THE CONFLICT BETWEEN THE RELIGIOUS FREEDOM RESTORATION ACT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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INTRODUCTION

Recent societal and legal developments largely beginning with the passage of the Religious Freedom Restoration Act ("RFRA")[1] and the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*[2] have raised important questions surrounding religious and individual liberty. There is an increasingly urgent need to resolve the confusion surrounding the religious freedom of closely-held corporations as applied to Title VII of the Civil Rights Act of 1964 ("Title VII"),[3] due to the potential effects such freedom could have on employers' obligations to comply with Title VII. Discrimination because of sex, race, color, national origin, and religion collides with religious employers' beliefs on a frequent basis.

This Note provides a broad overarching analysis of the inherent problems with employers raising a RFRA defense in response to claimed violations of Title VII, as opposed to other analyses which apply RFRA to specific subcategories of claims.[4] This Note seeks to address the competing concerns raised by the application of RFRA to Title VII, and ultimately determines that application of RFRA protection to employers is impermissible. Title VII's prohibitions on employment discrimination constitute both a compelling government interest and the least restrictive means of furthering that interest. To hold otherwise would mandate that an individual employer's religious exercise outweighs an employee's protections from discrimination. Such an outcome is undesirable from a public policy standpoint and is in conflict with the statutory intent of both RFRA and Title VII.

This Note will proceed in five parts. Part I will delineate the historical background of the passage of RFRA leading up to the recent increase in religious freedom sentiment in the United States. Part II.A will introduce Title VII of the Civil Rights Act of 1964, while Part II.B will explain how Title VII interacts with religious organization and exercises. Part III will explain how courts have interpreted RFRA as applied to Title VII and the competing issues which have arisen from

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1. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488 (codified as 42 U.S.C. § 2000bb to 2000bb-4 (2018)).

2. 573 U.S. 682 (2014).

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 852.

4. *See, e.g.*, Amanda Brennan, *Playing Outside the Joints: Where the Religious Freedom Restoration Act Meets Title VII*, 68 AM. U.L. REV. 569, 573 (2018) (arguing that application of RFRA to Title VII constitutes government action that compels LGBT employees to conform to the religious ideology of their employer); Elizabeth Brown & Inara Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 AM. BUS. L.J. 55, 56 (2019) (assessing conflicts between an employer defending LGBTQ employees and employees holding differing views); Hanna Martin, *Race, Religion, and RFRA: The Implications of* Burwell v. Hobby Lobby Stores, Inc. *in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 3 (2016) (analyzing the conceivable success of an employer's RFRA defense as applied to racial discrimination prohibited under Title VII).

these decisions. Part IV will argue that RFRA should not afford religious employers an exemption from complying with Title VII, due to the harmful effects this would have on employees experiencing discrimination. The final part will present counterarguments and conclusions.

I. HISTORICAL BACKGROUND OF RFRA AND THE RECENT INCREASE IN RELIGIOUS FREEDOM SENTIMENT IN THE UNITED STATES

Long before Congress enacted Title VII of the Civil Rights Act in 1964, or RFRA in 1993, the United States held a deeply ingrained awareness of the sanctity of religious freedom. The first formal law codifying this significant freedom began with the passage of the First Amendment in 1789.[5] Given our society's historic respect for religious freedom and the First Amendment, it is unsurprising that employers have increasingly sought to exercise their religious beliefs in the employment context. This Part will focus solely on the Free Exercise portion of the First Amendment, as opposed to the Establishment Clause, because this is the foundation for the rationale behind in the Religious Freedom Restoration Act of 1993.[6] It is necessary to understand the context surrounding the passage of RFRA in order to appreciate how RFRA implicates other federal statutes, specifically Title VII.

A. The Supreme Court's Free Exercise Jurisprudence Prior to the 1990s

The Supreme Court first examined the reach of the Free Exercise Clause in *Reynolds v. United States* in 1878, determining that the First Amendment does not prevent the government from passing neutral laws that incidentally burden certain religious practices.[7] This interpretation continued throughout the 1960s, until strict scrutiny was applied to laws burdening religion. In *Sherbert v. Verner*, a religious claimant whose faith precluded her from working on Saturdays was denied unemployment benefits for which she applied after she was terminated due to her unavailability.[8] The Court held that the Free Exercise Clause required the government to demonstrate both a compelling interest and that the law in question was narrowly

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5. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). The Establishment Clause prevents the government from promoting religion or favoring one religion over another. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

6. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488 (codified as 42 U.S.C. § 2000bb to 2000bb-4 (2018)).

7. 98 U.S. 145, 165-68 (1879).

8. 374 U.S. 398, 399-401 (1963).

tailored to achieve that interest.[9] Nearly ten years later, the Court refined this approach, holding that the government was required to show that application of the law in question to the individual religious objector served its compelling interest.[10]

In the 1980s, the Court clarified the circumstances in which some facially neutral laws may or may not impose a burden on religion. In *United States v. Lee*, an Amish employer asserted his faith in declining to participate in the Social Security system, arguing that the system was an unconstitutional infringement of the First Amendment.[11] The Court agreed that the compulsory participation in the Social Security system interfered with the employer's Free Exercise rights.[12] Nevertheless, the Court recognized that the Social Security tax should be imposed uniformly in order to accomplish an overriding governmental interest.[13] In *Thomas v. Review Board of Indiana Employment Security Division*, a religious claimant was denied unemployment benefits after he voluntarily terminated his position manufacturing war materials.[14] The Court determined the government had not demonstrated a compelling interest in the disqualifying provision of the unemployment scheme; neither the possible burden on the unemployment fund if people were allowed to leave their jobs nor the desire to avoid asking job applicants' about their religious beliefs was sufficient.[15] Separately, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court clarified that a burden on religious exercise exists if individuals are coerced into acting contrary to their religious beliefs.[16] Such laws that only impose incidental effects" on religious exercise, not rising to the level of coercion, do not require the government to show a compelling interest.[17]

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9. *Id.* at 406-07.

10. Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

11. 455 U.S. 252, 254-55 (1982).

12. *Id.* at 257.

13. *Id.* at 259-60. *See also* Bowen v. Roy, 476 U.S. 693, 703 (1986) (explaining that the Social Security requirement was wholly neutral in religious terms, applied to all persons seeking government benefits, and was a reasonable means of achieving government's interest).

14. 450 U.S. 707, 709 (1982).

15. *Id.* at 718-19.

16. 485 U.S. 439, 441-42, 449-52 (1988) (challenging the building of a road through a national forest historically used by various Native American tribes for religious rituals).

17. *Id.* at 450.

B. Context of RFRA Passage and Subsequent Actions Affecting RFRA

The most significant case ultimately leading to the passage of RFRA was *Employment Division v. Smith*.[18] In *Smith*, the respondents were dismissed from their jobs for ingesting peyote for sacramental purposes at a Native American Church; consequently, their applications for unemployment benefits were denied after the board determined they were dismissed for work-related misconduct.[19] The Court, in a decision authored by Justice Scalia, declined to follow the *Sherbert* line of analysis of the religious claimants' burden, instead affirming the state's right to enact a uniform criminal prohibition which incidentally affects drugs consumed for religious use.[20] Thus, according to the *Smith* Court, the Free Exercise Clause does not require the government to provide accommodation from neutral, generally applicable laws, and a state is not required to justify a compelling interest in such religious-neutral criminal laws.[21] In so concluding, the Court acknowledged that its decision would leave religious exemptions determined by the political process but argued this result is preferable to judges weighing the importance of laws against religious beliefs.[22]

In 1993, Congress heeded Justice Scalia's suggestion, passing the Religious Freedom Restoration Act[23] with a unanimous House vote and a 97-3 vote in the Senate.[24] President Clinton signed the bill into law, remarking that religious freedom is "perhaps the most precious of all American liberties."[25] Congress enacted RFRA specifically to overturn the decision in *Smith* and to restore the "compelling governmental interest" test to laws burdening religion.[26] Congress envisioned a broad application of the test, explicitly denying that government activity must first coerce an individual into violating their beliefs and instead instructing that the test applies whenever any law burdens a person's

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18. 494 U.S. 872 (1990).

19. *Id.* at 874.

20. *Id.* at 877-79.

21. *Id.*

22. *Id.* at 890.

23. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. § 2000bb to 2000bb-4 (2018)).

24. Religious Freedom Restoration Act, H.R. 1308, 1993 Sess. (U.S. 1993), https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions [https://perma.cc/M6XR-TK94].

25. President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 2377, 2378 (Nov. 16, 1993), *in* 1993 Book II PUB. PAPERS (1993), available at https://www.govinfo.gov/content/pkg/WCPD-1993-11-22/pdf/WCPD-1993-11-22-Pg2377.pdf [https://perma.cc/K7VV-KTL6].

26. 42 U.S.C. § 2000bb(a)(3)-(5) (2018); *see also* H.R. REP. NO. 103-88, at 6 (1993).

religious exercise.[27] Importantly, RFRA provided a claim or affirmative "defense to persons whose religious exercise is substantially burdened by government."[28] The 1993 version of RFRA defined "religious exercise" as "the exercise of religion under the First Amendment to the Constitution."[29]

In 1997, the Court first examined RFRA in *City of Boerne v. Flores*, holding that RFRA's requirements cannot be applied to the States because Congress exceeded its authority granted under the Fourteenth Amendment.[30] As such, RFRA was understood to be only applicable in the context of federal laws.[31] In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") as a response to the Court's decision in *Flores*.[32] RLUIPA modified the term "religious exercise" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[33] This modified definition significantly expanded the possibilities in which a religious-based defense could be raised. The 1993 definition was tied to courts' interpretation of the First Amendment, while the 1997 definition suggests an expansion beyond case law in deference to the assertions of the religious entity.

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27. *See* H.R. REP. NO. 103-88, at 7 (1993).

28. 42 U.S.C. § 2000bb(b)(2) (1994); *see also* 42 U.S.C. § 2000bb-1(c) (1994) ("A person whose religious exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate reiief [sic] against a government.").

29. 42 U.S.C. § 2000bb(b)(2) (1993).

30. 521 U.S. 507, 511 (1997).

31. In response to the Court's decision, numerous states enacted their own versions of RFRA, which closely mirror the federal RFRA. *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/73L7-3QPB] (last visited April 28, 2021).

32. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as 42 U.S.C. § 2000cc (2018)). RLUIPA extended the substantial burden analysis to any program or activity that receives federal financial assistance. *Id.* RLUIPA is generally understood to be an extension of RFRA to state or local governments which receive federal funding, a workaround to the *Flores* decision, because it requires these governments to accommodate religious freedom. *See* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 203-207 (2008) (describing RLUIPA as a compromise solution after *Flores* had struck down provisions of RFRA).

33. *Id.* at. § 2000cc-5. RFRA's definition of religious exercise was modified concurrently. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106–274, § 7(a)(3), 114 Stat. 803, 806 (2000) (replacing "the exercise of religion under the First Amendment to the Constitution" with "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000").

The Court clarified the application of the RFRA compelling government interest test in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* in 2006.[34] The *O Centro* test requires the government to demonstrate a compelling interest by applying the challenged law "to the person"—the claimant whose sincere exercise of religion is being substantially burdened.[35] In so holding, the Court made it significantly more difficult for the government to demonstrate that its laws were the least restrictive means of achieving its interest, especially in the context of broad, generally applicable laws which further the overall interests of society. Viewed another way, it is now easier for an individual religious "person" to whom a law is applied to demonstrate that their exemption from the law will not prevent the government's interest from being achieved via some other avenue.

C. Supreme Court Decisions Affirming Broad Religious Freedoms and Recent Increases in Religious Freedom Sentiment

Perhaps the most famous Supreme Court decision involving RFRA since its passage is *Burwell v. Hobby Lobby Stores, Inc.*[36] The importance of *Hobby Lobby* cannot be overstated due to both its immediate impact and potential future impacts, some of which are becoming more apparent in litigation today. *Hobby Lobby* addressed the question of whether the Affordable Care Act's ("ACA") mandatory contraceptive regulations violated the closely-held business's religious exercise under RFRA.[37] The Court held that the regulations substantially burdened the owners' religious exercise; further, even if the regulations were a compelling government interest, the government failed to prove they were the least restrictive means of achieving such interest.[38] The decision was praised by religious freedom advocates.[39] The *Hobby Lobby* decision will be discussed in more detail in Part III.

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34. 546 U.S. 418, 423 (2006).

35. *Id.*

36. 573 U.S. 682 (2014).

37. *Id.* at 688-90.

38. *Id.* at 737-38.

39. Ariane De Vogue, *Hobby Lobby Wins Contraceptive Ruling in Supreme Court*, ABC NEWS (Jun. 30, 2014), https://abcnews.go.com/Politics/hobby-lobby-wins-contraceptive-ruling-supreme-court/story?id=24364311 [https://perma.cc/H6E4-PPTC] (quoting *Hobby Lobby* supporters as saying, "This is a great victory for religious liberty—the bedrock of our founding," and "The Supreme Court has delivered one of the most significant victories for religious freedom in our generation").

Religious freedom advocates have had further occasion for celebration due to the Trump Administration's stated goal of increasing religious freedoms.[40] Former Attorney General Jeff Sessions created a "Religious Liberty Task Force" in the Department of Justice to help the Department "fully implement [its] religious liberty guidance."[41] In May 2017, President Trump issued an Executive Order entitled *Promoting Free Speech and Religious Liberty* essentially directing the executive branch and its agencies to implement policies favoring religious freedoms.[42] Agency action as a result of this Executive Order is evident. The Department of Health and Human Services has issued a final "conscience rule" permitting healthcare workers to object to providing healthcare services such as abortion, sterilization, or assisted suicide on religious grounds.[43] The Department of Labor announced a Notice of Proposed Rulemaking to ensure that conscience and religious freedom are given the broadest protection permitted by law to religious organizations that contract with the federal government.[44] The overall thrust of the Trump Administration is undoubtedly to advance religious freedom as an important component of all facets of religious believers' daily lives.

The Supreme Court has also developed recent high-profile jurisprudence on the issue of religious freedom. In *Holt v. Hobbs*, the Court relied on *Hobby Lobby* in holding that the Department of Corrections' inmate grooming policy violated RLUIPA and that the Government had not satisfied the compelling interest test and least

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40. *See, e.g.*, White House Fact Sheet, Donald Trump, President of the United States, President Trump is Committed to Protecting Religious Freedom in the United States and Around the World (Sept. 23, 2019), https://www.whitehouse.gov/briefings-statements/president-trump-committed-protecting-religious-freedom-united-states-around-world/ [https://perma.cc/LYP7-B94T].

41. Press Release, Jeff Sessions, United States Attorney General, Attorney General Sessions Delivers Remarks at the Department of Justice's Religious Liberty Summit Monday (Jul. 30, 2018) https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit [https://perma.cc/42RH-VU9X].

42. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017) ("All executive departments and agencies . . . shall . . . respect and protect the freedom of persons and organizations to engage in religious and political speech."). Nearly a year later, another Executive Order was issued to establish a Faith and Opportunity Initiative to protect faith-based organizations' ability to receive federal grants. Exec. Order. No. 13,831, 83 Fed. Reg. 20,715 (May 3, 2018).

43. Alison Kodjak, *New Trump Rule Protects Health Care Workers Who Refuse Care for Religious Reasons*, NPR (May 2, 2019), https://www.npr.org/sections/health-shots/2019/05/02/688260025/new-trump-rule-protects-health-care-workers-who-refuse-care-for-religious-reason [https://perma.cc/ZN7F-Y3GV].

44. Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 Fed. Reg. 41,677 (proposed Aug. 15, 2019) (to be codified as 41 C.F.R. 60).

restrictive means of interference.[45] In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, where a state denied a religious organization a grant for playground surfaces made from recycled tires, the Court held the state's policy of denying public grant money to religious organizations violated their free exercise of religion.[46] The application of religious freedom to public accommodations law was not directly decided in *Masterpiece Cakeshop. v. Colorado Civil Rights Commission*; instead, the Court issued a narrow ruling deciding that respondents failed to adequately apply religious neutrality, thus violating petitioner's right to free exercise of religion.[47]

The 2019-2020 Supreme Court term yielded significant decisions implicating religious freedom and religious exercise. Most significantly in the RFRA-Title VII context, the Court held in *Bostock v. Clayton County* that Title VII's prohibition on discrimination "because of sex" necessarily includes sexual orientation and gender identity.[48] This decision will be discussed further in Part III. In *Espinoza v. Montana Department of Revenue*, the Court found a violation of the Free Exercise Clause in prohibiting state scholarship funds from being used at private religious schools.[49] In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, the Affordable Care Act's contraceptive mandate was again at issue.[50] The Court held that the Health Resources and Services Administration had validly used its discretion to permit employers to raise religious or moral objections to the provision of contraception.[51] The Court noted that it was clear from the text of the Affordable Care Act that the contraceptive mandate could violate RFRA, and the ACA does not explicitly exempt RFRA.[52] The Court's willingness to engage in these important religious freedom cases contributes to our society's increased awareness of religious freedom concerns.

The Court's recent jurisprudence regarding religious freedoms has created significant uncertainty, rather than clarity, for lower courts and citizens moving forward. Although *Hobby Lobby* confirmed that closely-held businesses could raise a RFRA defense, it did little to

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45. Holt v. Hobbs, 574 U.S. 352, 356 (2015).

46. 137 S. Ct. 2012, 2017, 2021 (2017).

47. 138 S. Ct. 1719, 1724 (2018). *See also* Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671-72 (2018) (judgment vacated and remanded to Supreme Court of Washington in light of *Masterpiece Cakeshop*).

48. 140 S. Ct. 1731, 1754 (2020).

49. 140 S. Ct. 2246, 2261-63 (2020).

50. 140 S. Ct. 2367 (2020).

51. *Id.* at 2383.

52. *Id.* at 2383. Although dicta, another takeaway from this decision is that executive agencies should consider RFRA in its promulgation of regulations moving forward. This raises interesting separation of powers questions beyond the scope of this Note.

clarify how RFRA interacts with the myriad federal statutes regulating such businesses across the country. It has become evident that lower courts have struggled to apply *Hobby Lobby*.[53] In *Holt*, the Court did not find the prison had a compelling government interest, citing the fact that other states and the federal government had different grooming policies allowing beards as reason to require that particular prison to explain the need for a policy deviating from that norm.[54] The prison's interest in inmate safety could not be deemed compelling because other prisons had implemented different grooming policies, although all grooming policies were presumably designed to promote inmate safety. This suggests a significant burden on the government moving forward, not only in explaining why a governmental policy should be applied to that individual, but also in explaining why this policy is different from other policies in the same realm of governmental interest. Further, in not reaching the direct conflict between religious freedom and antidiscrimination protection (in the public accommodation context) in *Masterpiece Cakeshop*, the Court failed to provide a helpful parallel to antidiscrimination in the employment context. In short, the Court has not directly answered how religious exercises are to remain protected if those religious exercises would constitute otherwise unlawful discrimination.

This uncertainty extends to Title VII, where an employer's RFRA defense citing religious freedom directly clashes with an employee's antidiscrimination claim. Justice Gorsuch's opinion in *Bostock* acknowledged the religious freedom concerns in the Title VII context—but reserved a decision on that issue for another day.[55] The government should be weary to assume that combating discrimination in the employment context will always constitute a compelling government interest as applied to a religious employer; *Holt* suggests the Court will require more persuasive evidence to justify application of an antidiscrimination statute to that specific employer. Further, *Hobby Lobby* only assumed a compelling government interest in implementing the Affordable Care Act, unrelated to Title VII.[56] In a future case, the Court will not necessarily assume a compelling government interest in implementing Title VII.

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53. *See infra* Part III.

54. Holt v. Hobbs, 574 U.S. 352, 366, 368 (2015).

55. *See infra* note 117 and associated discussion.

56. 573 U.S. 682, 691-92 (2014).

II. RELIGIOUS FREEDOMS AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Part II of this Note will introduce Title VII of the Civil Rights Act of 1964, its relevant provisions, the U.S. Equal Employment Opportunity Commission ("EEOC"), and explain its interaction with religious freedom and institutions.

A. Title VII of the Civil Rights Act of 1964

Title VII, Equal Employment Opportunity, is one of the major provisions of the Civil Rights Act of 1964, which was signed by President Lyndon B. Johnson in the wake of John F. Kennedy's assassination.[57] At the time of its passage, the country was in the midst of the Civil Rights Movement, and there was a growing recognition of the need to codify protections against discrimination.[58] The landmark Civil Rights Act thus contained the most significant protections against discrimination not previously recognized by Congress. The importance of Title VII, Equal Employment Opportunity, is best appreciated in the context of the other Titles included in the Act: Title I: voting rights; Title II: public accommodations; Title III: desegregation of public facilities; Title IV: desegregation of public education; Title V: creation of Commission on Civil Rights; and Title VI: nondiscrimination in federally assisted programs.[59] Employers with fifteen or more employees are required to comply with Title VII.[60]

The core provision of Title VII is located in 42 U.S.C. § 2000e-2:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[61]

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57. *Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html [https://perma.cc/N4VQ-QW2Y] (last visited March 3, 2021). Prior to his assassination, JFK had championed the Civil Rights Act as part of his overall support for the Civil Rights Movement. *Id.*

58. *See id.*

59. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 852.

60. 42 U.S.C. § 2000e(b) (2018) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks").

61. 42 U.S.C. § 2000e-2(a) (2018).

Simply put, an employer is forbidden from making employment decisions based on any of the employee's protected characteristics: race, color, religion, sex, or national origin. The U.S. Equal Employment Opportunity Commission, created at the time of Title VII's passage, is the agency charged with enforcement and investigation of Title VII violations.[62] Employees bring charges of discrimination based on protected characteristics to the EEOC; the agency then investigates the charges and determines the merits of allegations.[63] Almost all alleged Title VII violations are resolved within the agency as opposed to litigation.[64] This is partly because Title VII imposes a duty on the EEOC to attempt to resolve disputes prior to filing a lawsuit.[65] Courts will not review the reasonableness of these conciliation efforts, but will simply review whether the EEOC has satisfied its statutory obligation.[66] Thus, the EEOC retains significant power in resolution of charges of discrimination. The EEOC brings lawsuits on behalf of the affected individuals. As a result, RFRA can be used as an affirmative defense in Title VII lawsuits, because the suit is between a private party and the government.[67]

B. Title VII's Interaction with Religious Exercises and Institutions—The Religious Organization Exemption

Title VII contains a specific exemption for a "religious corporation, association, educational institution, or society" which employs individuals to perform work connected with these organizations.[68] The exception applies only to organizations whose "purpose and character

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62. *See* Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e-4, 2000e-5 (2018)).

63. *Id.*; *see also Enforcement & Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm [https://perma.cc/E45X-HKFE] (last visited April 8, 2021).

64. *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm [https://perma.cc/78WF-EZ4V] (showing that while the EEOC resolved over 70,000 charges of discrimination, the agency only filed 199 merits lawsuits in Fiscal Year 2018).

65. Mach Mining, LLC v. EEOC, 575 U.S. 480, 486 (2015).

66. *Id.*

67. The question of RFRA's applicability to suits between private parties is undecided (for example, if the EEOC declined to bring a lawsuit, but the affected individual proceeded with their own). *See* Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 67 (2011) (arguing that RFRA should be read to include claims between private parties).

68. 42 U.S.C. § 2000e-1 (2018).

are primarily religious."[69] The EEOC has interpreted the statute as essentially carving out religion as one of the protected characteristics, while leaving the others in place.[70] The exemption affords consideration to religious employers' unique employment priorities, such as a Catholic institution wishing to employ other Catholic members to further its mission.

The Supreme Court has interpreted the religious organization exemption as extending to non-religious activities conducted under the umbrella of the religious institution as a whole.[71] This reflects the idea that the right of religious organizations to be free from governmental intrusion outweighs the government's interest in eradicating religious discrimination by religious organizations.[72] Numerous courts have found the exemption to apply, thus ending plaintiffs' claims of religious discrimination.[73] From the perspective of the religious organizations,

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69. *See Question and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 31, 2011), https://www.eeoc.gov/policy/docs/qanda_religion.html [https://perma.cc/JAN8-5DFN]. In determining an organization's religious nature, consider: do its articles of incorporation state a religious purpose? Are its day-to-day operations religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion)? Is it not-for-profit? Is it affiliated with or supported by a church or other religious organization? *Id.*

70. *See id.* ("The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability."). Circuit courts have interpreted the exemption as applicable to all provisions of Title VII. *See, e.g.*, Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 192 (4th Cir. 2011); Garcia v. Salvation Army, 918 F.3d 997, 1004 (9th Cir. 2019).

71. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30 (1987). This relieves both the organization and the courts from the burden of determining which activities might be considered religious. *See id.*

72. In other words, the government's interest in eradicating religious discrimination of employees is never compelling enough to overcome the free exercise concerns of religious organizations. This rationale is similar to the "ministerial exception," a First Amendment principle that governmental regulation of religious organizations impedes the free exercise of religion and constitutes impermissible government "entanglement" with religious authority. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 173 (2012); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) (ministerial exception applied when a former employee, who was a nun, sued a religious university under Title VII). The ministerial exception was recently upheld in *Our Lady of Guadalupe School v. Morrissey-Berru*, where teachers could not raise employment discrimination claims against their Catholic school employers. 140 S. Ct. 2049 (2020).

73. *See, e.g.*, *Kennedy*, 657 F.3d at 194 (a tax-exempt nursing care facility conducting itself under the order of a church qualified for Title VII religious exemption); Hall v. Baptist Mem. Health Care Corp., 215 F.3d 618, 624-25 (6th Cir. 2000) (college of health sciences qualified as a religious institution under Title VII because it was an affiliated institution of a church-affiliated hospital, had direct relationship with the Baptist church, and the college atmosphere was permeated with religious overtones); Garcia, 918 F.3d at 1004 (the religious organization exemption applied because the Salvation Army's purpose and character were primarily religious). *But see* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d

it is important to establish themselves as eligible for the exemption; eligibility forecloses the need to defend the merits of their employment decisions. In contrast, in the case of a religious employee, an employer must provide reasonable accommodation of the employee's sincerely held religious beliefs when requested.[74] Accommodation is required unless it would impose an undue hardship on business operations, defined as a "more than *de minimis*" cost or burden on the employer.[75]

C. Common Title VII Violations: Opportunities for Religious Employers to Make Employment Decisions Otherwise Prohibited

There are myriad situations in which a religious employer could make employment decisions otherwise prohibited under Title VII. The following are hypothetical situations to elucidate these possible opportunities, based on common causes of action which employees bring against their employers:

1. Disparate Treatment

The most basic form of discrimination prohibited by Title VII is disparate treatment: treating one employee differently than others because of their membership in a protected class.[76] In a typical case, it is difficult for an employee to provide direct evidence of discriminatory intent because most employers do not openly discriminate. Employees mostly rely on circumstantial evidence which provides an inference of discrimination; the employer then rebuts this inference with a legitimate non-discriminatory reason for the adverse employment action.[77] The burden then shifts back to the employee to argue that the employer's reason was merely a pretext for the actual discriminatory reason.[78] Alternatively, disparate treatment cases may instead have a "mixed-motive" analysis: an employer has both a discriminatory and a

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610, 619 (9th Cir. 1988) (finding religious exemption did not apply to a mining equipment manufacturer whose owners were devout Christians and included their faith in many aspects of the business).

74. 42 U.S.C. § 2000e(j) (2018).

75. *Id.*; *see also Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.2(e) (2019). *See also* Townley Eng'g & Mfg. Co., 859 F.2d at 621 (employer's free exercise right to hold mandatory religious services outweighed by Title VII's obligation to accommodate atheist employee's request to be exempt from attending the services; excusing attendance would not pose an undue hardship on operation of employer's business).

76. "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would . . . adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2018).

77. This is the *McDonnell-Douglas* burden-shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

78. *See id.* at 804.

non-discriminatory motive for the employment decision and argues that the same decision would have been made for the non-discriminatory reason.[79]

Disparate treatment cases where a religious employer brings a RFRA defense would lead to interesting and confusing results. For example, a religious employer could treat a pregnant employee less favorably than other women because she is unmarried.[80] Some faiths hold that engaging in sexual intercourse outside of marriage is against their beliefs. This simplified example raises the question of how courts should analyze cases where an employer's religious beliefs were used to discriminate because of sex. Assuming that the religious employer was open about their beliefs and raises a RFRA defense, the disparate treatment claim would require the court to decide whether a religious-based RFRA defense outweighs Title VII sex discrimination. Under a pretext analysis, the employee could allege circumstantial evidence of sex discrimination (or direct evidence, if the employer made explicit comments), while the employer could allege the decision was based on their religious belief protected by RFRA. The employee could conceivably lose because there was no pretext—the decision was openly and purposefully because of the employer's religious beliefs; the actual discriminatory reason was not because of sex. Further, even under a mixed-motive analysis, if the court finds sex to be a discriminatory motive, the non-discriminatory motive of religion would seem to be permissible under RFRA. However, under either framework, the reality is that the religious beliefs were used to discriminate because of sex, so both the employee and the employer are correct in their assertions. A non-religious employer would have violated Title VII by treating a pregnant woman less favorably than others; a religious employer can raise a RFRA defense to essentially argue that their religious beliefs permit them to engage in sex discrimination. Thus, in this simple scenario, a court would not be engaging in traditional Title VII analysis but would instead be forced to decide between two federal statutes seemingly in conflict with each other.

2. Sexual Harassment

Sexual harassment is a common cause of action under Title VII's prohibition on sex-based discrimination. The EEOC has stated that sexual harassment does not have to be of a sexual nature and can

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79. "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2018).

80. The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit sex discrimination based on pregnancy. 95 Pub. Law 555, 92 Stat. 2076.

include offensive remarks about a person's sex.[81] An employee must allege facts demonstrating that the harassment was so severe and pervasive as to create a hostile work environment.[82] Further, because sexual orientation and gender identity fall under Title VII's prohibition of sex-based discrimination,[83] queer individuals may now bring sexual harassment claims against employers where they previously could not.

A religious employer could conceivably engage in sexual harassment via imposition of beliefs on employees. Some faiths believe in differences between the role of men and women in society, the appropriate behavior in which either gender should engage, or the "traditional values" which men and women should hold. Some faiths believe that marriage is between a man and a woman, or that same-sex relations are a sin forbidden under their religious texts. Employees not of the faith may be able to demonstrate that the imposition of such beliefs, or the requirement to adhere to such beliefs in the workplace, amount to a hostile work environment. Comments such as "a woman's place belongs in the home—according to my religious beliefs" or "two women should not be allowed to get married" could be offensive to others who do not hold such beliefs. The question then becomes how the RFRA defense interacts with an employer's obligation to maintain a non-hostile work environment for their employees.

3. Retaliation

Title VII prohibits an employer from retaliating against an employee for asserting their rights to be free from employment discrimination or engaging in protected activity.[84] Retaliation must be proven via a traditional "but-for" causation standard: that the employer's conduct caused the employee's injury.[85] Retaliatory injuries can take many forms: reprimanding the employee, giving a performance evaluation that is lower than it should be, or making the person's work more difficult to perform.

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81. *Sexual Harassment Guidelines*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [https://perma.cc/EY9A-KLNH] (last visited Dec. 18, 2019).

82. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986); Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.") (internal citations and quotations omitted).

83. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

84. *Retaliation Guidelines*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/retaliation.cfm [https://perma.cc/R7WB-TLF7] (last visited Dec. 18, 2019).

85. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 339 (2013).

An employee who requests a religious accommodation is engaging in protected activity. Hypothetically, a religious employee of a different faith than the employer could request an accommodation, and the employer could make that person's work more difficult in response. Or an employee of a different faith could request absence from an employer's religious activity, such as a prayer before a company lunch. An employer has an obligation to accommodate employee's religious beliefs, but it is less clear what happens if an employer's refusal to accommodate is a result of their own religious beliefs. These situations raise the important question of, essentially, whose religious beliefs will prevail?

III. RFRA SPECIFIC REQUIREMENTS AND APPLICATION OF THE RFRA REQUIREMENTS TO TITLE VII

This Part is devoted primarily to explaining particular provisions of the Religious Freedom Restoration Act, how the courts have interpreted its provisions thus far, and describing particular cases which have applied RFRA in the context of Title VII.

A. The Religious Freedom Restoration Act

RFRA states:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[86]

It is important to note that the text specifically contemplates "even if the burden results from a rule of general applicability," such as a federal statute. This textual provision contemplates that a statute like Title VII could constitute a governmentally-imposed burden on religious exercise. This language is not unusual in terms of constitutional doctrine developed by the Supreme Court, but it is remarkable in that Congress has codified it into law.

Generally, a substantial burden has been defined as imposing pressure on a religious adherent to either modify their behavior or violate their beliefs.[87] An obvious governmental burden is where the

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86. 42 U.S.C. § 2000bb-1(a)—(b) (2018).

87. *See* Hobbie v. Unemployment Appeals Comm'n., 480 U.S. 136, 140 (1986). *See also* Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 708 (1982) (holding a burden exists when the government denies receipt of a benefit because of conduct mandated by religious belief).

government compels an adherent to refrain from religious conduct under threat of sanctions.[88] In contrast, a burden does not exist for religious adherents who seek exceptions from a condition that is binding on all other persons who seek the same benefits from the government.[89]

As the text of RFRA indicates, the first part of the two-part exception to imposing an impermissible substantial burden on religion is to advance a "compelling government interest." In its pre-RFRA jurisprudence, the Court defined compelling government interests in a variety of circumstances: it was not compelling to enforce state unemployment eligibility provisions against a petitioner discharged due to religious beliefs;[90] a compelling interest in the "fiscal vitality" of the Social Security system was furthered by requiring an Amish employer to participate;[91] the government's interest in eradicating racial discrimination in education outweighs the religious interest of a private college whose racial discrimination was founded on religious beliefs;[92] and the government had a compelling interest in maintaining a uniform tax system without exceptions granted for religious beliefs.[93] However, in the post-RFRA context, the compelling government interest is modified by the "to the person" language contained in the statute and affirmed in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[94] This is a higher burden on the government—it must show that the compelling interest is furthered specifically when the religious objector complies with the law, rather than a compelling interest in the uniform application of laws to all individuals.

Even if a compelling interest exists as applied to the individual religious objector in the case, the government must satisfy the second part of the test: demonstrate that the application of this burden is the least restrictive means of furthering the interest. The Court has stated that if there is a less restrictive alternative to achieve the interest, the government must use it.[95] For example, a prison's grooming policy for

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88. *See* Bowen v. Roy, 476 U.S. 693, 703 (1986).

89. *See id.*

90. Sherbert v. S.C. Emp. Sec. Comm'n, 374 U.S. 398, 398 (1963).

91. United States v. Lee, 455 U.S. 252, 258 (1981).

92. Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983).

93. Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989).

94. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423 (2006) (affirming that RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened).

95. *See* Holt v. Hobbs, 574 U.S. 352, 365 (2015) ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.") (citing United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 815 (2000)).

inmate identification violated the inmate's religious interests because the inmate could be photographed with or without a beard.[96]

While the government's burden to meet RFRA's exception appears difficult, there have been situations in which the government successfully passed the test. In *Adams v. Commissioner*, the uniform application of tax laws was a compelling government interest, and neither the petitioner's religious beliefs nor RFRA exempted her from abiding by these laws.[97] In *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, a federal statute prohibiting cannabis did not constitute a "substantial burden," forcing plaintiffs to choose between obedience to their religion or criminal sanction.[98] In *United States v. Wilgus*, the government's compelling interest in protecting bald eagles and preserving Native American culture outweighed a RFRA defense raised by a non-Native American practicing a Native American religion who collected bald eagle feathers in violation of a federal statute.[99]

B. Burwell v. Hobby Lobby Stores, Inc.

The most famous and important case involving the RFRA is *Burwell v. Hobby Lobby Stores, Inc*.[100] This was the first major Supreme Court decision to expand upon the RFRA requirements in both the holding and dicta. The Court held that closely-held, for-profit corporations can be exempt from the government's Affordable Care Act requirements due to the religious objections of the corporate owners.[101] The Court reasoned that such closely-held corporations are "persons" under the text of the RFRA.[102] The Court expressly declined to limit its analysis to the confines of pre-*Smith* case law, despite Congress's stated reasons for passing RFRA.[103] Further, the Court weakened the "substantial burden" which must be shown by the company owners, instead accepting that if the protesting companies sincerely object, it is not for the Court to determine that their beliefs are mistaken or

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96. *See id.* at 365-66.

97. Adams v. Comm'r, 110 T.C. 137, 139 (1998); *See also* Miller v. Comm'r, 114 T.C. 511, 518-19 (2000) (finding no other feasible accommodation from religious claimants' objection to use of Social Security numbers).

98. 828 F.3d 1012, 1016 (9th Cir. 2016).

99. 638 F.3d 1274, 1277, 1288, 1295-96 (10th Cir. 2011).

100. 573 U.S. 682 (2014).

101. *Id.* at 690-91. The requirement at issue was the provision of various forms of birth control to qualifying employees, which the owners objected to on religious grounds. *Id.*

102. *Id.* at 706, 708.

103. *Id.* at 682. *See supra* Part II for a discussion of the motivation of passage of the RFRA.

insubstantial.[104] The Court did not affirm or deny whether the government's interest was compelling; the Court determined the government had not satisfied the "least restrictive means" test due to the availability of an opt-out provision for non-profit and religious organizations.[105]

The Court's dicta suggested an awareness of the significant scope of its holding. In addressing the broad possibilities arising from a defense based on religious objections, the Court expressly foreclosed the possibility of discrimination in hiring based on race "cloaked as religious practice."[106] An employer could not use such beliefs as a shield to escape legal sanction.[107] Further, in rejecting the government's argument that some federal statutes expressly exempt religious organizations but not for-profit companies (thus suggesting the companies at issue should not be exempt from the Affordable Care Act's requirements), the Court specifically referred to Title VII.[108] The Court reasoned that Congress speaks with specificity when it intends for a religious accommodation not to extend to for-profit corporations, as it did in Title VII.[109] Such dicta, although not legally binding on employers, suggests that the Court would not be willing to entertain a RFRA defense arising from a religious employer's employment decisions that would otherwise violate Title VII. Alternatively, even if a RFRA defense were permitted, the EEOC could still conceivably pass the two-prong RFRA test in demonstrating that adherence to Title VII requirements was the least restrictive means of furthering the compelling government interest against discrimination.

C. Various Court Applications of RFRA to Title VII

There is some indication in lower court decisions that a RFRA defense would not succeed in the Title VII context. Three circuit courts have ruled or suggested that Title VII prohibits an employer from discriminating against an employee who fails to conform her conduct

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104. *See id.* at 725-26 (finding the significant economic penalties imposed for noncompliance with the Affordable Care Act satisfied the burden). For a further discussion of *Hobby Lobby*, see Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015).

105. *Hobby Lobby*, 573 U.S. at 692 ("Although [Health and Human Services] has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections.").

106. *Id.* at 733 ("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.").

107. *Id.*

108. *Id.* at 716-17.

109. *Id.*

with the employer's religious beliefs.[110] Title VII would overrule the religious employer's beliefs regardless of whether the employee can show that her own conduct was motivated by her religious beliefs or that she holds religious beliefs different from her employer's.[111] However, these cases are pre-*Hobby Lobby*, and it is plausible that the Court would view the application of RFRA differently in light of its reasoning there.

A district court viewed Title VII as an exception to the application of RFRA.[112] There, a religious school terminated a teacher for being pregnant and unmarried, and the employer did not show evidence of any other terminations for engaging in sexual intercourse outside of marriage, which would ostensibly have strengthened the RFRA defense.[113] Further, the ministerial exception did not apply as the employee's duties were purely secular.[114] Ten years after that decision, another district court declined to allow an employee to raise a RFRA claim where Title VII was available as a remedy.[115] That court did not read *Hobby Lobby* as extending to religious liberty in the employment context, but rather determined that the decision was limited to the context of the mandatory contraception coverage of the Affordable Care Act.[116]

A recent case has addressed the RFRA and Title VII issue directly: *EEOC v. R.G.*[117] In the district court, a funeral home employer who operated his business as an extension of his faith successfully raised a RFRA defense in terminating a transgender employee.[118] The district court ruled that RFRA prohibited the EEOC from applying Title VII to force the employer to violate his sincerely held religious beliefs; the EEOC failed to demonstrate that general compliance with Title VII

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110. *See* Lawrence v. Mars, Inc., 955 F.2d 902, 905-06 (4th Cir. 1992); Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997); Noyes v. Kelly Servs., 488 F.3d 1163, 1168-69 (9th Cir. 2007). *See also* Yancey v. Nat'l Ctr. on Insts. & Alts., 986 F. Supp. 945, 954 (D. Md. 1997), *aff'd per curiam*, 1998 WL 196733, (4th Cir. Apr. 24, 1998).

111. *See Lawrence*, 955 F.2d at 905-06; *Venters*, 123 F.3d at 972; *Noyes*, 488 F.3d at 1168-69; *see also Yancey*, 986 F. Supp. at 954, *aff'd per curiam*, 1998 WL 196733.

112. Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006).

113. *Id.* at 215, 223.

114. *Id.* at 221; *see also supra* note 72. Note this reasoning would likely not be used today. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020). In other words, an employee's purely secular job responsibilities may no longer be an important factor in whether the employer qualifies for the ministerial exception.

115. Holly v. Jewell, 196 F. Supp. 3d 1079, 1090-91 (N.D. Cal. 2016).

116. *Id.* at 1090. ("[A]ny dictum that can be extracted from *Burwell* about RFRA's relationship to Title VII amounts to tea leaves at best.").

117. EEOC v. R.G & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018).

118. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016).

was the least restrictive means of protecting employees from gender stereotyping.[119] On appeal, the Sixth Circuit overturned the district court, noting that the employer's RFRA defense was insufficient because the employer did not show a substantial burden in continuing to employ the transgender employee.[120] Further, the EEOC showed that enforcing Title VII was the least restrictive means of furthering its compelling interest in eradicating sex discrimination.[121] The Sixth Circuit's decision was appealed to the Supreme Court, which consolidated the case with two others in *Bostock v. Clayton County*.[122] The Court's decision was limited to whether "because of sex" includes discrimination because of sexual orientation and gender identity, thus letting the Sixth Circuit's decision to deny the RFRA defense stand. Justice Gorsuch, writing for the majority, noted that future cases may directly address the issue of religious employers' obligations to comply with Title VII. He wrote:

> [W]orries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting [Title VII], Congress included an express statutory exception for religious organizations. . . . And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA) . . . . Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.[123]

Although dicta, the *Bostock* decision provided two important takeaways. First, the Supreme Court affirmed the availability of a RFRA defense for religious employers who have allegedly violated Title VII (which is in line with the post-*Hobby Lobby* cases); second, there is now a strong suggestion that a RFRA defense would succeed against a Title VII claim. Unfortunately, Justice Gorsuch did not elaborate on how RFRA could properly be considered a "super statute" compared to Title VII itself, nor did he clarify what an "appropriate case" would look like. Future courts that encounter this issue may look to Justice Gorsuch's dicta in the highest court for guidance and ultimately decide that RFRA should succeed over Title VII. Alternatively, they may look to the Sixth Circuit's *R.G.* decision, as this is the only circuit court decision that has weighed the merits of the arguments and reached a conclusion.[124]

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119. *Id.* at 841.

120. *R.G.*, 884 F.3d at 567.

121. *Id.*

122. 140 S. Ct. 1731 (2020).

123. *Id.* at 1754.

124. As of July 2020.

IV. RFRA DOES NOT CREATE AN ABSOLUTE DEFENSE TO RELIGIOUS EMPLOYER'S REQUIREMENTS UNDER TITLE VII

Put simply, RFRA does not permit religious employers to make employment decisions otherwise prohibited under Title VII. Although a religious employer may validly raise a RFRA defense, employers should not be permitted to circumvent their obligations to abide by Title VII simply by citing their religious beliefs as motivation for their discriminatory behavior. Stated another way, the government's compelling interest in eradicating discrimination is achieved via the least restrictive means of enforcing Title VII obligations even against religious employers. Courts have emphatically indicated an unwillingness to investigate the sincerity of religious beliefs, which means that any religious-based defense would be accepted as valid for purposes of resolving employment disputes. *Hobby Lobby* should not be read as extending RFRA to discrimination in employment, and other religious-based objections are unworkable in the context of employment discrimination. By choosing to operate a business and employ individuals in the public sector for the purpose of earning a profit, religious employers are agreeing to abide by federal law prohibiting discrimination in the operation of their for-profit enterprises.

A. Hobby Lobby *Should Not Be Read as Permitting Closely-Held Corporations To Not Comply With Title VII*

Hobby Lobby was distinctly removed from the employment context—it concerned solely the Department of Health and Human Services enforcement of the mandatory contraception requirement provided under the Affordable Care Act. The holding, agreeing that closely-held corporations are "persons" under the RFRA, should not be extended to mean that RFRA could be raised in the context of every federal statute. Instead, the Court simply affirmed that closely-held corporations could bring RFRA claims just like non-profits, and religious organizations could do so to challenge the birth control mandate. Further, the Court in *Hobby Lobby* expressly contemplated using religious beliefs to engage in race-based employment discrimination and rejected this possibility. Race is only one of the protected characteristics listed in Title VII—the Court's logic permissibly extends to all of the protected characteristics. No court would entertain the idea of permitting discrimination on religious grounds to other protected categories while forbidding discrimination based on race.

The *Hobby Lobby* Court's reference to Congress's intent in creating a religious exemption in Title VII still stands. In creating the religious exemption, Congress indicated that all other non-exempt organizations must abide by Title VII. The statutory language and the

court doctrine in granting religious exemptions speak to Congress's intent. It is unlikely that a closely-held corporation would meet the Court's or the EEOC's factor tests in granting such exemptions.[125] Thus, it would be unworkable and confusing for religious employers to not qualify for the religious exemption under the statutory provision yet still be permitted to claim a religious exemption in practice.

Moving forward, *Hobby Lobby* simply permits a closely-held corporation to raise a RFRA defense, which has now been confirmed in *Bostock*. Indeed, *Little Sisters of the Poor* seems to re-affirm the narrowness of *Hobby Lobby*'s holding, relying heavily on *Hobby Lobby* in upholding HHS regulations which permit organizations to opt out of the contraceptive mandate.[126] This 2020 decision serves to undermine the contraceptive mandate of the ACA, and defers to executive agency regulations on the matter, but it does not expand the concept of closely-held employers' ability to practice religion in other contexts besides the ACA. In the Title VII context, a court could conceivably view an enforcement action brought by the EEOC as imposing a substantial burden on the religious employer, given the *Hobby Lobby* Court's deference to an employer's "honest conviction."[127] However, the purpose and provisions of Title VII will likely constitute a compelling government interest—thus, the analysis will hinge upon the least restrictive alternative prong of the RFRA two-part exception test. It is unclear how preventing employment discrimination could be achieved in a less restrictive way. The discrimination at issue, namely a religious employer making otherwise invalid Title VII employment decisions based on their religious beliefs, is a direct result of excusing a religious employer from complying with Title VII. This is not a choice amongst various alternative means of preventing discrimination, but rather a choice between allowing discrimination based on religious beliefs or forbidding discrimination under Title VII.

B. Conscience-Based Complicity Claims Raised Under RFRA Rarely Apply in The Employment Context

Religious objectors often raise a "complicity" argument—that being "complicit" in furthering behavior which violates their religious beliefs means they are violating their beliefs directly.[128] Such claims raise important questions because they link a religious objector to the perceived actions of third-party, potentially non-religious

125. For a description, see *supra* Part III.

126. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. at 2367 (2020).

127. *Hobby Lobby*, 572 U.S. 276.

128. For a further discussion of complicity claims, see Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

individuals.[129] Indeed, a principal argument for the *Hobby Lobby* petitioners centered around their belief that they were "complicit in sin" by providing contraceptives to their employees.[130] It is important to note that *Hobby Lobby*'s complicity argument was limited specifically to mandatory contraceptives under the Affordable Care Act—the case does not extend to all religious-based objections to perceived conduct of employees.[131]

When complicity claims do arise in the employment context, they arise primarily when employees are compelled to perform certain job duties which violate their religious beliefs. For example, the petitioner in *Thomas v. Review Board of Indiana Employment Security Division* held a religious objection to certain job duties manufacturing weapons.[132] More recently, the issue of religious employees being compelled to perform healthcare services that violate their religious beliefs has increased the prominence of a complicity defense. The Trump Administration has acknowledged such claims and worked to permit employees to seek exclusion from employment responsibilities which violate their religious beliefs.[133] It is less likely for an employer to be complicit in the "sins" of an employee, as it is doubtful that an employer would even be in the business of compelling employees to engage in job duties that violate their religious beliefs.

There is little analogous "complicity" for Title VII claims specifically. Avoiding discrimination in employment does not make an employer complicit in the "sins" of their employees. An employer can control the employee's job duties and responsibilities, but this does not mean that the employer is held responsible for all behavior of employees conducted outside of work (or at work but outside of their regularly performed job duties). The court in *EEOC v. R.G.* directly addressed this when it stated, "[A]s a matter of law, tolerating [the fired employee's] understanding of her sex and gender identity is not tantamount to supporting it."[134] Religious employers should not be able to simultaneously raise a religious-based motive for engaging in discriminatory behavior while also claiming that the employee's conduct itself made the employer complicit.

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129. *See id.* at 2538.

130. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 686 (2014).

131. *See id.* at 701 (describing the plaintiffs' religious beliefs about conception and the ACA's contraceptive mandate).

132. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 707 (1981).

133. *See supra* Part I.

134. EEOC v. R.G & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 588 (6th Cir. 2018).

C. There Is No "Less Restrictive Alternative"

In order to survive a RFRA defense, the government must establish that there is no less restrictive alternative to achieving its compelling interest. Title VII directly furthers the compelling interest in eradicating employment discrimination. It is unclear how preventing discrimination in employment could be achieved in any other way than enforcing the seminal law passed for this explicit purpose. The religious organization exemption in Title VII has been carefully circumscribed in specific contexts where it would be inappropriate for the government to intervene in these organizations' employment decisions.[135]

Hobby Lobby found a less restrictive alternative, noting that employees have alternative available means to obtain contraceptives outside of their employer-sponsored health insurance.[136] Thus, there was a perceived lesser harm to employees resulting from the employer's objections to providing such coverage. In the employment context, the harm is direct and particularized against the individual experiencing discrimination. The availability of other employment does not erase the harmful discrimination experienced at the former employer's workplace. There is no less restrictive alternative to choose from if the decision is between permitting discrimination and forbidding it. The discrimination would simply be a direct result of permitting RFRA to outweigh the provisions of Title VII.

Further, the EEOC does not interpret religious burdens to include employers. In a press release regarding a Notice of Proposed Rulemaking from September 2019[137] the EEOC stated: "[t]he proposal also reaffirms employers' obligations not to discriminate on the basis of race, sex, or other protected bases and does not exempt or excuse a contractor from complying with any other requirements."

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135. For a description, see *supra* Part II.

136. *Hobby Lobby*, 573 U.S. at 692.

137. Press Release, U.S. Department of Labor, U.S. Department of Labor Proposes a Rule Clarifying Civil Rights Protections for Religious Organizations (Aug. 14, 2019), https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814 [https://perma.cc/WU5E-A56G].

The EEOC also issued a guidance document that states:

> The [religious organization] exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.[138]

Courts should grant deference to the primary federal agency tasked with ensuring compliance with federal employment discrimination laws.

CONCLUSION

Religious employers who wish to raise RFRA defenses when they make employment decisions that violate Title VII have arguments potentially on their side. In terms of RFRA's "less restrictive alternative," employers may claim that the government has demonstrated the availability of a less restrictive alternative by offering a religious exemption to Title VII. This religious exemption is analogous to the "opt-out" provision of the Affordable Care Act discussed in *Hobby Lobby*. Title VII contemplates the possibility of raising sincerely held religious beliefs for purposes of employment and respects such beliefs via offering an option to be exempt from compliance. Employers could argue for a "two-way street" of religious accommodation: both employees and employers must demonstrate an "undue hardship" if compelled to accommodate each other's religious beliefs. Such an "undue hardship" test has proven workable by the courts[139]—it could easily be extended to apply to all individuals at the place of employment. However, the workability of this approach raises more issues than it resolves. Courts may be faced with a battle of religions, or a battle between religion and a protected characteristic, and then what? A true analogy to the ACA would be if the EEOC promulgated regulations permitting religious employers to opt out of complying with the Title VII, which the Supreme Court then upheld as a valid exercise of executive agency discretion as in *Little Sisters of the Poor*. As it stands now, Title VII has the EEOC regulations and decades of case law on its side, while RFRA is a relatively new affirmative defense.

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138. Guidance Document, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace [https://perma.cc/5CCH-AVG6].

139. *See* Antoine v. First Student, Inc., 713 F.3d 824, 839 (5th Cir. 2013) (examining whether accommodating the plaintiff with a shift swap constituted an undue hardship); *see also* Weber v. Roadway Exp., Inc., 199 F.3d 270, 274 (5th Cir. 2000) (same).

Religious employers can note that the provisions of Title VII are too broad to survive the *O Centro* "to the person" test. Applying the government's compelling interest directly "to the person" whom the government seeks to use to further that interest may be too difficult for the government to succeed. To take the *Harris Funeral Homes* facts as an example: the government's compelling interest in eradicating employment discrimination will not necessarily be weakened by declining to enforce Title VII against an individual religious funeral home operator. Such a small-business owner who fires a transgender employee is not exactly undermining the EEOC's work across the country. The obvious problem with such arguments is that granting an accommodation for one individual opens the doors to push the accommodation further in more general and harmful circumstances. Employment discrimination is employment discrimination, and Title VII is the most effective and least restrictive means of remedying such discrimination. Lastly, the Supreme Court's recent decision in *Trinity Lutheran* suggests there cannot be a compelling government interest furthered by a statute if the same interest is guaranteed by the Constitution.[140] This confuses the application of Title VII and RFRA to employment disputes, as the First Amendment has long protected religious freedom in this country. Courts may simply decline to address sensitive issues, leaving litigation to be resolved in haphazard or incomplete manners.

Title VII's prohibitions on employment discrimination constitute both a compelling government interest and the least restrictive means of furthering that interest. Raising RFRA defenses in the employment context is simply unworkable and leads to harmful discrimination against third parties. If RFRA permitted employers to make employment decisions otherwise violative of Title VII, then an individual employer's religious exercise would overcome an employee's protections from discrimination. Such an outcome is undesirable from a public policy standpoint, as well as in conflict with the statutory intent of both RFRA and Title VII.

140. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).