

*Hobby Lobby* contained three main questions. First, did RFRA apply to closely held, for-profit corporations, even if the law from which the exemption is sought is designed to protect their workers, many of whom will not share the owners' religious convictions? Second, is there a "substantial burden" on religious exercise? And, finally, does the government either lack a compelling interest behind its regulation or fail to employ an available "less restrictive means" to achieve its objective? The majority opinion, written by Justice Alito, answered yes to all three.

Justice Alito's opinion pays virtually no attention to whether the new legal standard imposes third-party burdens by sacrificing female workers' legitimate interests.<sup>179</sup> It also ignores the serious administrative problems and the potential grant of concessions that go beyond what RFRA covers.<sup>180</sup> In Justice Alito's mind, the primary question is whether for-profit corporations count as "persons" within that statute, and he relies on both the legal fiction of corporations as persons and the Dictionary Act<sup>181</sup> to get to yes. Because some

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176 In contrast, federal regulations define pregnancy as beginning at implementation, not conception. *See, e.g.*, 62 Fed. Reg. 8611 (1997); 45 C.F.R. § 46.202(f) (2013).

177 Evidence indicates that one of the four objected to means of contraception, Plan B, may not operate by preventing a fertilized egg from developing any further by inhibiting its attachment to the uterus. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1457–59 (2012).

178 Under the ACA, employers with fifty or more employees are required to provide "minimum essential coverage" in their health insurance plans. *See* 26 U.S.C. § 4980H(a), (c)(2) (2012). The Department of Health and Human Services promulgated that minimum coverage includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

179 Greenawalt, *supra* note 95, at 130.

180 *Id.*

181 1 U.S.C. § 1 (2012)—though this act is only controlling where context does not indicate otherwise. *Id.*

nonprofit corporations had been held to be “persons” under RFRA, Justice Alito wrote that, “no understanding of the term “person” includes *some* but not all corporations.”<sup>182</sup> In attempting to justify granting RFRA protection to for-profit corporations, Justice Alito relies partially on *Braunfeld v. Brown*,<sup>183</sup> in which an Orthodox Jewish company sought an exemption from a Sunday closing law—but the company was not actually incorporated.<sup>184</sup> Justice Alito also states, erroneously, that “nothing in the text of the RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment.”<sup>185</sup>

Once Justice Alito decided that RFRA did apply to closely held, for-profit corporations, he quickly found a substantial burden. In a change from past cases, Justice Alito assessed the burden based on the penalties for noncompliance (\$100 per day for each employee, or \$2,000 per employee per year for not providing insurance coverage at all), not in terms of its basic compliance requirements.<sup>186</sup> To get to that point, Justice Alito had to assume that companies would accept a penalty rather than provide the insurance—and that willingness to suffer a penalty considerably helped establish the strength and intensity of their religious convictions.<sup>187</sup> This illustrates the problem of administrability: How can courts assess how substantial the burden is on a *particular* person’s religious exercise? And if religious exemptions are available and help a person avoid adverse consequences, a person wanting an exemption could persuade themselves and genuinely arrive at the belief that a law poses a substantial burden.<sup>188</sup> Any group helping religious organizations or individuals advocate for exemptions in the name of sanctuary should avoid arguing for this interpretation of the substantial burden analysis. Instead, people or groups asserting religious exemptions

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182 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2769 (2014).

183 366 U.S. 599 (1961).

184 Greenawalt, *supra* note 95, at 133.

185 This is just factually incorrect. As stated previously, the text of RFRA states its objective as to “restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*.” See *supra* Part I.B.2. Additionally, the Senate report stated RFRA’s purpose was “only to overturn the Supreme Court’s decision in *Smith*.” See *supra* Part I.B.2.

186 Greenawalt, *supra* note 95, at 137–38.

187 *Id.*

188 See *id.* at 139 n.57. The author points out that a similar situation arose during the Vietnam War, which many draftees perceived as unjustified. Some applied for conscientious objector exemptions, which require an objection to participating in “war in any form.” Many did actually arrive at this belief, although they would almost certainly not have in other circumstances, such as World War II.



should rely on the proper pre-*Smith* test to determine the substantiality of a burden: whether a government action coerces a person to violate his or her religious beliefs or deny him or her the “rights, benefits, and privileges enjoyed by other citizens.”<sup>189</sup> The fact that “the challenged Government action would interfere significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs” does not automatically indicate the presence of a substantial burden.<sup>190</sup>

A tax case that Justice Alito distinguishes as a free exercise, but not a RFRA, issue—even though RFRA restored the pre-*Smith* cases as the relevant evaluating standard—*United States v. Lee* is actually quite similar to the case at the bar. The Court declined to honor a free exercise claim by an Amish employer, with only Amish employees, who objected to paying social security taxes on his employees, claiming that both the payment and receipt of such benefits violated his Amish faith.<sup>191</sup> His payment of taxes went toward his workers’ ability to receive those benefits, just as in *Hobby Lobby* the companies’ insurance payments went toward their employees’ ability to receive a benefit—and in *Hobby Lobby*, there were employees that did not share the corporations’ religious beliefs on contraception. There was no valid free exercise claim in *Lee*, but Justice Alito found one in *Hobby Lobby*.

In a “powerful dissent,”<sup>192</sup> Justice Ginsburg pointed out that the Court’s “decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger.”<sup>193</sup> The substantiality of the burden is a legal matter, a question of law, not any improper evaluation of the sincerity of a person’s religious belief. Here, Justice Ginsburg concludes that the requirement of offering insurance that covers contraception “is too attenuated to rank as substantial.”<sup>194</sup> A company offering health insurance has no input on whether a woman will use any form of contraception, let alone one of the four types found objectionable in this case. That decision will be made by a woman and her doctor, and the insurance company pays for whatever medicinal product they chose. The company’s connection to the actual potential use of contraception, in Justice Ginsburg’s estimation, is too remote to constitute a substantial burden.

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189 *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

190 *Id.*

191 *United States v. Lee*, 455 U.S. 252 (1982).

192 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

193 *Id.* at 2799 (Ginsburg, J., dissenting).

194 *Id.*

Justice Alito pays short shrift to the compelling interest question, ultimately concluding that it is unnecessary to reach the issue.<sup>195</sup> He assumes that the government's interest in "guaranteeing cost-free access to the four challenged contraceptive methods" meets the compelling interest standard, but not before dismissing broad interests like "public health" and "gender equality" and insisting that the government "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant."<sup>196</sup> Taking this language literally, though, is problematic.<sup>197</sup> Take *United States v. Lee*: one employer failing to pay Social Security taxes would have virtually no impact on the overall system, but the government's compelling interest would be gutted if it granted exceptions to all interested parties. And *Lee* is certainly part of the free exercise doctrine that RFRA explicitly restored as controlling law.<sup>198</sup>

Justice Alito acknowledged that courts must consider third-party burdens when weighing the RFRA claims, but, instead of considering the impact of an exemption on female employees of Hobby Lobby, he immediately minimized the third-party burden analysis by flipping the issue and framing it in terms of benefits. "By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless."<sup>199</sup> The parade of horrors<sup>200</sup> follows:

For example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an

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195 *Id.* at 2780.

196 *Id.* at 2779–80.

197 Greenawalt, *supra* note 95, at 141–42.

198 *United States v. Lee*, 455 U.S. 252 (1982). This is a particularly illustrative example of why some consider the Court's religious liberty doctrine muddled and incoherent.

199 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2781 n.37 (2014).

200 This parade of horrors tactic was a common feature of Justice Scalia's opposition to gay rights. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.").

opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants).<sup>201</sup>

Scholars have called this alleged analysis of third-party burdens “incoherent.”<sup>202</sup>

In Justice Alito’s world, the government could frame any law or regulation as an entitlement, and the intended beneficiaries of those entitlements would then be burdened by its loss, thereby precluding a religious exemption under RFRA.<sup>203</sup> This interpretation ignores the fact that any government interest must be a “compelling” one. In the end, the majority concluded the third-party burdens in *Hobby Lobby* were “precisely zero,” because the government could hypothetically create a new system in which it financed and provided contraceptives to women directly.<sup>204</sup> Justice Alito paid no regard to the practicality of such a suggestion. In dissent, Justice Ginsburg described this hypothetical in another way: “the government, i.e., the general public, can pick up the tab.”<sup>205</sup>

The final question, centering on whether the denial of the exemption was the least restrictive means available, was resolved in the negative by Justice Alito. He decreed that the least restrictive means standard was “exceptionally demanding,”<sup>206</sup> in contrast with the Court’s decision in *Cutter v. Wilkinson*.<sup>207</sup> *Cutter* involved a successful RLUIPA challenge by men incarcerated in a federal prison in Ohio alleging that prison officials failed to accommodate their religious exercise.<sup>208</sup> In *Cutter*, context mattered for the compelling interest/least restrictive means test, and “due deference” was given to prison officials on

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201 *Hobby Lobby*, 134 S. Ct. at 2781 n.37

202 Tebbe, *How to Think*, *supra* note 39, at 354; *see also* Gedicks & Van Tassell, *supra* note 25, at 331. (“[T]he role that the majority envisions for third-party burden analysis is insignificant and implausible”).

203 Gedicks & Van Tassell, *supra* note 25, at 331.

204 *Hobby Lobby*, 134 S. Ct. at 2760.

205 *Id.* at 2787 (Ginsburg, J., dissenting).

206 *Id.* at 2780.

207 544 U.S. 709 (2005).

208 The petitioners assert that they were adherents of “nonmainstream” religions—the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian—and were not given the same opportunities for group worship that are granted to adherents of mainstream religions, among other claims. *Id.* at 712–13.

maintaining order and safety<sup>209</sup>—far from an “exceptionally demanding” standard.<sup>210</sup> Ultimately in *Hobby Lobby*, Justice Alito pointed to the fact that the Obama administration had already granted an exemption to nonprofit religious organizations from paying for insurance for contraceptives if their use violated the organization’s religious beliefs as evidence that there was a lesser restrictive means available in *Hobby Lobby*.<sup>211</sup> Justice Alito again went back to the idea of letting the public pick up the tab for the corporations, suggesting that the government could assume “the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ religious objections,” as the least restrictive means.<sup>212</sup> Again, this raises the question of how to square *Hobby Lobby* with *Lee*—could the government not cover a small amount for social security should any of the Amish employees decide to accept the benefit in the future?

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209 *Id.* at 710.

210 The Court warned that allowing inmates exemptions would “jeopardize the effective functioning of an institution” and trigger a proper as-applied Establishment Clause challenge by prison authorities. *Id.* at 726.

211 *Hobby Lobby*, 134 S. Ct. at 2781–82. If a nonprofit religious organization had group health insurance, the insurance company paid for the contraception used by insured employees, on the logic that this would not cost the insurance company additional money: paying for contraception was less expensive than paying for more costly medical treatment associated with unintended pregnancies and births. Or, if a religious nonprofit was self-insured, a third-party administrator provided contraception insurance from a company that administers Federal Facilitated Exchange Insurance. This “lesser restrictive means” satisfied the government’s compelling interest so long as organizations did not object to filling out the forms registering their objections—something contested almost immediately after the *Hobby Lobby* ruling. *See* *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (holding that to obtain injunction pending appeal, the college was not required to follow notice procedures for a nonprofit organization’s claim for religious accommodation, to which procedures the college objected on religious grounds). In 2015, the Seventh Circuit in *Wheaton College v. Burwell*, 791 F.3d 792 (7th Cir. 2015) (*Wheaton College II*) affirmed the denial of another preliminary injunction for *Wheaton College*, holding that the college was “incorrect” in its belief that, as the trigger-puller or facilitator, it shared responsibility for the extension of emergency contraception coverage to its students, faculty, and staff. *Id.* at 796; *see also* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016). In 2016, the eight-member Court avoided ruling on the merits and vacated denials of injunctive relief and remanded cases back to the Third, Fifth, Tenth, and D.C. Circuits for supplemental briefing. *Zubik*, 136 S. Ct. at 1561. The parties and the government were encouraged to find an acceptable compromise on the notice issue but never did and never needed to after the Trump administration promulgated new regulations that rolled back the contraception mandate. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792 (Oct. 13, 2017), 45 C.F.R. § 147.132 (2017), 45 C.F.R. § 147.133 (2017). Employers no longer have to file any paperwork with the government to stop offering birth control—they just have to notify their employees.

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

Ultimately, Justice Alito stripped the analysis in *Hobby Lobby* of any context, acting like each legal question—the meaning of “a person’s exercise of religion,” the substantiality of a burden, the compelling interest test and the least restrictive means analysis—is distinct and not interconnected to any other question.<sup>213</sup> He attempted to present a complex question as simple when it was anything but that. By protecting the religious liberties of corporations, the *Hobby Lobby* decision awakens echoes of an ideal of private ordering from the *Lochner* era.<sup>214</sup> In this world view, the refusal to serve certain individuals, such as women in need of emergency contraception or LGBTQ individuals, is merely declining to enter into a private contract, and government regulation unfairly imposes on businesses, endorsing a line of thinking that prioritizes “the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”<sup>215</sup> It is not hard to see how this *Lochner*-esque thinking could undermine antidiscrimination laws protecting LGBTQ communities if the compelling interest test is applied in a “strict in theory, fatal in fact” manner, unlike the pre-*Smith* “strict in theory, feeble in fact” way.<sup>216</sup> Those asserting religious liberty claims in the name of sanctuary should take care not to further usher in a return to the *Lochner* era.

In dissent, Justice Ginsberg charged the court with wrongly treating RFRA “as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence,”<sup>217</sup> pointing out that Congress had “enacted RFRA to serve a far less radical purpose” than that.<sup>218</sup> The majority, in Justice Ginsburg’s estimation, was too accepting of religious accommodations from general laws and too willing to let the public—especially women—bear the costs of those accommodations.<sup>219</sup> By its unprecedented extending of RFRA into the commercial sphere, the Court took steps to eliminate the long-respected inalienable boundary between church and state.

The Court did allow that other insurance-coverage mandates would not automatically

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213 Greenawalt, *supra* note 95, at 146.

214 *Lochner v. New York*, 198 U.S. 45, 64 (1905) (recognizing a freedom of contract); Sepper, *supra* note 99, at 1456.

215 *Lochner*, 198 U.S. at 58; Sepper, *supra* note 99, at 1457.

216 Eisgruber & Sager, *supra* note 98, at 447.

217 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2791–92 (2014) (Ginsburg, J., dissenting).

218 *Id.* at 2787 (Ginsburg, J., dissenting).

219 *Id.*

fail the RFRA balancing test if they conflicted with an employer's religious beliefs.<sup>220</sup> Indeed, the Third Circuit found a way to hold that the contraceptive mandate is not a substantial burden to the free exercise of religion,<sup>221</sup> and it did this by actually analyzing the how substantial the burden was to religious exercise—unlike *Hobby Lobby*, which assessed the burden based on potential penalties for noncompliance. Anyone asserting a RFRA claim in any context, including sanctuary, should push for both an actual substantial burden analysis and an evaluation of the burdens placed on third parties.

Finally, the *Hobby Lobby* Court recognized that antidiscrimination laws come with a compelling government interest in providing equal opportunities.<sup>222</sup> This could provide an avenue for the return to the pre-*Smith* compelling interest test and provide protection against religious liberty claims that attempt to discriminate against LGBTQ persons.

### **B. The Next Supreme Court Battle: Religious Liberty and LGBTQ Equality**

While *Hobby Lobby* was a case involving the contraception mandate and women's reproductive rights more broadly, there were immediate concerns about its spillover effects on LGTBQ rights. Justice Ginsburg alluded to consequences for the LGBTQ community

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220 *Id.* at 2783 (“Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.”).

221 *Real Alternatives, Inc. v. Sec’y Dep’t of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017). A nonprofit, non-religious, anti-abortion organization and its employees challenged the contraception mandate as a burden to their free exercise, among other claims. The Third Circuit considered two questions, and, “after careful review, but without any hesitation,” answered both in the negative. *Id.* at 343. The first: Whether the contraceptive mandate must exempt a secular anti-abortion group with no religious affiliation. And the second: Whether an employee's religious beliefs are substantially burdened by the law's requirement that his or her employer's insurance plan cover contraceptives. The Third Circuit distinguished *Hobby Lobby* by saying it held “that an employer's provision, not an individual's maintenance, of coverage may violate RFRA.” *Id.* at 355 n.17. Further, the Third Circuit considered the question of whether a burden was substantial enough to trigger RFRA a question of law. The Third Circuit cited *Lyng v. Northwest Indian Cemetery Protective Ass’n* for the proposition that there is no substantial burden if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the “rights, benefits, and privileges enjoyed by other citizens”—even if “the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.” 485 U.S. 439, 449 (1988). Finally, the Third Circuit held that the employees had “failed to demonstrate that the Contraceptive Mandate forces them to violate their religious beliefs.” *Id.* at 356–59.

222 *Hobby Lobby*, 134 S. Ct. at 2783 (“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.”).

in her dissent: “Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs,” she wrote, before citing to two cases in which claims for religious accommodations had been invoked against LGBTQ people.<sup>223</sup> “Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not?”<sup>224</sup> News commentators and others had already explicitly made the connection between the forthcoming ruling in *Hobby Lobby* and the potential segue to LGBTQ discrimination in the name of religious accommodation.<sup>225</sup> And, one year later in *Obergefell*, Chief Justice Roberts foreshadowed the battles to come (“Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . . . There is little doubt that these and similar questions will soon be before this Court.”).<sup>226</sup>

It was not a surprise, then, to see *Hobby Lobby* cited—incorrectly as it was—in the brief for the petitioners in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>227</sup> decided by the Court this past term.<sup>228</sup> In *Masterpiece Cakeshop*, a gay couple walked into a retail bakery in 2012—a place of public accommodation—hoping to buy a wedding cake. They were denied service on the basis of their sexual orientation, in violation of the Colorado Anti-Discrimination Act (CADA).<sup>229</sup>

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223 *Id.* at 2804–05, with citations to *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (for-profit photography business owned by a heterosexual couple refused to photograph a lesbian couple’s commitment ceremony based on the religious beliefs of the business owners) and *In re Minnesota ex rel. McClure*, 370 N.W.2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining any person “antagonistic to the Bible,” including “fornicators and homosexuals”).

224 *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

225 See Press Release, Am. Civil Liberties Union, *Supreme Court Upsets Church-State Balance and Enhances Digital Privacy in Key End-of-Term Decisions* (July 1, 2014), <https://www.aclu.org/news/supreme-court-upsets-church-state-balance-and-enhances-digital-privacy-key-end-term-decisions> [<https://perma.cc/Z9E6-NZLQ>]; Adam Winkler, *Will the Supreme Court License Anti-Gay Discrimination?*, HUFFINGTON POST (Mar. 24, 2014), [https://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li\\_b\\_5020848.html](https://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li_b_5020848.html) [<https://perma.cc/5LWU-G8SX>].

226 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, J., dissenting).

227 Brief for Petitioner at 38, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111) [hereinafter, Petitioner’s Brief].

228 138 S. Ct. 1719 (2018).

229 COLO. REV. STAT. §§ 24-34-301–601.



The petitioner cites to *Hobby Lobby* for free exercise protection for his closely held, for-profit business (*Hobby Lobby* was explicitly not decided on free exercise grounds).<sup>230</sup> In regard to the free exercise argument, the weighing of third-party burdens as part of a balanced approach “is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.”<sup>231</sup> This is not a RFRA case—because RFRA was ruled unconstitutional as applied to the states—and Colorado has not passed a state RFRA statute.<sup>232</sup> Colorado courts have affirmed that the state follows the *Smith* standard for free exercise claims: for state action, neutral laws of general applicability “need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge.”<sup>233</sup>

Jack Phillips, the owner of Masterpiece Cakeshop, considers himself an “active participant” in the “sacred event” of marriage by virtue of providing a cake for a celebration after the ceremony has concluded.<sup>234</sup> In this situation, the couple planned to marry in Massachusetts before returning home to Colorado to have the cake and celebrate with friends.<sup>235</sup> The baker’s connection to the marriage is attenuated at best.

When the Court’s much-anticipated opinion was released, it featured a narrow ruling, saving the difficult decisions on the merits for another day and vacating the ruling of the Colorado Court of Appeals on the basis that the Colorado Civil Rights Commission treated Phillips’ case with “clear and impermissible hostility toward the sincere religious beliefs that motivated his objection,” thus violating the Free Exercise Clause.<sup>236</sup> Writing for the 7-2 majority, Justice Kennedy cited *Church of the Lukumi* for the proposition that “the

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230 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2784 (2014) (distinguishing *Lee* as not controlling because “*Lee* was a free-exercise, not a RFRA, case”); *id.* at 2787 (Ginsburg, J., dissenting) (“The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score.”).

231 *Id.* at 2790 n.8 (Ginsburg, J., dissenting).

232 J. Ryann Peyton et. al, *CADA: The Intersection of LGBT Civil Rights and Religious Freedom*, COLO. LAW. Jan. 2017, at 31, 36 (citing two failed attempts in 2015 and 2016 to pass a state RFRA law).

233 *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 289 (Colo. App. 2015) (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 879, 883 (1990)); Peyton, *supra* note 232, at 35.

234 Petitioner’s Brief, *supra* note 227, at 38.

235 Brief for Respondent at 10–11, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111).

236 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com’n*, 138 S. Ct. 1719, 1729 (2018).

government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."<sup>237</sup> The majority's basis for finding hostility on the part of the Commission stems in part from uncontested comments made during a public meeting by one commissioner:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H] olocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>238</sup>

The majority held “[t]his sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”<sup>239</sup> In dissent, Justice Ginsburg distinguished *Church of the Lukumi* as a case in which the government action that violated a principle of religious neutrality implicated a sole decision-making body—the city council—versus *Masterpiece Cakeshop*, which involved several layers of independent decision making, with the Commission making up just one of those layers:

First, the [Colorado Civil Rights] Division had to find probable cause that Phillips violated CADA. Second, the ALJ [administrative law judge] entertained the parties’ cross-motions for summary judgment. Third, the Commission heard Phillips’ appeal. Fourth, after the Commission’s ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say.<sup>240</sup>

The dissent, which was joined by Justice Sotomayor, also was not persuaded by the majority’s other basis for its ruling of unconstitutional religious hostility. The fact that the

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237 *Id.* at 1731.

238 *Id.* at 1729.

239 *Id.*

240 *Id.* at 1751–52 (Ginsburg, J., dissenting).

Colorado Civil Rights Division and the Commission had found that three bakers acted lawfully when they refused to design cakes with religious text and anti-gay messages expressing disapproval of same-sex marriages for a customer, unlike the finding in *Masterpiece Cakeshop* of an unlawful refusal.<sup>241</sup> The majority pointed to a footnote in the decision below and claimed the basis for the difference in treatment in these cases was, impermissibly, the Colorado court's own assessment of offensiveness.<sup>242</sup>

[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive . . . . The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs.<sup>243</sup>

The dissent makes the distinction the majority refuses to recognize: "The bakers would have refused to make a cake with [William] Jack's requested message for any customer, regardless of his or her religion . . . . Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others."<sup>244</sup> The dissent would have affirmed the decision below, finding Phillips in violation of Colorado's antidiscrimination law.<sup>245</sup>

The majority did reiterate the fact that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."<sup>246</sup> At least one lower court immediately took this to heart, citing *Masterpiece Cakeshop* two days after it was decided in an opinion affirming summary judgment for the city of Phoenix against a claim that its ordinance prohibiting discrimination in places of public accommodation on the basis of sexual orientation violated the plaintiffs' rights to free speech and free exercise of religion.<sup>247</sup> Another case before the Court that presented the same free exercise questions,

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241 *Id.* at 1730.

242 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

243 *Id.*

244 *Id.* at 1750 (Ginsburg, J., dissenting).

245 *Id.* at 1752 (Ginsburg, J., dissenting).

246 *Id.* at 1723–24.

247 *Brush & Nib Studio v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018).

*Arlene's Flowers Inc. v. Washington*, had its judgment below vacated and remanded back to the Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop*.<sup>248</sup> In affirming judgment for the state, the Supreme Court of Washington had cited *Smith* and used rational basis review to reject the free exercise challenge to the neutral, generally applicable Washington law against discrimination (WLAD).<sup>249</sup> The majority in *Masterpiece Cakeshop* did not express an opinion on *Smith*. Justice Gorsuch, concurring in the judgment, noted that “*Smith* remains controversial in many quarters.”<sup>250</sup> While the Court declined to rule on the merits in *Masterpiece Cakeshop* and *Arlene's Flowers*, the open question about where to draw the line between religious liberty and antidiscrimination is not going away.

One important difference between *Masterpiece Cakeshop* and the next case presenting the antidiscrimination-free exercise decision will be the difference in the composition of the Court itself. The retirement of Justice Kennedy, who was the deciding vote in the landmark gay rights cases *United States v. Windsor*<sup>251</sup> and *Obergefell v. Hodges*,<sup>252</sup> combined with the confirmation of Justice Kavanaugh, gives the Court a conservative majority that will likely be more sympathetic to religious liberty claims made by Christians. Justice Kavanaugh's prior opinions suggest that he will be sympathetic to these claims.<sup>253</sup> For this

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248 *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

249 *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

250 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

251 570 U.S. 744 (2013).

252 135 S. Ct. 2584 (2015).

253 Then-Judge Kavanaugh argued, in dissent from a denial of rehearing en banc, that the mere act of having religious nonprofits fill out a form registering their religious objections to fulfilling the contraception mandate constituted a substantial burden on the company's beliefs in violation of RFRA. *Priests for Life v. U.S. Dept. of Health and Human Services*, 808 F.3d 1, 15 (D.C. Cir. 2014) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties”). Additionally, in a 2010 Establishment Clause case, Kavanaugh wrote separately to concur in the judgment upholding the dismissal of a complaint filed by several atheists opposing prayers and the addition of the term “so help me God” to the presidential oath at the presidential inauguration ceremony in 2008. *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010). The complaint was dismissed as moot as to the 2008 inauguration, and the court held that the plaintiffs lacked standing to challenge future inaugurations. Kavanaugh disagreed with the majority that the plaintiffs lacked standing, so he wrote separately to address the merits. He chose to apply the “tradition” test from *Marsh v. Chambers*, 463 U.S. 783 (1983), which essentially grants a free pass to all longstanding

reason, it is worth considering one argument advanced by the petitioners in *Masterpiece Cakeshop* that was not addressed by the majority. The petitioners in *Masterpiece Cakeshop* challenged the general applicability of the antidiscrimination law in their brief by arguing that Phillips, who opposes same-sex marriage, is punished while bakers who approve of same-sex marriage are protected.<sup>254</sup> It is this Note's position that if this is the standard for evaluating the general applicability of laws, every antidiscrimination law would be held to violate the Free Exercise Clause. For example, laws protecting against racial discrimination "punish" white supremacists and "protect" those who believe in equality. The petitioner uses a zero-sum game to pit the LGBTQ community against people of faith, claiming that protection for the former is taking rights away from the latter.<sup>255</sup> This has never been the framework for evaluating antidiscrimination, free exercise, or RFRA claims. The idea that public accommodations laws interfere with a business owner's free exercise of religion has been rejected as "patently frivolous."<sup>256</sup> And the Court has held that a nondiscrimination policy protecting against discrimination on the basis of sexual orientation is a law of general applicability that does not target or single out religious beliefs and is therefore valid under the Free Exercise Clause.<sup>257</sup>

In the inevitable next challenge before the Court, the proper baseline for measuring third-party burdens in free exercise and RFRA claims should be the distribution of burdens and benefits existing immediately preceding the proposed accommodation, not some fantasy world in which there are no government protections in place. Where the government has provided for antidiscrimination laws, for instance, eroding them in the name of one religion constitutes a burden that violates both Religions Clauses and RFRA. As Justice Scalia reasoned in another free exercise case:

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals

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religious speech that is nonproselytizing. "However, there is significant debate about whether *Marsh* applies in contexts outside of those in which government religious speech goes back to the time of the framing." Frank Ravitch, *Judge Kavanaugh on law and religion issues*, SCOTUSBLOG (July 30, 2018), <http://www.scotusblog.com/2018/07/judge-kavanaugh-on-law-and-religion-issues/> [<https://perma.cc/M58J-MJSJ>].

254 Petitioner's Brief, *supra* note 227, at 38–39.

255 *Id.* at 41 ("the Commission's one-sided construction of CADA affords broader protection to LGBT consumers than to people of faith.").

256 *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968).

257 *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669, 697 n.27 (2010).

solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.<sup>258</sup>

Antidiscrimination laws—and the right to marry for same-sex couples—are part of the baseline against which any proposed accommodation for religion are measured. There would be heavy third-party burdens to bear should any of those protections be weakened in the name of religion.

There is no right to religious accommodation at the expense of antidiscrimination,<sup>259</sup> especially under the *Smith* standard of no religious exemptions from generally applicable laws. It is, of course, possible that the future Court will have a different view than the one suggested in this Note and find a way to muddle the religious liberty doctrine even further. If that is the case, it will be a dark day for those who view antidiscrimination principles as absolute and vital to the functioning of our country.

### III. Suggestions for Potential Religious Liberty Claims in the Name of Sanctuary

This section offers suggestions for any potential religious liberty claims that would arise in a sanctuary context. They should, in short, turn RFRA back into a shield, as opposed to wielding it as a sword. It seems most likely that RFRA would be raised by religious officials in a defense to criminal charges of harboring under section 274 of the INA.<sup>260</sup> Given that immigration is seen as a domain for federal law exclusively,<sup>261</sup> RFRA would be the relevant statute for any religious liberty challenge to immigration law. Indeed, this is exactly what happened in the case of Scott Daniel Warren, the Arizona No More Deaths volunteer accused of providing two undocumented migrants with food, water, beds, and clean clothes at “the barn,” a small, private residence in Ajo, Arizona, that humanitarian groups use as an operations base to help migrants crossing into the United States through the desert.<sup>262</sup> His

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258 *Locke v. Davey*, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting).

259 *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the government’s interest in eradicating racial discrimination overcomes “whatever burden” might be placed on religiously motivated conduct).

260 8 U.S.C. § 1324(a)(1)(A)(iii) (2012); *see supra* text accompanying note 9.

261 *Arizona v. United States*, 567 U.S. 387, 394–95 (2010) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens . . . . It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”).

262 Ryan Lucas, *Deep In The Desert, A Case Pits Immigration Crackdown Against Religious Freedom*,

trial, which is set for Jan. 8, 2019,<sup>263</sup> could provide a model for sanctuary advocates looking to advance RFRA defenses—or ammunition for the government to defeat RFRA claims in the name of sanctuary.

In this limited context of sanctuary, the RFRA standard is fortunate, because *Smith* would quickly shut down any religious exemption challenge to the generally applicable immigration laws.<sup>264</sup> There would necessarily be a fight between prosecution and defense over how to define the government’s compelling interest. The government would likely advocate for a broadly defined interest, like border protection.<sup>265</sup> However, for the harboring cases that do not involve charges of transporting immigrants across the border,<sup>266</sup> defendants should advocate for a more narrowly defined government interest, such as a government interest in raiding places of worship. Additionally, defendants could challenge raiding places of worship as the “least restrictive means” available to achieve the compelling government interest.

These potential religious liberty claims in the name of sanctuary should be narrowly tailored and not overbroad to the point where they could also be argued against reproductive and women’s health rights and LGBTQ equality. Admittedly, this is challenging, like threading a needle. For example, it would not be wise to attempt to ground any sanctuary religious liberty claims in the text of the Bible, even when it would be helpful.<sup>267</sup> The Bible is a double-edged sword, as Attorney General Jeff Sessions cited to it *in defense* of the

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NPR (Oct. 18, 2018), <https://www.npr.org/2018/10/18/658255488/deep-in-the-desert-a-case-pits-immigration-crackdown-against-religious-freedom> [<https://perma.cc/9TBR-7BLS>].

263 Order Continuing Plea Deadline and Trial, *United States v. Warren*, No. CR-18-00223-001-TUC-RCC (BPV) (D. Ariz. Oct. 26, 2018).

264 The INA explicitly prohibits certain discriminatory decision-making practices. *See, e.g.*, INA § 202(a)(1), 8 U.S.C. § 152(a)(1) (2012) (prohibiting discrimination in visa issuance due to a person’s race, sex, nationality, place of birth, or place of residence).

265 It may be useful in this instance to cite to *Hobby Lobby* and the majority’s insistence that broad interests (in that case “public health” and “gender equality”) were out of sync with RFRA’s requirement of a “more focused” inquiry, which demanded that the Government demonstrate that the compelling interest test is satisfied through application of the challenged law to the particular claimant. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2779–80 (2014). Of course, that can’t possibly be true under *Lee*, which is part of the pre-*Smith* line of cases RFRA restored.

266 8 U.S.C. § 1324(a)(1)(A)(i) (2012).

267 *See, e.g.*, *Matthew* 25:35 (“For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in”).



administration's policy of separating children from their parents at the U.S.-Mexico border.<sup>268</sup> Opponents of gay rights also frequently quote Bible passages as the source of their convictions.<sup>269</sup> If those who value reproductive rights, LGBTQ equality, and protection for immigrants seek to legitimize the Bible as the basis for a RFRA claim, conservative Christians will do the same, to the detriment of all those interests.

Additionally, attempting to have the government interest drawn too narrowly—such as a government interest in prosecuting individual sanctuary workers—should be avoided as well. This could allow individual businesses like Masterpiece Cakeshop to argue for exemptions to existing antidiscrimination laws. No antidiscrimination laws face obvious potential erosion if the government honors the sincerely held religious beliefs of congregation leaders like First Unitarian Society's Reverend Mike Morran, who helped Jeanette Vizguerra avoid deportation in Colorado, and does not prosecute him or raid his church. And no third parties are burdened by this accommodation. It is current ICE policy not to raid churches, so no one will be burdened if the policy continues to exist.

Any religious liberty claims for sanctuary should be analogized to existing protections in antidiscrimination law, not “conscience clauses.” Religious organizations should also advocate for courts to take a critical, hard look at RFRA claims, using a more searching review, in an attempt to keep them narrowly constructed to the immigration sanctuary realm. And courts should not be afraid to weigh the sincerity of a person's sincerely held religious belief—an activity the Court has engaged in for decades with religion in a variety of contexts.

### **A. Draw Analogies not to “Conscience,” but Antidiscrimination**

One temptation that should be avoided is any analogizing of religious liberty sanctuary claims to “conscience clauses,” or “refusal clauses,” which protect opponents of abortion

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268 Richard Gonzalezs, *Sessions Cites The Bible To Justify Immigrant Family Separations*, NPR (June 14, 2018), <https://www.npr.org/2018/06/14/620181177/sessions-cites-the-bible-to-justify-immigrant-family-separations> [<https://perma.cc/G95N-5G84>] (“I would cite you to the Apostle Paul and his clear and wise command in Romans 13, to obey the laws of the government because God has ordained them for the purpose of order,” Sessions said during a speech to law enforcement officers in Fort Wayne, Ind. “Orderly and lawful processes are good in themselves and protect the weak and lawful,” Sessions said, prefacing his remarks by saying he was addressing the concerns “of our church friends”).

269 See, e.g., *Matthew* 19:4–5, (“Jesus answered, ‘Have you not read that from the beginning the Creator ‘made them male and female’ and said, ‘For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh?’”); *Romans* 1:24–32.

from direct involvement in terminating a pregnancy.<sup>270</sup> These “conscience clauses” extend significant protection for objections based on conscience generally, not just religious beliefs. It is not hard to imagine sanctuary-based religious liberty claims analogous to conscience clauses getting exploited in settings involving reproductive rights and LGBTQ rights.<sup>271</sup> Letting a for-profit corporation or place of public accommodation refuse service based on conscience is akin to a license to discriminate.

Conscience clauses “usually apply regardless of whether accommodating objectors imposes serious burdens on patients seeking a medical good or service.”<sup>272</sup> The Hyde-Weldon Amendment does not even provide an exception for emergency situations.<sup>273</sup> By not basing protection on religion, conscience clauses use a broad scope that avoids potential Establishment Clause issues for exempting religious people but then shifting the cost of that relief onto women who do not share those religious beliefs.<sup>274</sup> Of course, this does not eliminate the impact on the affected third parties—in fact, it does the opposite.

Conscience clauses apply at a discrete, singular moment in time: the time of a requested medical procedure.<sup>275</sup> In contrast, sanctuary-based religious liberty claims extend much further in time. Expanding conscience clauses beyond the abortion arena could facilitate unintended further expansion in the reproductive rights field and against the LGBTQ community. Prior to *Obergefell*, some scholars advocated that religious groups assert conscience clause-based arguments against gay marriage.<sup>276</sup> Had that idea gathered steam and

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270 Tebbe, *Religion and Marriage*, *supra* note 22, at 42. The 1973 Church Amendment prohibits federal programs from conditioning funding on any requirement that a person “perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.” 42 U.S.C. § 300a-7. The 2005 Hyde-Weldon Amendment extended the degree of performance to cover “facilitat[ing] in any way” the performance of an abortion and expanded the meaning of procedure to include “counseling and referral.” 42 U.S.C. § 1395w-22(j)(3)(B).

271 *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2789 n.6 (2014) (Ginsburg, J., dissenting) (“Separating moral convictions from religious beliefs would be of questionable legitimacy”) (internal citation omitted).

272 Tebbe, *Religion and Marriage*, *supra* note 22, at 43.

273 Pub. L. No. 108-447, 118 Stat. 2809 (2004).

274 Tebbe, *Religion and Marriage*, *supra* note 22, at 44.

275 *Id.* at 45.

276 See, e.g., Laycock, *Culture Wars*, *supra* note 30, at 839; Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 Nw. J. L. & Soc. POL’Y 206 (2010); Robin Fretwell Wilson, *Same Sex Marriage and Religious Liberty: Life After Prop 8*, 14 Nexus 101, 109–10 (2009).

those who supported marriage equality been willing to compromise, situations like that in *Masterpiece Cakeshop* would be widespread.

A better solution would be to think about whether a religious exemption would be provided in the domain of antidiscrimination law generally, or in a particular law that protects against discrimination based on race or gender.<sup>277</sup> Unlike in *Masterpiece Cakeshop*, no religious liberty argument in the name of sanctuary should aim to curtail the reach of antidiscrimination law. The standard for judging third-party burdens should be one of “materiality,” or “de minimis,” similar to the “undue hardship”<sup>278</sup> standard under Title VII of the Civil Rights Act of 1964.<sup>279</sup> Under Title VII, employees have the right to “reasonable accommodations”—defined as ones that do not impose “undue hardship” on the employer<sup>280</sup>—of their religious beliefs and practices.<sup>281</sup> Granting a religious liberty claim to a church official offering sanctuary to an undocumented immigrant does not impose any undue hardship on any third party—unlike *Masterpiece Cakeshop*, where the burden borne on the LGBTQ third parties is their loss of dignity and standing as equals under the law.

One of the basic purposes of antidiscrimination law is to preserve the equal standing of members of minority groups in the economy and in society.<sup>282</sup> It is not just the government that can infringe on equal standing, but exclusion from nongovernmental entities that is

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277 Tebbe, *Religion and Marriage*, *supra* note 22, at 29.

278 An “undue hardship” is any burden on the employer exceeding an insignificant or “de minimis” cost. *Trans World Airlines, Inc. v. Hardison*, 32 U.S. 63, 85 (1977). In *Hardison*, an employee claimed a right under Title VII not to work on his Saturday Sabbath, and the Court found that the employer, TWA, could only have accommodated this at the expense of others by denying more senior employees their preferred shifts, violating established collective bargaining rights. Thus, the Court found an “undue hardship” in accommodating a religion in which not all employees participated.

279 Gedicks & Van Tassell, *supra* note 25, at 338.

280 42 U.S.C. § 2000e(j) (2012).

281 *Id.*; 42 U.S.C. § 2000e-2(a) (2012).

282 Tebbe, *Religion and Marriage*, *supra* note 22, at 38; *see Roberts v. Jaycees*, 468 U.S. 609, 625 (1984) (“[I]n upholding Title II of the Civil Rights Act of 1964, which forbids race discrimination in public accommodations, we emphasized that its fundamental object was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”) (internal citations and quotations omitted).

tolerated by the legal regime can infringe as well.<sup>283</sup> Granting a narrow religious liberty claim to religious houses of worship would not impede on current antidiscrimination laws, but an overbroad exemption could grow to do that in the future.

### B. Advocate for a Narrower Construction of RFRA's Reach

Outside of the detention context, the intersection of RFRA and immigration is, to date, quite small.<sup>284</sup> Lower courts have shown that they will not just rubberstamp RFRA claims in the immigration context.<sup>285</sup> They do, however, indicate a way to advocate for a narrowing of RFRA's overbroad reach.

In a case involving a removal proceeding, the Ninth Circuit rejected the petitioners' First Amendment and RFRA claims based on the argument that the requirements for the defense of cancellation of removal<sup>286</sup> (which requires showing "exceptional and extremely unusual hardship" to a qualifying relative, such as a child who is a U.S. citizen or legal permanent resident) burdened them as devout Catholics who were unable to conceive a child due to the Church's teachings that frowned upon *in vitro* fertilization.<sup>287</sup> The Court found that since the petitioners had not shown they opposed adoption on religious grounds, their lack of a qualifying relative was not due to their religious beliefs.<sup>288</sup> Additionally, the Court found that the statute could not have placed pressure on the petitioners to modify their religious beliefs due to the fact that they did not have a child that would suffer "exceptional and extremely unusual hardship."<sup>289</sup> The Court further noted: "No sensible person would abandon his religious precepts to have a child in the hope that the child would be so very ill or learning disabled as to come within the small number of children as to whom 'excep-

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283 Tebbe, *Religion and Marriage*, *supra* note 22, at 38.

284 See Scott D. Pollock, *Immigration Law vs. Religious Freedom: Using the Religious Freedom Restoration Act to Challenge Restrictive Immigration Laws and Practices*, 12 RUTGERS J. L. & RELIGION 295, 311, 337 (2011).

285 See Ruiz-Diaz v. United States, 703 F.3d 483 (9th Cir. 2012); Fernandez v. Mukasey, 520 F.3d 965 (9th Cir. 2008) (per curiam).

286 8 U.S.C. § 1229b(b) (2012).

287 Fernandez v. Mukasey, 520 F.3d 965, 966 (9th Cir. 2008) (per curiam).

288 *Id.*

289 *Id.*

tional and extremely unusual hardship’ can be shown.”<sup>290</sup>

Another case dismissed the RFRA challenge to the United States Citizenship and Immigration Services (USCIS) regulation that makes it more difficult for non-citizen religious workers to obtain legal permanent resident (LPR) status than it is for other, secular workers. Religious workers must undergo a two-step process, which might cause administrative delays forcing workers to leave the U.S., while secular workers have just a one-step process.<sup>291</sup> The Court found the burden of possibly having to leave was due to the terms of their temporary visa status, not their religion, and that the USCIS process did not force workers to choose between exercising their religion and obtaining a government benefit or avoiding civil or criminal penalty.<sup>292</sup>

In attempts to resist a broad reading of RFRA that would put a plethora of government laws and regulations at risk, the Ninth Circuit has interpreted RFRA as requiring that successful claims show that they will lose a government benefit (*Sherbert*) or suffer a governmentally imposed penalty (*Yoder*) if they practice their religion.<sup>293</sup> Another way to further narrow RFRA is to actually evaluate the substantiality of the burden, something Justice Alito completely failed to do in *Hobby Lobby*. Pre-*Smith* precedent mandates courts evaluate the substantiality of a burden. There is no substantial burden if the government action does not coerce an individual to violate his or her religious beliefs or deny the “rights, benefits, and privileges enjoyed by other citizens”—even if “the challenged Government action would interfere significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs.”<sup>294</sup> This type of reading of RFRA could potentially honor religious sanctuary claims—a criminal conviction under the INA for harboring would certainly qualify as a government-imposed penalty. Houses of worship offering sanctuary could, in good faith, claim a sincerely held religious belief to help vulnerable

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290 *Id.* at 966–67.

291 *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012); 8 C.F.R. § 245.2(a)(2)(i)(B) (2018).

292 *Id.* at 486–87.

293 *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (“Under RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).”); Pollock, *supra* note 284, at 315. The Ninth Circuit has reaffirmed this understanding of RFRA post-*Hobby Lobby* in *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1013 (9th Cir. 2016), *cert. denied sub nom.* *Oklevueha Native Church of Hawaii, Inc. v. Lynch*, 137 S. Ct. 510, 196 L. Ed. 2d 406 (2016).

294 *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

populations like undocumented immigrants. And this understanding of RFRA would not reach claims like those in *Masterpiece Cakeshop*, which seek to limit the reach of generally applicable antidiscrimination laws concerning public accommodations.

### C. Evaluate the Sincerity of Sincerely Held Religious Beliefs

It is true that courts cannot question the reasonableness of a religious belief. However, courts could and should question whether a specific claimant truly believes the practice is religious in nature.

Courts have had no issues judging the sincerity of an incarcerated person's religious beliefs in the RLUIPA context: "[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity."<sup>295</sup> Courts have also not had issues judging the sincerity of the religious beliefs of conscientious objectors from conscripted military service,<sup>296</sup> holding that, "any fact which casts doubt on the veracity of the registrant is relevant."<sup>297</sup> Claims for religious exemptions from drug laws have historically been subject to more skepticism than other claims.<sup>298</sup> The bankruptcy code, too, guards against fraudulent transfers of large pre-petition donations to religious organizations.<sup>299</sup> To evaluate the validity of a donation in question, courts must

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295 *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("Further, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion, see 42 U.S.C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity").

296 See 50 U.S.C.A. § 3806 (West 2018) (exempting from service anyone who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form"); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact.").

297 *Witmer v. United States*, 348 U.S. 375, 381–82 (1955).

298 In *Hobby Lobby*, Justice Alito cited to *United States v. Quaintance*, a case in which the founding members of the Church of Cognizance, which teaches that marihuana is "a deity and sacrament" raised RFRA in defense to criminal drug prosecution. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2774 n.28 (2014) (citing *United States v. Quaintance*, 608 F.3d 717, 718–19 (10th Cir. 2010)). The Tenth Circuit rejected the RFRA claim, holding that the evidence strongly suggested the defendant's marihuana dealings stemmed from "commercial or secular motives rather than sincere religious conviction." *Quaintance*, 608 F.3d. at 722.

299 The Religious Liberty and Charitable Donation Protection Act of 1998, 11 U.S.C. § 544(b)(2) (2012),

judge whether the contribution was motivated by sincere religious belief and not ulterior, secular goals. And in the prosecution of the religious officials during the original sanctuary movement of the 1980s, the government refused to honor the defendants' claims that their sanctuary was religiously motivated, insisting the movement's motivation was political instead.<sup>300</sup>

The RFRA should work the same way as the RLUIPA and conscientious objections to military service. Sanctuary claims should survive this inquiry. The dangerous nature of risking a violation of federal criminal law and the extensive support that shelter offers is evidence of the true sincerity of the belief. Any evidence that a belief is not sincere should be presented and evaluated, too.<sup>301</sup> Courts have plenty of experience weighing evidence and judging credibility through objective analysis. Looking for any secular interests, potential discrimination (as evidenced by the claimant's behavior), and inconsistencies with stated beliefs can help courts weigh the questions of fact on sincerity. There is no reason courts cannot undertake this analysis in the RFRA context as well. Determining where to draw the line on "honest conviction[s]" is a role the Court has played with religion for decades.<sup>302</sup>

## CONCLUSION

RFRA was never intended to create new rights for any religious practice.<sup>303</sup> However, in the years since its passing in 1993, it has been expanded considerably by the Court. To be

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protects smaller donations from creditors, but "Congress left § 548(a)(1) of the Bankruptcy Code intact, allowing the avoidance of any transfer, regardless of size, when made with 'actual intent to hinder, delay, or defraud.'" Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 62 (2014).

300 See Colbert, *supra* note 63 and accompanying text.

301 Neither the majority nor the petitioner in *Hobby Lobby* questioned the sincerity of the companies' religious beliefs. 134 S. Ct. at 2779. It might have been a question worth asking, though, as evidence came to light after oral arguments, but prior to the decision, that Hobby Lobby invested more than \$73 million through its retirement plans in funds with stakes in contraception manufacturers. See Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (April 1, 2014), <http://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers/> [<https://perma.cc/8K7Q-2U63>].

302 *Hobby Lobby*, 134 S. Ct. at 2779 ("Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'") (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981)).

303 *Hobby Lobby*, 134 S. Ct. at 2791 (Ginsburg, J., dissenting) (quoting 139 Cong. Rec. 26178 (statement of Sen. Kennedy)).



sure, there are more progressive arguments to be made about whether RFRA is constitutional at all,<sup>304</sup> but, given the makeup of the current Court, these challenges do not seem like winnable propositions. So advocates must work inside the existing religious liberty framework. Many of the same progressive groups interested in reproductive rights, antidiscrimination in general, and LGBTQ equality specifically also support immigrants' rights, both for the documented and undocumented. There is a natural inclination to want to support the plight of immigrants targeted by the Trump administration. The sanctuary some houses of worship have chosen to offer furthers this goal. However, if it comes to a legal challenge, progressive groups should carefully evaluate any claims of religious liberty made in the name of sanctuary. RFRA morphed into a sword for discrimination precisely because Congress blindly signed off on the overbroad idea of religious exemptions generally. The current sanctuary movement should take care not to make the same mistake.

RFRA has the potential to become the next *Lochner*, shooting down federal statutes that are “meddlesome interferences with the rights of the individual” and “undue influences with the liberty of person and freedom of contract.”<sup>305</sup> Courts should not hesitate to evaluate the RFRA claims critically—even with a close look, claims like those of Denver's First Unitarian Society and First Baptist, protecting Jeanette Vizguerra, have the chance to survive.

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304 See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) (“In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution . . . the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment”); Hamilton, *Bad Public Policy*, *supra* note 111, at 129 n.3; Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995); Eisgruber & Sager, *supra* note 98.

305 *Lochner v. New York*, 198 U.S. 45, 60–61 (1905).