Missouri Law Review

Volume 81
Issue 3 *Summer 2016*

Article 5

Summer 2016

RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases

Scott W. Gaylord

MISSOURI LAW REVIEW

VOLUME 81 SUMMER 2016 NUMBER 3

RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases

Scott W. Gaylord[*]

"I am the King's good servant, but God's first."
—St. Thomas More

ABSTRACT

The most recent challenge to the free exercise of religion is here. And while it stems from the same legislation that prompted the action in Burwell v. Hobby Lobby Stores, Inc. *– the contraception mandate under the Patient Protection and Affordable Care Act (the "ACA") – it raises unique and equally important issues: what constitutes a substantial burden on the exercise of religion, and who gets to decide (the religious adherents or the courts)? In* Hobby Lobby*, the government contended that for-profit corporations could not exercise religion and, consequently, could not avail themselves of the broad protection afforded to free exercise under the Religious Freedom Restoration Act ("RFRA"). In the seven religious nonprofit cases that the Supreme Court of the United States recently considered and vacated in* Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the government acknowledged that RFRA applies to religious nonprofits but alleged that the ACA does not substantially burden the free exercise of these religious organizations. In particular, the government argued that the accommodation to the contraception mandate (which permits religious nonprofits to avoid directly providing coverage for all FDA-approved contraceptives and sterilization procedures by giving notice to their insurance issuers or third-party administrators ("TPAs") that the religious organizations object to providing such coverage – the "Accommodation") does not burden, let alone substantially burden, the religious nonprofits' exercise of religion.*

Prior to the Supreme Court's decision in Zubik*, eight circuit courts of appeals had sided with the government, instructing the religious nonprofits that their sincerely held belief – that the accommodation makes them complicit in a*

[*] The author is a Professor of Law at Elon University School of Law, where he teaches First Amendment and Constitutional Law. The author had primary responsibility for preparing an amicus curiae brief to the Supreme Court of the United States in the religious nonprofit cases challenging the government's accommodation to the Health and Human Services mandate. The amicus brief addresses many of the legal issues discussed in this Article.

grave moral wrong (i.e., the provision of contraceptives and abortifacients) – was incorrect because the ACA, not any actions by the religious nonprofits, is the legal cause of the insurance issuers' and TPAs' obligation to provide such coverage. Under the majority's "Pontius Pilate" defense, the Accommodation "washes the hands" of religious nonprofits, cleansing them of any legal or moral responsibility for providing the objectionable coverage. As a result, the religious nonprofits cannot meet their burden under RFRA because the Accommodation does not substantially burden their exercise of religion. Only the Eighth Circuit had ruled for the religious nonprofits. In Zubik*, however, the Supreme Court vacated seven circuit court opinions favoring the government yet "expresse[d] no view on the merits of the cases." As a result, the circuit courts now have a second chance to consider the scope of free exercise protection under RFRA and whether courts or religious practitioners have the right to determine when government-mandated actions actually contravene sincerely held religious beliefs.*

This Article contends that on remand, the circuit majority should join the Eighth Circuit and uphold the right of religious nonprofits to forego the notice required under the Accommodation. Contrary to the majority's claim, Hobby Lobby *and* Holt v. Hobbs *preclude courts from deciding whether the ACA (or any other statute) actually burdens a religious adherent's sincerely held beliefs. Although, as Chief Justice Marshall famously declared, "it is emphatically the province and duty of the judicial department to declare what the law is," courts lack the authority and competence to declare what the religious commitments of a faith are and when those commitments are violated. Under the Court's free exercise precedents, courts can determine only whether the government puts a religious practitioner to the choice of engaging in conduct that violates her beliefs or disobeying the government's policy and facing "serious" consequences. Religious and philosophical questions regarding moral complicity are left to religious adherents, not the courts. As the Founders recognized, religious and moral questions transcend the legal, imposing a different – and higher – obligation on religious believers. For religious adherents, only God (through a religious authority determined in accordance with their sincere religious beliefs) can determine whether an action makes them complicit in sin. Consequently, as the Court explained* in Hobby Lobby*, "question[s]" about moral complicity are ones "that the federal courts have no business addressing."*

TABLE OF CONTENTS

I. INTRODUCTION

In the wake of *Employment Division, Department of Human Resources of Oregon v. Smith*,[1] Congress passed the Religious Freedom Restoration Act ("RFRA") "to provide very broad protection for religious liberty."[2] In fact, the Supreme Court has acknowledged that RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment."[3] As a result, plaintiffs claiming that a federal statute or policy violates their religious beliefs typically rely on RFRA or its sister statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which "imposes the same general test as RFRA but on a more limited category of governmental actions,"[4] instead of the Free Exercise Clause.[5] To secure the "expansive protection for religious liberty" under RFRA and RLUIPA, though, plaintiffs have the initial burden of showing both that "the relevant exercise of religion is grounded in a sincerely held religious belief" and that the federal statute or policy "substantially burdened that exercise of religion."[6] If the plaintiff establishes that the federal government substantially burdened its sincerely held religious belief, then the burden shifts to the government to "demonstrate[] 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."[7] If the government meets its burden, then the plaintiff's claim fails; if not, the plaintiff is entitled to an exemption from the statute or policy.

Hobby Lobby is perhaps best known for its resolution of the threshold (and at the time, entirely novel) question: whether for-profit corporations could exercise religion.[8] In its 5-4 decision, the Court ultimately held that

1. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

2. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

3. *Holt*, 135 S. Ct. at 859–60.

4. *Hobby Lobby*, 134 S. Ct. at 2761.

5. As initially enacted, RFRA applied to federal and state action. *Id. See also* City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997) (stating that Congress exceeded its section 5 authority because "[t]he stringent test RFRA demands . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*"), *superseded by statute*, §§ 2000cc–2000cc-5, *as recognized in Hobby Lobby*, 134 S. Ct. at 2761.

6. *Holt*, 135 S. Ct. at 860, 862.

7. *See* § 2000bb-1(b); *Hobby Lobby*, 134 S. Ct. at 2761; *Holt*, 135 S. Ct. at 863.

8. *See* Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) ("These arguments [regarding the free exercise rights of for-profit corporations] pose difficult questions of first impression."), *aff'd*, 542 F. App'x 706 (10th Cir. 2013); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 741 (S.D. Ill. 2012), *rev'd and remanded sub nom.* Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013). *See also* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 114 (D.D.C. 2012) (stating that "whether for-profit corporations can exercise religion

corporations could exercise religion because "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies."[9] This holding was important because it meant "a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."[10] That is, because corporations were "persons" under RFRA, they were entitled to the "broad protection" that RFRA affords free exercise.[11] But *Hobby Lobby* does not resolve the central issue in the religious nonprofit cases, because the substantial burden analysis in that case was straightforward. As the majority noted:

> If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price – as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.[12]

Similarly, in *Holt v. Hobbs*, the Court unanimously held that the Arkansas Department of Corrections's grooming policy, which required a Muslim prisoner to shave his beard, substantially burdened his sincerely held religious beliefs: "If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise."[13] Thus, *Hobby Lobby* and *Holt* presented situations in which the Court easily concluded that the government's policies imposed a substantial burden on the free exercise of religion.

The substantial burden analysis has proven to be more difficult – and certainly more contentious – in the religious nonprofit cases. While the government has not challenged the general ability of religious nonprofits to exercise religion (as it did with respect to for-profits in *Hobby Lobby*), it has argued that the accommodation (the "Accommodation") to the Health and Human Services ("HHS") Mandate does not burden, let alone substantially bur-

---

within the meaning of the RFRA and the Free Exercise Clause" is an "unresolved question"); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) ("Neither the Supreme Court nor the Third Circuit have had occasion to decide whether for-profit, secular corporations possess the religious rights held by individuals."), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), *rev'd sub nom.* Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 13-1144, 2014 WL 4467879 (3d Cir. Aug. 5, 2014).

9. *Hobby Lobby*, 134 S. Ct. at 2768.

10. *Id.* at 2775.

11. *See id.* at 2767–68.

12. *Id.* at 2759.

13. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

den, the free exercise rights of the religious nonprofits.[14] Under the government's view, the ACA imposes a legal obligation on insurance issuers and third-party administrators ("TPAs") to provide the required coverage once a religious nonprofit avails itself of the Accommodation and opts out of providing all (or some) of the FDA-approved contraceptives and sterilization procedures.[15] And eight of the nine circuit courts to consider the issue have agreed with the government – which might make one think this is yet another easy case, like *Hobby Lobby* and *Holt*.[16]

Unlike the Court's prior RFRA cases, however, the consolidated cases raise different – yet equally important – questions regarding who gets to decide whether a government policy substantially burdens a religious adherent's free exercise and what the proper scope of free exercise is under RFRA. Does the substantial burden prong require courts to make an objective determination as to the nature of the burden imposed on religious objectors, as the majority of circuits have held? Or does it refer instead to the nature of the

14. *See* Brief for the Respondents at 33, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 537623, at *33.

15. *Id.* at 37–38.

16. *See* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1173 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015) (agreeing with the government), *and cert. granted in part* 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) [hereinafter Zubik III] (per curiam); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 252 (D.C. Cir. 2014) (agreeing with the government), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 456 (5th Cir. 2015) (agreeing with the government), *cert. granted*, 136 S. Ct. 444 (2015), *and vacated sub nom.* Univ. of Dallas v. Burwell, 136 S. Ct. 2008 (2016), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Grace Schs. v. Burwell, 801 F.3d 788, 807 (7th Cir. 2015) (agreeing with the government), *vacated sub nom.* Diocese of Fort Wayne-S. Bend, Inc. v. Burwell, 136 S. Ct. 2010 (2016), *and vacated*, 136 S. Ct. 2011 (2016); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 218 (2d Cir. 2015) (agreeing with the government), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 437 (3d Cir. 2015) (agreeing with the government), *cert. granted in part sub nom.* Zubik v. Burwell, 136 S. Ct. 444 (2015) [hereinafter Zubik II], *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 390 (6th Cir. 2014) (agreeing with the government), *vacated sub nom.* Mich. Catholic Conference v. Burwell, 135 S. Ct. 1914 (2015); Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1129 (11th Cir. 2016) (agreeing with the government). *See also* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 936 (8th Cir. 2015), *vacated sub nom.* Dep't of Health & Human Servs. v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

pressure that the government places on a religious adherent to take an action that she sincerely believes violates *her* religious views? And how much deference should be given to a plaintiff's claim that a government policy substantially burdens her belief? The circuit court split highlights markedly different interpretations of the burden RFRA imposes on religious objectors, as well as conflicting understandings of the scope of protection afforded the free exercise of religion under RFRA.

And *Zubik* did nothing to resolve this uncertainty. In its *per curiam* opinion, the Supreme Court vacated the judgments of the courts of appeals (all of which had been victories for the government) but expressly stated that the Court "expresses no view on the merits of the cases."[17] Specifically, the Court emphasized that it was not "decid[ing] whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest."[18] The Court simply instructed the circuit courts on remand to give the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."[19]

Given that the Supreme Court did not reach the merits, on remand the government is apt to argue once again that courts must make an objective determination as to the nature of the burden imposed on religious adherents.[20] Such independent review is necessary to avoid conflating the sincerity of belief and substantial burden prongs, as well as to ensure that courts retain a role in deciding whether the government action actually infringes on the free exercise of the plaintiffs' religion.[21] According to the government, a careful review of the Accommodation reveals that the ACA is the legal cause of the insurance issuers and TPAs providing the contraceptive coverage to which the religious nonprofits object.[22] As a result, the nonprofits' religious beliefs are not actually burdened.[23] The religious nonprofits' real objection is to the government's requiring and arranging for coverage to be provided through third parties. But the Court's free exercise precedents preclude the religious nonprofits' objecting when the government makes arrangements to provide

17. *Zubik III*, 136 S. Ct. at 1560.

18. *Id.*

19. *Id.*

20. *See Little Sisters of the Poor*, 794 F.3d at 1176; *Priests for Life*, 772 F.3d at 247; *Grace Schs.*, 801 F.3d at 805.

21. *Little Sisters of the Poor*, 794 F.3d at 1176 ("If plaintiffs could assert and establish that a burden is substantial without any possibility of judicial scrutiny, the word substantial would become wholly devoid of independent meaning. Furthermore, accepting any burden alleged by Plaintiffs as substantial would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.") (citations omitted).

22. *See* Brief for the Respondents, *supra* note 14, at 25–26.

23. *Id.* at 25.

coverage directly through the insurance issuers or TPAs. According to the government, signing Form 700, or giving notice directly to HHS, is a *de minimis* act and neither causes nor facilitates coverage.[24] The religious nonprofits, therefore, cannot meet their initial burden under RFRA to show a substantial burden on their religious exercise and, consequently, are not entitled to relief from the Accommodation.[25] They must either provide the coverage directly, give notice using Form 700 or directly to HHS, or pay the penalties set forth in the ACA.[26]

This Article contends that the lower courts have seriously misconstrued RFRA's substantial burden analysis and arrogated the authority to tell religious believers when government-mandated actions contravene their sincerely held beliefs.[27] Specifically, these courts have informed the religious nonprofit organizations that, because the ACA is the legal cause of the obligation of insurance issuers and TPAs to provide contraceptive coverage, giving notice under the Accommodation does not make the religious nonprofits complicit in immoral conduct – despite their sincere belief to the contrary that such notice enables and facilitates the provision of contraceptive and sterilization services. By resolving the legal question (whether the ACA is the legal cause of contraceptive coverage), the lower courts claim to obviate the moral question (whether giving notice makes a religious adherent complicit in sin). On this view, instead of looking to the tenets of their faith or their religious leaders, religious nonprofits must look to the courts to determine if a government-mandated action "wash[es their] hands of any involvement" in wrongdoing.[28]

There are at least two fundamental problems with permitting courts to tell religious adherents what does or does not violate their moral and religious beliefs. After providing an overview in Part II of the ACA, as well as the constitutional and statutory framework that applies to free exercise claims, Part III explores the first problem – that the circuit majority's interpretation is inconsistent with the substantial burden analysis that the Court set forth in *Hobby Lobby* and *Holt v. Hobbs*. Contrary to the circuit court majority, RFRA defines "substantial burden" in relation to the force or pressure that the

---

24. *See Little Sisters of the Poor*, 794 F.3d at 1173–74; *Priests for Life*, 772 F.3d at 249; Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 220 (2d Cir. 2015), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016).

25. *See* Brief for the Respondents, *supra* note 14, at 33–34.

26. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 936 (8th Cir. 2015), *vacated sub nom.* Dep't of Health & Human Servs. v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

27. *See* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 442 (3d Cir. 2015) ("[N]ow that we have dispelled the notion that the self-certification procedure is burdensome, we need not consider whether the burden is substantial . . . ."), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

28. *Id.* at 441.

government places on a religious believer, not on a court's allegedly objective determination that a required action does or does not impose an actual burden on religious adherents. The Supreme Court's analysis of the plaintiff's burden in *Hobby Lobby* and *Holt* confirms that the government substantially burdens the exercise of religion when it puts a religious adherent to the choice of either (1) following the government's directive and engaging in conduct that violates her sincerely held religious beliefs or (2) contravening that directive and facing significant penalties (as in *Hobby Lobby*) or discipline (as in *Holt*).[29] Because (1) it is undisputed that giving notice contravenes the petitioners' sincerely held religious beliefs (facilitating the provision of contraceptive services by authorizing the use of their healthcare information and infrastructure) and (2) the religious nonprofits face the same penalties under the ACA as Hobby Lobby and Conestoga if the religious nonprofits do not give notice under the Accommodation, the Accommodation imposes a substantial burden on the religious nonprofits' exercise of religion.

Moreover, the government and circuit majority completely ignore the Court's right of association cases, even though the Court has instructed that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment."[30] These right-of-association cases demonstrate that courts should defer to a plaintiff's assertion about what her beliefs are and whether a government-mandated action contravenes those beliefs. In *Boy Scouts of America v. Dale*[31] and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*,[32] the Court did not question the associations' claims about what their beliefs were or the types of actions that conflicted with those beliefs, recognizing the need to allow associations – and not the government or the courts – to determine the nature and scope of their beliefs, even if (or perhaps especially when) those beliefs run counter to the government's views.

Part IV evaluates the second problem with the majority's position – namely, that the lower courts impermissibly conflate the legal and religious realms, assuming the power to tell religious adherents that their sincerely held beliefs about moral complicity are wrong. As James Madison eloquently stated in his *Memorial and Remonstrance*, though, the two realms are distinct:

> [W]e hold it for a fundamental and undeniable truth "that religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The religion, then, of every man must be left to the conviction

29. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014); Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

30. Lee v. Weisman, 505 U.S. 577, 591 (1992).

31. 530 U.S. 640 (2000).

32. 450 U.S. 107 (1981).

> and conscience of every man: and that it is the right of every man to exercise it as these may dictate.[33]

Given the "broad protection" afforded the exercise of religion under RFRA, the government cannot "force" religious adherents to violate their sincerely held religious beliefs (without satisfying RFRA's "exceptionally demanding" least-restrictive-means test),[34] and courts cannot decide for such believers that certain government-mandated actions do not significantly interfere with their sincerely held religious beliefs. This is why the Supreme Court has "[r]epeatedly and in many different contexts . . . warned that courts must not presume to determine . . . the plausibility of a religious claim"[35] or "in effect tell the plaintiffs that their beliefs are flawed."[36] But that is precisely what the lower courts have done in the religious nonprofit cases.

II. THE RELIGIOUS NONPROFITS' CHALLENGES TO THE ACCOMMODATION TO THE HHS MANDATE

As the seven religious nonprofit cases recently argued before the Supreme Court of the United States demonstrate,[37] *Hobby Lobby* did not resolve

---

33. JAMES MADISON, *Citizens' "Memorial and Remonstrance" to Virginia*, *in* THE JAMES MADISON PAPERS, 1723 TO 1859 1 (photo. reprint) (1785), https://www.loc.gov/resource/mjm.02_0449_0450/?sp=1.

34. *See Holt*, 135 S. Ct. at 864.

35. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *as recognized in Holt*, 135 S. Ct. at 853.

36. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014).

37. Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III 136 S. Ct. 1557 (2016) (per curiam); Roman Catholic Archbishop of Wash. v. Sebelius, 19 F. Supp. 3d 48 (D.D.C. 2013), *aff'd in part*, *vacated in part sub nom.* Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 444 (2015), *and vacated sub nom.* Univ. of Dallas v. Burwell, 136 S. Ct. 2008 (2016), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015) *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; S. Nazarene Univ. v. Sebelius, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), *rev'd sub nom.* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794

all of the issues regarding the ACA's impact on the free exercise rights of religious adherents under RFRA. To date, nine circuits have considered fifteen challenges to the government's proposed Accommodation to the HHS Mandate.[38] According to the government, the Accommodation permits religious nonprofits to opt-out of the HHS Mandate simply by providing notice to their insurance issuers or TPAs, stating that the religious nonprofit objects to providing all FDA-approved contraception and sterilization procedures.[39] The religious nonprofits, not surprisingly, take a different view. According to these organizations, the Accommodation requires them to facilitate or to enable the exact same coverage to which these groups originally objected under the ACA.[40] That is, under the religious nonprofits' position, the proposed Accommodation fails to accommodate their religious beliefs because it forces them to choose between and among impermissible options. The religious nonprofits must either (1) provide all FDA-approved contraception and sterilization procedures, (2) give notice that (in their view) effectively triggers or facilitates the same coverage by and through their preexisting insurance plan, or (3) pay the substantial penalties set forth in the ACA, which amounted to "as much as $475 million per year in the case of Hobby Lobby."[41] The first two options violate the religious nonprofits' sincerely held beliefs, while the third option is so prohibitively expensive that it forces them to pick one of the first two options (thereby infringing on the same beliefs) or go out of business.

F.3d 1151 (10th Cir. 2015), *vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Zubik v. Sebelius, 983 F. Supp. 2d 576 (W.D. Pa. 2013), *rev'd sub nom.* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015), *vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

38. In addition to the seven cases consolidated on appeal and vacated in *Zubik III*, religious nonprofits have filed actions in: Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015), *vacated*, 136 S. Ct. 2006 (2016); Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122 (11th Cir. 2016); Grace Schs. v. Burwell, 801 F.3d 788 (7th Cir. 2015), *vacated sub nom.* Diocese of Fort Wayne-S. Bend, Inc. v. Burwell, 136 S. Ct. 2010 (2016), *and vacated*, 136 S. Ct. 2011 (2016); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 807 F.3d 738 (6th Cir. 2015), *vacated sub nom.* Mich. Catholic Conference v. Burwell, No. 15-1131, 2016 WL 932712 (U.S. May 23, 2016); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015), *vacated sub nom.* Dep't of Health & Human Servs. v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); Wheaton Coll. v. Burwell, 791 F.3d 792 (7th Cir. 2015).

39. *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being,* U.S. DEP'T HEALTH & HUM. SERVS., http://www.hrsa.gov/womensguidelines/ (last visited July 20, 2016).

40. *See* cases cited *supra* notes 37–38.

41. *Hobby Lobby*, 134 S. Ct. at 2779.

To date, eight circuits – the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. – have ruled for the government.[42] Only the Eighth Circuit has held for the religious nonprofits, leaving one to wonder whether the religious nonprofits have a viable free exercise claim.[43] The fact that the Supreme Court vacated seven of the circuit court decisions favoring the government might suggest that the Eighth Circuit was on to something. Yet the Court expressly disclaimed resolving any of the underlying issues in the case, leaving the circuit courts, as the concurrence noted, "[F]ree to reach the same conclusion or a different one on each of the questions presented by these cases."[44]

Upon first inspection, though, the almost unanimous support for the government's position seems surprising given the "expansive protection for religious liberty" under RFRA and RLUIPA.[45] After all, the religious nonprofits' claims are novel and implicate difficult questions about complicity in wrongdoing, as well as the court's competence to answer such questions. Yet despite the fact that the Supreme Court has never addressed the specific issues in these consolidated cases, a resounding majority of the circuit courts has held for the government.

On remand, then, the courts of appeals must reconsider whether the Supreme Court's RFRA cases provide such overwhelming support for the government's position. In so doing, the lower courts must determine what is the appropriate free exercise framework set forth in these cases and how it applies to the sincerely held beliefs of religious nonprofits. A careful review of the Accommodation to the ACA, the burden-shifting analysis that the Court articulated in *Hobby Lobby* and *Holt*, and the government's admission that "challenged procedures 'for employers with insured plans could be modified to operate in the manner posited in the Court's order'"[46] demonstrates the need for the circuit court majority to reevaluate its prior decisions. And this Article is meant to guide them – as well as practitioners and courts in other RFRA cases – by walking through and applying the proper RFRA analysis under *Hobby Lobby* and *Holt*.

Passed in March 2010, the Patient Protection and Affordable Care Act[47] has proven to be the gift that keeps on giving for constitutional law scholars and attorneys, requiring courts to resolve challenges under the Commerce,

42. *See* cases cited *supra* note 16.

43. *See Sharpe Holdings, Inc.*, 801 F.3d at 936.

44. Zubik III, 136 S. Ct. 1557, 1562 (2016) (Sotomayor, J., concurring) (per curiam); *see also id.* (stating that "[l]ower courts . . . should not construe either today's *per curiam* or our order of March 29, 2016, as signals of where this Court stands").

45. Holt v. Hobbs, 135 S. Ct. 853, 860 (2015).

46. *Zubik III*, 136 S. Ct. at 1560 (quoting Supplemental Brief for the Respondents at 14–15, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 1445915, at *14–15).

47. Patient Protection & Affordable Care Act, 42 U.S.C.A. §§ 18001–18122 (West 2016).

Spending, Taxing,[48] Origination,[49] Free Speech, and Free Exercise Clauses,[50] as well as issues of statutory construction under the ACA[51] and RFRA.[52] Among other things, the ACA requires most employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage."[53] These employers must provide no-cost coverage for women employees for "such additional preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (the "HRSA").[54] The HRSA, which is part of HHS, turned to the Institute of Medicine (the "IOM") to define which preventative care and screenings would be required under the ACA. Under the comprehensive guidelines that HHS promulgated, most employers with fifty or more full-time employees are required to provide all FDA-approved contraceptives, sterilization procedures, and related education and counseling.[55] A plan or issuer that fails to provide the required coverage under the HHS guidelines is subject to substantial tax penalties under the Internal Revenue Code,[56] penalties totaling "as much as $475 million per year in the case of Hobby Lobby."[57]

Although the ACA exempts "religious employers" from the HHS Mandate, that term is defined somewhat narrowly to include only churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order.[58] The definition does not

48. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

49. *See generally* Sissel v. U.S. Dep't of Health & Human Servs,. 760 F.3d 1 (D.C. Cir. 2014).

50. *See, e.g.*, Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1196–1205 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

51. *See generally* King v. Burwell, 135 S. Ct. 2480 (2015).

52. *See generally, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

53. 26 U.S.C. § 5000A(f)(2) (2012); 26 U.S.C.A. §§ 4980H(a), (c)(2) (West 2016).

54. 42 U.S.C. § 300gg-13(a)(4).

55. *See* 42 U.S.C.A. § 18024; 45 C.F.R. § 147.130 (2016); *Women's Preventive Services Guidelines*, U.S. DEP'T HEALTH & HUM. SERVS., http://www.hrsa.gov/womensguidelines/ (last visited Aug. 29, 2016).

56. *See, e.g.*, 26 U.S.C. § 4980D(b)(1) (stating that employers that do not provide the coverage required under the HHS Mandate are subject to a penalty of $100 per day for each affected individual); 26 U.S.C.A. § 4980H(c)(1) (noting that employers subject to the HHS Mandate that do not offer health coverage and have at least one full-time employee who has certified to the employer under § 1411 of the ACA is subject to a penalty of $2000 per employee each year).

57. *Hobby Lobby*, 134 S. Ct. at 2779.

58. *See* 45 C.F.R. § 147.131(a) (2016). The ACA also exempts employers with fewer than fifty employees and those providing "grandfathered health plans," i.e.,

include religious schools, religious hospitals, and the non-religious activities of religious orders, such as the Little Sisters of the Poor. Instead of exempting such organizations, the Departments of Labor, HHS, and the Treasury (the "Departments") provided "accommodations" for certain religious groups as part of the final rules implementing the HHS Mandate (the "Final Rules").[59] To qualify as an "eligible organization" subject to the Accommodation, an organization must (1) oppose providing coverage under the HHS Mandate on account of religious objections, (2) be organized and operate as a nonprofit entity, (3) hold itself out as a religious organization, and (4) self-certify that it satisfies the first three criteria by giving notice pursuant to the procedures specified in the Final Rules.[60] To self-certify, eligible organizations originally had to execute and deliver a specific form, EBSA Form 700 ("Form 700"), to their insurers, stating that the organization is eligible for the Accommodation.[61] Upon receiving Form 700, the organization's insurance issuer is required to "assume sole responsibility for providing separate payments for contraceptive services directly for plan participants and beneficiaries, without cost sharing, premium, fee, or other charge to plan participants or beneficiaries or to the eligible organization or its plan."[62]

Several religious nonprofits challenged the Accommodation, arguing that submitting Form 700 substantially burdened their exercise of religion by forcing them to provide information about their insurance plans that led to their insurance issuers effectively providing the same objectionable coverage by and through the religious nonprofits' plans. That is, the religious nonprofits argued that Form 700 facilitated or enabled the provision of contraceptives and sterilization procedures, thereby violating their sincerely held religious beliefs. In fact, Wheaton College, a Christian college in Wheaton, Illinois, applied for and received an injunction from the Supreme Court, prohibiting the government from enforcing the HHS Mandate.[63] Pursuant to the Court's order pending appeal, instead of using Form 700, Wheaton College could avoid the requirements of the HHS Mandate by giving notice directly to HHS:

---

plans that existed prior to March 23, 2010, and that have not made specific changes after that date. *See Hobby Lobby*, 134 S. Ct. at 2764 (citing 42 U.S.C. §§ 18011(a), (e) and 26 U.S.C.A. § 4980H(c)(2)). Neither of these exemptions is implicated in the religious nonprofit cases.

59. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39874–78 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156).

60. *Id.* at 39870, 39875.

61. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51094 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147).

62. 78 Fed. Reg. at 39876; *see also* 45 C.F.R. § 147.131(c)(2)(i) (2016).

63. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

> If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the [Departments] are enjoined from enforcing against the applicant the challenged provisions of the [ACA] and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the [Form 700], and need not send copies to health insurance issuers or third-party administrators.[64]

The Court noted, though, that "[n]othing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act."[65]

Based on the Court's order in *Wheaton College* and a similar injunction in *Little Sisters of the Poor*,[66] the Departments issued interim final regulations, altering the accommodation process set forth in the Final Rules.[67] These regulations provided an alternative means of giving notice if a religious nonprofit objected to providing some or all of the contraceptive services required under the HHS Mandate. According to the modified procedure:

> [A]n eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services. The notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services . . . ; the plan name and type . . . ; and the name and contact information of any of the plan's third party administrators and health insurance issuers.[68]

Upon receiving such notice, HHS is required to send a separate notice to the insurance issuer, informing it that the eligible organization objects and that the issuer must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan[] and . . . [p]rovide separate payments for any contraceptive services required to be covered."[69] The insurance issuer is then responsible for providing separate payments for contraceptive services directly for plan par-

---

64. *Id.*

65. *Id.*

66. Little Sisters of the Poor Home for the Aged, Denver v. Sebelius, 134 S. Ct. 1022 (2014).

67. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51092 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147).

68. *Id.* at 51094–95.

69. 45 C.F.R. § 147.131(c)(2)(i) (2016).

ticipants and beneficiaries without cost sharing or other charge to the participants and their beneficiaries.[70]

According to the government, the Accommodation at issue in the religious nonprofits cases is meant to lift or alleviate the burden that the HHS Mandate imposes on certain religious groups that do not qualify as "religious employers" under the ACA.[71] The information under Form 700, or the alternative notice specified in the interim final regulations, is "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" the government's policy.[72] The religious nonprofits contend that providing such information makes them complicit in a grave moral wrong, namely the provision of the contraception and sterilization services for which they made sure not to contract when securing coverage for their employees in the first place.[73] As it turns out, determining whether the religious nonprofits or the government should win depends on the scope of protection afforded the exercise of religion under the Constitution and RFRA.

A. Overview of the Constitutional and Statutory Frameworks for Free Exercise Claims

Passed in 1993 in response to the Court's decision in *Smith*, RFRA marked a significant shift in the Court's free exercise jurisprudence. Prior to *Smith*, the Court operated under what was known as the *Sherbert*/*Yoder* regime, which provided for constitutionally mandated exemptions for religious adherents who could show that a government-mandated action infringed the Free Exercise Clause of the First Amendment.[74] To determine whether the government-required action violated the Free Exercise Clause, courts employed a balancing test "that took into account 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."[75] Applying this standard in *Sherbert v. Verner*, the Court upheld the free exercise rights of an employee who was denied unemployment benefits after being fired for refusing to work on the Sabbath, which she celebrated on Saturdays.[76] The Court noted that denying her unemployment benefits "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[77] Such a choice, the Court concluded, "[E]ffectively penal-

70. 79 Fed. Reg. at 51092, 51095.
71. *Id.* at 51094.
72. *Id.* at 51095.
73. *See* cases cited *supra* notes 37–38.
74. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).
75. *Id.*
76. 374 U.S. 398, 408–09 (1963).
77. *Id.* at 404.

izes the free exercise of her constitutional liberties."[78] Similarly, in *Wisconsin v. Yoder*, the Court concluded that the State of Wisconsin could not require Amish children to remain in school until age sixteen, when their religion dictated that they spend their formative adolescent years learning about Amish values and beliefs through vocational education in the Amish community.[79] As in *Sherbert*, the Court emphasized that the government could not force the claimants to act in ways that were unquestionably at odds with the tenets of their faith, absent a compelling governmental interest.[80]

Although *Sherbert* and *Yoder* provided some level of constitutional protection to free exercise claims, claimants won only occasionally under the balancing test.[81] The *Sherbert*/*Yoder* regime, therefore, was considered to be strict in theory but "feeble" in fact, giving only modest protection to free exercise claims.[82] But in *Smith*, the Court rejected "the balancing test set forth in *Sherbert*,"[83] concluding that even this level of protection was excessive because it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[84]

The shift in the Court's free exercise jurisprudence was pronounced. Instead of a constitutional regime, under which the courts determined whether the Constitution mandated an exemption in a given case, the *Smith* Court implemented a statutory regime under which the legislature had broad discretion to decide whether religious claimants should be exempt from neutral laws of general applicability. Absent such a legislatively granted exemption, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."[85]

The effect on individual claimants was readily apparent. In *Smith*, the plaintiffs were members of the Native American Church who ingested a hal-

78. *Id.* at 406.

79. 406 U.S. 205, 210–11, 234–36 (1972).

80. *See id.* at 218 ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.") (citation omitted).

81. *See, e.g.*, United States v. Lee, 455 U.S. 252, 258–61 (1982) (requiring an Amish employer to pay Social Security taxes despite his claim that the collection and payment of such taxes violated his religious exercise); Braunfeld v. Brown, 366 U.S. 599, 601 (1961) (denying that Sunday closing laws impermissibly infringed on the claimants' "ability . . . to earn a livelihood," given that they observed the Sabbath on Saturday).

82. *See* EUGENE VOLOKH, THE RELIGION CLAUSES AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 369 (2005).

83. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

84. *Id.* at 888.

85. City of Boerne v. Flores, 521 U.S. 507, 514 (1997), *superseded by statute*, §§ 2000cc–2000cc-5, *as recognized in Hobby Lobby*, 134 S. Ct. at 2761.

lucinogenic drug, peyote, for sacramental purposes as part of a religious ceremony.[86] Under Oregon law, those in possession of peyote and other drugs listed on Schedules I through V of the Controlled Substances Act[87] are "guilty of a Class B Felony."[88] The plaintiffs' employers fired them after learning about their sacramental – and, under Oregon law, illegal – use of peyote.[89] The Employment Division denied the plaintiffs' subsequent request for unemployment benefits because they had been fired for "misconduct," i.e., violating Oregon law.[90] Consistent with the *Sherbert*/*Yoder* balancing test, the Oregon Supreme Court held that the plaintiffs were entitled to unemployment benefits because the Oregon law impermissibly infringed on their free exercise rights.[91]

On appeal, the Supreme Court reversed.[92] The Court reasoned, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[93] According to the Court, to allow everyone to opt out of neutral, generally applicable laws, whenever those laws allegedly conflict with religious practice, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[94] Under such a regime, federal laws would become voluntary for religious believers, who could exempt themselves from general civic obligations (such as the payment of taxes, compulsory military service, health and safety regulations, drug and traffic laws, environmental laws, discrimination laws, and a host of other obligations) by invoking the Free Exercise Clause.[95] The Court refused to adopt such a far-reaching rule. Although legislation cannot specifically target religious conduct (because such laws would not be neutral and generally applicable) without satisfying strict scrutiny,[96] merely having religious views or practices "which contradict the relevant concerns of a political society does not relieve the citizen from the dis-

86. *Smith*, 494 U.S. at 883.

87. 21 U.S.C.A. §§ 811–12.

88. OR. REV. STAT. ANN. § 475.752(1) (West 2016).

89. *Smith*, 494 U.S. at 882.

90. *See id.* at 874.

91. *Id.*

92. *Id.* at 890.

93. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

94. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

95. *Id.* at 889.

96. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (citation omitted).

charge of political responsibilities."[97] As a result, the Court upheld Oregon's denial of unemployment benefits because that decision was based on plaintiffs using a drug prohibited under a neutral, generally applicable, Oregon law.[98]

After *Smith*, a claim that a neutral, generally applicable law infringes the Free Exercise Clause is subject only to rational basis review.[99] That is, in the wake of *Smith*, the Free Exercise Clause does not provide robust protection for religious exercise.[100] Under the legislative model, Congress has broad discretion to pass neutral, generally applicable laws that incidentally burden

97. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940). *See also* Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (plurality opinion) (upholding a Sunday-closing law against challenges by merchants who claimed that such laws burdened their religious practice of closing on Saturday, the Sabbath for their particular faiths); United States v. Lee, 455 U.S. 252, 258–61 (1982) (requiring an Amish employer to pay Social Security taxes despite his claim that the collection and payment of such taxes violated his religious exercise).

98. *Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

99. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006) ("[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."); WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 541 n.4 (S.D.N.Y. 2008) ("[T]he Supreme Court . . . confirmed that neutral laws, regulations and policies of general applicability that have only an incidental effect on religion need not be held to a standard higher than rational basis scrutiny."), *aff'd sub nom.* World Trade Ctr. Families for Proper Burial, Inc. v. City of New York, 359 F. App'x 177 (2d Cir. 2009); City of Boerne v. Flores, 521 U.S. 507, 533–35 (1997), *superseded by statute*, Religious Land Use & Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2012), *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

100. By lowering the scrutiny review to rational basis, the Court significantly weakened the protection afforded the free exercise of religion under the First Amendment, thereby making it easier for the government to infringe religious practices. *Boerne*, 521 U.S. at 529. As the President of the ACLU, Nadine Strossen, stated during a congressional hearing, "[i]n the aftermath of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws," and "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services" were at risk. *See* Kevin C. Walsh, *ACLU's President on Forced Provision of "Contraception Services" Over Religious Objections – Circa 1992*, WALSHLAW (July 13, 2012), http://walshslaw142.rssing.com/browser.php?indx=7204035&item=4 (quoting *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 80–81 (1992) (statement of Nadine Strossen, President, ACLU)).

religion,[101] as well laws that grant exemptions to religious adherents from such laws. In rejecting the constitutional model of exemptions, the *Smith* majority acknowledged that the nature and scope of accommodations is a matter better left to the legislature than to the courts:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs. [102]

On this view, a society is free to be "solicitous" of free exercise values through its legislation, permitting exemptions for some religious adherents but not others, or for religious believers generally. But legislatures need not provide exemptions for individuals who object to neutral, generally applicable laws on nonreligious grounds. And while *Smith* was criticized widely, Congress moved quickly, using the legislative process to provide "very broad protection for religious liberty."[103]

Drawing on broad bipartisan support, Congress passed RFRA in 1993 to undo the effect of *Smith* on religious free exercise claims: "[RFRA was meant] to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[104] Under RFRA, the government can impose substantial burdens on religious exercise through a neutral law of general applicability only if the law survives a form of heightened scrutiny.[105] That is, the government must "demonstrate[] that

---

101. The *Smith* majority compares the free exercise analysis to the analysis used for other First Amendment protections. *Smith*, 494 U.S. at 876–77. According to the majority, the collection of a general tax is no more an infringement on the free exercise rights of religious adherents who believe that supporting organized government is sinful than it is on the freedom of the press to those publishing companies that must pay the tax to stay in business: "It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

102. *Id.* at 890.

103. *Hobby Lobby*, 134 S. Ct. at 2760. *See also* 42 U.S.C. § 2000bb-1(a) (stating that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability").

104. 42 U.S.C. § 2000bb(b)(1).

105. In *Boerne*, the Court determined that, as applied to state action, RFRA exceeded Congress's power under section 5 of the Fourteenth Amendment. *Boerne*, 521 U.S. at 513. The Supreme Court held that Congress lacked authority to enact RFRA with respect to state action but upheld RFRA as to federal legislation. *Id.* at 534–36. *See also* Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33

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."[106]

Although *Smith* denied heightened constitutional protection against neutral laws of general applicability that burdened religious exercise, the Court had no problem upholding the constitutionality of RFRA,[107] which provided the same type of protection as *Sherbert* and *Yoder*. But RFRA presented the Court with a new question: Did Congress intend to reinstitute the balancing test under the *Sherbert*/*Yoder* regime, which provided limited protection to the exercise of religion, or a more robust protection? If the latter, then how much protection should RFRA accord laws that are alleged to burden religious exercise? What constitutes a substantial burden on religion for RFRA purposes? And what role should courts play in determining whether government actions substantially burden religious exercise? *Hobby Lobby* and *Holt* addressed the first question directly, concluding that RFRA and RLUIPA

CARDOZO L. REV. 1389, 1412 (2012). In the wake of *Boerne*, many states enacted state RFRAs – state legislation that mirrored the federal RFRA by providing heightened scrutiny review for substantial burdens on religious exercise that the state creates. *See* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466 (2010); W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 666 (1999). As a result, plaintiffs asserting free exercise claims now confront a patchwork of different standards depending on whether the claims assert Free Exercise Clause, federal RFRA, state RFRA, or state constitutional challenges. Lund, *supra*, at 466–67; Durham, *supra*, at 666. If a claim is made under the First Amendment that a neutral law of general applicability substantially burdens religiously motivated conduct, then rational basis applies. Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 40 (2013). If the same claim is made under a state or federal RFRA, then strict scrutiny applies. *Id.* Finally, if a state law is alleged to violate religious exercise in a state without a state RFRA, then the state constitution determines the level of protection afforded religious exercise. *Id.* For a more detailed analysis of the "Free Exercise landscape" post-*Smith*, see Colombo, *supra*, at 41. *See also* Eugene Volokh, *Intermediate Questions of Religious Exemptions – A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999) (explaining that state RFRAs "facially require strict scrutiny of all substantial burdens on religious practices"); Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, sec. 2(b) (codified at 42 U.S.C. § 2000bb) (reinstating the strict scrutiny standard "in all cases where free exercise of religion is substantially burdened").

106. 42 U.S.C. §§ 2000bb-1(a)–(b).

107. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (affirming under RFRA an injunction that prohibited the government's enforcing the Controlled Substances Act against a religious sect's religious use of hoasca, a tea that contained a hallucinogen). *See also Smith*, 494 U.S. at 890 (noting that because "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process[,] . . . a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well").

provide "very broad"[108] and "expansive protection for religious liberty."[109] But these cases did not resolve the other questions, which are the central issues in the religious nonprofit cases: (1) what constitutes a substantial burden under RFRA, and (2) who gets to decide whether there is such a burden, the courts or the religious objectors? As the split between the circuit majority and the Eighth Circuit demonstrates, the answers to these questions directly determine whether religious nonprofits can meet their initial burden under RFRA.

B. The Circuit Split: Whether the Accommodation Substantially Burdens the Religoius Nonprofits' Exercise of Religion

Given the lack of case law addressing the substantial burden analysis under RFRA, federal courts have reached different conclusions regarding the effect the Accommodation has on the exercise of religion by religious nonprofits. In the nine circuits that have decided cases to date, the courts have taken one of two positions: (1) the Accommodation does not burden the exercise of religion because it enables religious nonprofits to opt-out of providing the objectionable coverage,[110] or (2) the Accommodation impermissibly requires religious nonprofits to choose between suffering serious consequences if they adhere to the tenets of their faith and violating their sincerely held religious beliefs if they conform to the government's directive.[111]

1. The Circuit Court Majority Rejects the Religious Nonprofits' Claims

The seven religious nonprofit cases that the Supreme Court of the United States considered and vacated in *Zubik v. Burwell* came from four circuits – the Third, Fifth, Tenth, and District of Columbia.[112] In each of these cases, the circuit court ruled in favor of the government, concluding that the religious nonprofits did not show that the Accommodation substantially burdened their sincerely held religious beliefs. The Second, Sixth, Seventh, and Eleventh Circuits reached the same conclusion.[113] As a result, eight circuit

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

109. Holt v. Hobbs, 135 S. Ct. 853, 860 (2015).

110. Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1148 (11th Cir. 2016).

111. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 945–46 (8th Cir. 2015), *vacated sub nom.* Dep't of Health & Human Servs. v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

112. *See* cases cited *supra* note 37.

113. *See, e.g.*, Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 807 F.3d 738 (6th Cir. 2015), *vacated sub nom.* Mich. Catholic Conference v. Burwell, No. 15-1131, 2016 WL 932712

courts have now ruled in favor of the government and denied that the religious nonprofits' objection to the Accommodation fell within RFRA's "broad protection" of religious exercise.

Although there are some differences between and among the various religious nonprofit cases,[114] the parties make the same general arguments, and the circuit courts in the majority adopt the same general analysis. The religious nonprofits object to the contraception mandate, as well as the Accommodation, which enables them to give notice that they object on religious grounds to paying for the contraceptive services, but (from their perspective) that objection "triggers" or "facilitates" the provision of the same contraceptive services through their insurance issuers or TPAs.[115] According to the religious nonprofits, giving the notice required under the Accommodation "requires them to be 'complicit' in sin."[116] Although the act of signing a generic form or giving notice directly to the government may not contradict their religious beliefs, signing Form 700 or giving the detailed notice under the Accommodation does because it provides the government with "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" the

(U.S. May 23, 2016); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Eternal Word*, 818 F.3d at 1122.

114. For example, in *Geneva College*, the religious nonprofits argued that the Accommodation imposed a second substantial burden because it "improperly partitions the Catholic Church by making the Dioceses eligible for the exemption, while the Catholic nonprofits [which have self-insured health plans through the Dioceses] can only qualify for the accommodation, even though all the Catholic entities share the same religious beliefs." Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 443 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam). In *Little Sisters of the Poor*, the majority and dissent disagreed as to the effect of the ACA on self-insured plans. *See* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1210 (10th Cir. 2015) (Baldock, J., dissenting in part), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557. While the majority holds that the ACA is the legal cause in both situations, the dissent contends that the fact that the TPA is legally responsible for coverage only after a religious nonprofit opts out is a "critical distinction" that warrants a different result. *Id.* This Article focuses on the substantial burden analysis under RFRA generally, given that (1) this is the central point of disagreement between the circuit majority and the Eighth Circuit, and (2) determining the proper substantial burden analysis is apt to have the biggest impact on RFRA litigation going forward.

115. *See, e.g.*, *Geneva Coll.*, 778 F.3d at 427.

116. *Id.* at 435. *See also Univ. Notre Dame*, 786 F.3d at 611 ("Because of its contractual relations with the two companies [providing coverage,] . . . Notre Dame claims to be complicit in the sin of contraception.").

ACA's contraception mandate.[117] That is, according to the religious nonprofits, signing Form 700 is more than a *de minimis* act; it is a "necessary" component of the government's being able to provide the coverage to which the religious nonprofits object.[118]

Across the board, the circuit court majority rejected the religious nonprofits' claims. Although deferring to the religious nonprofits as to the sincerity of their religious beliefs, these courts have asserted the obligation to make an objective determination as to whether the Accommodation substantially burdens those sincerely held beliefs: "Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage."[119] Courts must make this type of objective determination (1) to give meaning to all of the statutory language relating to the plaintiffs' burden under RFRA and (2) to avoid conflating the sincerity of belief and substantial burden prongs. As the Tenth Circuit noted in *Little Sisters of the Poor*, "If plaintiffs could assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning."[120] Moreover, "[A]ccepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise."[121]

Before turning directly to the religious nonprofits' specific claims, the circuit court majority distinguished the present cases from *Hobby Lobby*.[122] The for-profit companies challenged the contraception mandate because it presented two choices, both of which infringed their religious liberty.[123] The companies were required to either provide the contraceptive coverage direct-

117. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51095 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147).

118. *Id.*

119. *Geneva Coll.*, 778 F.3d at 435 ("While the Supreme Court reinforced in *Hobby Lobby* that we should defer to the reasonableness of the appellees' religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and the substantiality of that burden on the appellees' religious exercise."); *Univ. Notre Dame*, 786 F.3d at 612 ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs.").

120. Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015) *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

121. *Id.*

122. *See Geneva Coll.*, 778 F.3d at 436.

123. *Id.* at 435.

ly, which "did render the plaintiffs 'complicit,'" or pay significant fines.[124] Absent an accommodation, this choice constituted an "actual burden."[125] But under the Accommodation, the religious nonprofits have a third option – giving notice through Form 700 or directly to HHS – that enables them to avoid the financial penalties in *Hobby Lobby*.[126] That is, the Accommodation gives the religious nonprofits a way to avoid both providing contraceptive coverage directly and having to pay substantial penalties for not following the contraception mandate, thereby removing the substantial burdens under the ACA.

Moreover, contrary to the religious nonprofits' contention, the Accommodation's notice process does not "trigger" or "facilitate" the objectionable coverage. Rather, the obligation of insurance issuers and TPAs to provide such coverage is mandated by the ACA: "Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries."[127] Thus, on the majority's view, the Accommodation serves "to lift a burden from the [religious nonprofits'] shoulders"[128] or, as the Third and Seventh Circuits put it, to "wash[their] hands of any involvement in contraceptive coverage."[129] The Accommodation provides a way for the religious nonprofits to opt out of providing contraceptive coverage without having to pay any penalties or fines. Using Form 700 or giving notice directly to HHS "does not enable coverage"; "it simply notifies its health insurance issuer the organization will not be providing cov-

---

124. *Id.* at 436; Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2776–77 (2014).

125. *Geneva Coll.*, 778 F.3d at 436.

126. *Id.* at 437.

127. Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1180 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam). Three Justices of the Supreme Court of the United States also have adopted this reasoning. In Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014), the Court approved an alternative form of notice that the religious nonprofit could use instead of Form 700: "If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the [ACA]." In dissent, Justices Ginsburg, Sotomayor, and Kagan adopted the reasoning of the circuit court majority: "[Wheaton College's] claim ignores that the provision of contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law." *Id.* at 2808 (Sotomayor, J., dissenting).

128. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 614 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016).

129. *Geneva Coll.*, 778 F.3d at 441 (quoting Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 557 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015)).

erage."[130] The insurance issuers and TPAs then must provide no-cost coverage for the contested services and cannot charge the religious nonprofits extra. As a result, these courts conclude that submitting the self-certification Form or notice to HHS "does not make the appellees 'complicit in the provision of contraceptive coverage.' If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage."[131] Because signing the form is a *de minimis* act that does not cause, trigger, or facilitate contraceptive coverage, the religious nonprofits cannot establish that the Accommodation substantially burdens their exercise of religion.

Consequently, several of the circuit courts contend that the religious nonprofits' "real objection" is to the government's provision of contraceptives under the ACA generally.[132] The Accommodation enables the government to ensure that the religious nonprofits' employees receive coverage, which contravenes the religious nonprofits' sincerely held religious beliefs.[133] The religious nonprofits object to the government's finding a substitute to provide the objectionable contraceptive coverage.[134] But this is just an objection to how the government conducts its internal operations when carrying out the HHS Mandate. RFRA, though, does not permit the religious nonprofits to challenge the government's internal operations or reliance on third parties to carry out its policies: "RFRA does not grant [the religious nonprofits] a religious veto against plan providers' compliance with those regulations, nor the right to enlist the government to effectuate such a religious veto against legally required conduct of third parties."[135]

The circuit courts invoke two of the Supreme Court's pre-RFRA cases, *Bowen v. Roy*[136] and *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[137] to illustrate why this objection fails under RFRA. In *Roy*, the plaintiff objected to the government's use of his daughter's Social Security number because, pursuant to his Native American religious beliefs, any use of her unique iden-

130. *Little Sisters of the Poor*, 794 F.3d at 1181. *See also* 45 C.F.R. § 147.131(c)(1)(i) (2016) ("When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130.").

131. *Geneva Coll.*, 778 F.3d at 438–39.

132. *Id.* at 439.

133. *Id.*

134. *Id.*

135. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 251 (D.C. Cir. 2014), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

136. 476 U.S. 693 (1986).

137. 485 U.S. 439 (1988).

tifier would harm her spirit.[138] The father sought an accommodation that, among other things, would preclude the government's using her number in its internal operations.[139] The Court denied his request, stating that "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[140] While "the Free Exercise Clause affords an individual protection from certain forms of governmental compulsion," religious adherents cannot invoke free exercise "to dictate the conduct of the Government's internal procedures."[141] Similarly, in *Lyng*, Native American religious practitioners challenged the Forest Service's plan to allow timber harvesting and road construction in an area of a national forest that three American Indian tribes traditionally used for religious purposes.[142] Even though the Court had "no reason to doubt[] that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices," the Court rejected the free exercise challenge because the government neither coerced the individuals "into violating their religious beliefs" nor "penalize[d] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[143] The Free Exercise Clause did not require the government "to bring forward a compelling justification for its otherwise lawful actions" just because a government program had the incidental effect of "mak[ing] it more difficult to practice certain religions but which ha[d] no tendency to coerce individuals into acting contrary to their religious beliefs."[144]

To illustrate this point, several circuits have compared the religious nonprofits' claim to that of a conscientious objector who objects on religious grounds to serving in the military and to the draft generally.[145] Federal law

138. *Bowen*, 476 U.S. at 696.

139. *Id.* at 699.

140. *Id.* at 700.

141. *Id.* at 699–700.

142. 485 U.S. at 439.

143. *Id.* at 440, 449–50.

144. *Id.* at 440, 465. *See also* Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008) ("The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way – it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages.").

145. *See* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1184 n.33 (10th Cir. 2015) (discussing the conscientious objector analogy and concluding that "the comparison is apt"), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 623–24 (7th Cir. 2015) (Hamilton, J., concurring), *vacated*, 136 S. Ct. 2007 (2016). *See also* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 439 n.14 (3d Cir. 2015) (making a similar point using an example of an employee who requests time off to

allows an exemption from military service for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[146] The circuit courts present a situation where a conscientious objector applies for and receives an exemption. In his *Notre Dame* concurrence, Judge Hamilton posits that the conscientious objector also objects to the fact that, because he "will not be drafted, someone else will be drafted in his place."[147] The conscientious objector asserts that if his substitute will engage in the same wrongdoing that the conscientious objector would have been required to engage in (and which violated his sincere religious beliefs), then the conscientious objector remains morally responsible for that wrongdoing.[148] Drafting a substitute, therefore, substantially burdens the conscientious objector's sincere religious beliefs.[149] Thus, invoking RFRA, the conscientious objector asserts that he must be given an accommodation without a substitute.

According to Judge Hamilton, although the conscientious objector's claim is a "fantastic suggestion," the religious nonprofits make the same argument.[150] And the religious nonprofits' argument fails for the same reasons: (1) a "party claiming the exemption is not entitled to raise a religious objection to the arrangements the government makes for a substitute," and (2) under such a regime, "fair governance where the law imposes burdens on individuals would become nearly impossible."[151] Under *Smith*, the government may take actions that contravene citizens' sincere religious beliefs without substantially burdening their exercise of religion under RFRA:

> Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors.[152]

---

accommodate his exercise of religion but then objects to the government's arranging for a substitute), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting) (invoking the Seventh Circuit's conscientious objector example "to explain why Wheaton's complicity theory cannot be legally sound").

146. 50 U.S.C. § 3806(j) (2012).

147. *Univ. Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring).

148. *Id.* at 624.

149. *Id.* at 623.

150. *Id.*

151. *Id.* at 623–24.

152. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 246 (D.C. Cir. 2014), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v.

Consequently, because the Accommodation's self-certification process does not substantially burden the exercise of religion by the religious nonprofits, the burden never shifts to the government, and the circuit court majority does not even have to consider whether the government has a compelling interest and whether the Accommodation is the least restrictive means of advancing that interest.

2. The Eighth Circuit's Defense of RFRA Protection for Religious Nonprofits

The Eighth Circuit is the only circuit court to rule in favor of the religious nonprofits on the merits. In *Sharpe Holdings, Inc. v. United States Department of Health & Human Services*,[153] two nonprofits, CNS International Ministries, Inc. ("CNS") and Heartland Christian College ("HCC"),[154] objected to the Accommodation, claiming that "the government is coercing them to violate their religious beliefs by threatening to impose severe monetary penalties unless they either directly provide coverage for objectionable contraceptives . . . or indirectly provide, trigger, and facilitate that objectionable coverage through the Form 700/HHS Notice accommodation process."[155] Consistent with its winning argument in other circuits, the government maintained that the Accommodation did not burden CNS's or HCC's exercise of religion because the notice requirement did not "trigger" or "facilitate" contraceptive coverage because the ACA – and not the notice under the Accommodation – imposed a separate legal obligation on their TPAs to provide such coverage.[156] In the alternative, even if CNS and HCC could establish a substantial burden, the government argued that it employed the least restrictive means of providing no-cost coverage for contraceptives.[157]

As in the other religious nonprofit cases, in *Sharpe Holdings*, the government did not contest the sincerity of the claimants' religious beliefs. Unlike the other circuit court cases, however, the Eighth Circuit found that the Accommodation substantially burdened the sincerely held beliefs of the religious nonprofits.[158] CNS and HHS alleged that their religious beliefs pre-

---

Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

153. 801 F.3d 927 (8th Cir. 2015), *vacated sub nom.* Dep't of Health & Human Servs. v. CNS Int'l Ministries, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

154. Given that HCC has fewer than fifty employees, it is not required to offer healthcare coverage. *See id.* at 933; 26 U.S.C.A. §§ 4980H(a), (c) (West 2015). But HCC, consistent with CNS, offers such coverage as part of its "religious mission to promote the well-being and health of [its] employees." *Sharpe Holdings*, 801 F.3d at 933.

155. *Sharpe Holdings*, 801 F.3d at 936.

156. *Id.*

157. *Id.*

158. *Id.* at 941.

cluded them from directly or indirectly providing coverage for certain contraceptives, namely those that (in their view) operated as abortifacients by preventing a fertilized egg from attaching in the womb.[159] Given that "RFRA was designed to provide very broad protection for religious liberty," protection that goes "far beyond what [the Supreme] Court has held is constitutionally required,"[160] the panel deferred to CNS's and HCC's characterization of the effect of the Accommodation on their religious beliefs: "[A] religious objector is entitled to 'dr[a]w a line' regarding the conduct that his religion deems permissible, and once that line is drawn, 'it is not for [a court] to say that the line . . . was . . . unreasonable.'"[161] According to the Eighth Circuit, all a court can do under *Hobby Lobby* "'is to determine' whether the line drawn reflects 'an honest conviction.'"[162] In *Sharpe Holdings*, the religious nonprofits "sincerely believe[d] that the actions 'demanded by the . . . regulations [were] connected to' illicit conduct 'in a way that is sufficient to make it immoral for them to' take those actions."[163] Under the Supreme Court precedents, the court, therefore, could neither second-guess the sincerity of the religious nonprofits' beliefs nor assess whether those beliefs were correct.[164]

Yet for the Eighth Circuit panel, the government's argument required the court to do just that – to assess the reasonableness or correctness of CNS's and HCC's religious beliefs. But the legal question (whether the ACA imposed a legal obligation to provide contraceptive coverage on insurance issuers when a religious nonprofit gave notice under the Accommodation) did not resolve the moral question (whether signing and submitting Form 700 or giving detailed notice to HHS made a religious claimant complicit in immoral conduct).[165] The religious nonprofits answered the latter question in the affirmative, and under *Thomas*, the court could not adjudge their response, giv-

159. *Id.* at 935–36.

160. *Id.* at 938.

161. *Id.* at 939 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981)).

162. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas*, 450 U.S. at 716).

163. *Sharpe Holdings*, 801 F.3d at 941 (quoting *Hobby Lobby*, 134 S. Ct. at 2778).

164. *See, e.g.*, Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 19 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do.").

165. *See Sharpe Holdings*, 801 F.3d at 942 ("The question here is not whether CNS and HCC have correctly interpreted the law, but whether they have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacient coverage. Their affirmative answer to that question is not for us to dispute.").

en that religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to warrant RFRA protection.[166]

Moreover, the panel rejected the government's claim that the Accommodation could not substantially burden the religious nonprofits' exercise of religion because they had already declared their objection to providing contraceptive coverage by excluding such coverage from their original policies.[167] The Eighth Circuit emphasized that the government's argument ignored the fact that the Accommodation brought about the specific coverage that CNS and HCC expressly sought to prevent – having a group health plan that provided for contraceptive coverage that violated their sincere religious beliefs.[168] The notice, therefore, had a direct effect on the obligations of TPAs, thereby undermining the government's claim that self-certification under the Accommodation could not burden the claimants' exercise of religion: "If TPAs had a wholly independent obligation to provide contraceptive coverage to religious objectors' employees and plan beneficiaries, there would be no need to insist on CNS and HCC's compliance with the accommodation process."[169] In addition, the Eighth Circuit had no problem concluding that the ACA constituted a substantial burden because CNS and HCC faced the same "significant monetary penalties" if they failed to either abide by the contraception mandate or submit the written notice specified in the Accommodation:[170] "When the government imposes a direct monetary penalty to coerce conduct that violates religious belief, [t]here has never been a question that the government imposes a substantial burden on the exercise of religion."[171]

Having found that the Accommodation substantially burdened the religious nonprofits' exercise of religion,[172] the burden shifted to the government to show that it had a compelling interest and that the Accommodation was the least restrictive means of achieving that interest. The Eighth Circuit followed the majority in *Hobby Lobby* and "assume[d] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA."[173] Turning to the "exceptionally demanding"[174] least-restrictive-means analysis, the court noted that the government must show that "'no alternative forms of regulation' would accomplish those interests without infringing on a claimant's religious-exercise rights."[175]

166. *Thomas*, 450 U.S. at 714.

167. *Sharpe Holdings*, 801 F.3d at 942.

168. *Id.*

169. *Id.*

170. *Id.* at 937.

171. *Id.* at 938 (alteration in original).

172. *See id.* ("In light of CNS and HCC's sincerely held religious beliefs, we conclude that compelling their participation in the accommodation process by threat of severe monetary penalty is a substantial burden on their exercise of religion.").

173. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014).

174. *Id.*

175. *Sharpe Holdings*, 801 F.3d at 943 (8th Cir. 2015).

While recognizing that *Hobby Lobby* determined that the Accommodation was less restrictive than requiring the religious for-profits to provide coverage directly, the Eighth Circuit panel explained that the Court's holding was limited to the facts of the for-profit cases, i.e., that the *Hobby Lobby* Court "was specifically 'not decid[ing] . . . whether an approach of this type complies with RFRA for purposes of all religious claims.'"[176] Hobby Lobby and Conestoga Wood Specialties did not object to the Accommodation on free exercise grounds.[177] As a result, the Accommodation served to accommodate these particular claimants. Furthermore, any uncertainty on this point was removed shortly after *Hobby Lobby* when the Supreme Court issued its order in *Wheaton College*,[178] permitting the religious school to avoid the contraception mandate by notifying HHS directly that it objected to the Accommodation on religious grounds without having to give detailed written notice through Form 700 or to HHS.[179]

Although not a final decision on the merits, the Eighth Circuit concluded that the Court's willingness to enjoin enforcement of the contraception mandate (if religious nonprofits gave notice of their objection to HHS) signaled a less restrictive way by which the government could pursue its interests.[180] To the extent that the government knew who the religious nonprofits' TPAs were, there would be no cost to the government to implement the contraception mandate through TPAs.[181] And even if TPAs were unknown, the government failed to establish at that stage in the case that identifying TPAs would impose an administrative hurdle so high that the contraception mandate would become "unworkable."[182] In addition, there was no indication

176. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2782) (alteration in original). *See also Hobby Lobby*, 134 S. Ct. at 2806 n.40 ("The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.").

177. *Hobby Lobby*, 134 S. Ct. at 2806 n.27.

178. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014). *See also* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1220 (10th Cir. 2015) (enjoining enforcement of the contraception mandate if the Little Sisters of the Poor provide written notice to HHS stating that the claimants "are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services"), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

179. *Sharpe Holdings*, 801 F.3d at 944.

180. *Id.* at 944. *See also* Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[R]egardless of whether we as a lower court are *formally* bound by the Supreme Court stay orders in *Wheaton College* and *Little Sisters of the Poor*, the notice identified by the Supreme Court in those two cases is undoubtedly a less restrictive way for the Government to further its interest than [the Accommodation].").

181. *Sharpe Holdings*, 801 F.3d at 944.

182. *Id.*

that *Wheaton College* notice would affect the ability of CNS's and HCC's employees to receive contraceptive coverage, especially given that the government could "rely[] on th[e] notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the [ACA]."[183] Thus, the government failed to meet its burden, and the Eighth Circuit affirmed the injunction against enforcement of the contraception mandate against CNS and HCC.

C. Zubik v. Burwell: *Remand Without Resolution of the Merits*

The Court heard oral argument in *Zubik* on March 23, 2016. In a somewhat unusual move, on March 29, 2016, the Court issued an order directing the parties "to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."[184] That is, the Court asked the parties to explain whether the notice provision under the Accommodation, which was the basis for the religious nonprofits' lawsuits, was necessary to ensure contraceptive coverage to the petitioners' employees. In particular, the Order required the parties to consider a specific proposal: a situation where the religious nonprofits inform their insurance companies that they do not want to provide any contraceptive coverage to which they object on religious grounds, and the insurance companies (without any further action by the religious nonprofits) separately notify the employees of the religious nonprofits that the insurance company (and not the religious nonprofits or their health plan) will provide cost-free contraceptive coverage.[185]

The parties filed their supplemental briefs in April 2016, addressing the specific issue set forth in the Court's March 29, 2015, Order. In its brief, the government ultimately acknowledged that the Court's proposal was possible for religious nonprofits with insured plans: "[T]he accommodation for employers with insured plans could be modified to operate in the manner posited in the Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly."[186] The government's admission suggested

183. *Wheaton Coll.*, 134 S. Ct. at 2807. The religious nonprofits also argued that the government had other less restrictive ways of ensuring cost-free contraceptive coverage, including, among other things, by having the government (1) cover the cost (by means of "subsidies, reimbursements, tax credits, or tax deductions to employees"), (2) "pay for the distribution of such services at community health centers, public clinics, and hospitals with income-based support," and (3) "make contraceptives available to employees through its own healthcare exchanges." *Sharpe Holdings*, 801 F.3d at 945.

184. Zubik v. Burwell, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191, 2016 WL 1203818, at *2 (U.S. Mar. 29, 2016).

185. *See id.*

186. Supplemental Brief for the Respondents, *supra* note 46, at 14–15.

that the Accommodation was not the least restrictive way to provide no-cost contraceptive coverage to women working for religious nonprofits who objected to the Accommodation on religious grounds. But the admission did not resolve the threshold question – whether the Accommodation constitutes a substantial burden on the free exercise of religious nonprofits. Moreover, as all of the parties acknowledged, the Court's proposal did not address the RFRA claims of self-insured plans.[187] As a result, in the wake of the supplemental briefs, it appeared that the Court would have to decide whether the Accommodation substantially burdened the free exercise of religious nonprofits, such that the burden should shift to the government to prove that the Accommodation was narrowly tailored to serve a compelling government interest.

Instead, the Court issued a *per curiam* opinion that vacated and remanded the consolidated cases to the circuit courts but "expresse[d] no view on the merits of the cases."[188] Given "the gravity of the dispute" and that "[b]oth petitioners and the Government now confirm that [providing contraceptive coverage to petitioners' employees through petitioners' insurance companies but without notice from petitioners] is feasible,"[189] the Court concluded that the cases should be remanded to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[190] Accordingly, the Court stated it was "not decid[ing] whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest."[191] Consequently, on remand, the lower courts must reconsider the merits and, for the reasons discussed below, should find that the Accommodation substantially burdens the free exercise of religious nonprofits that object on religious grounds to providing the ACA's contraception coverage.

187. *See, e.g.*, *id.* at 2 ("[T]he order correctly anticipates that the alternative it posits would not work for the many employers with self-insured plans, which use third-party administrators (TPAs) rather than insurers . . . ."); Supplemental Brief for Petitioners at 16–17, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 1445914, at *16–17 ("This Court's order focused on '[p]etitioners with insured plans.' That focus presumably recognizes that the dynamic is quite different for employers that self-insure or utilize self-insured church plans.") (alteration in original).

188. *Zubik III*, 136 S. Ct. at 1560.

189. *Id.*

190. *Id.*

191. *Id.*

III. THE LOWER COURTS FUNDAMENTALLY MISCONSTRUED RFRA'S SUBSTANTIAL BURDEN ANALYSIS AND, IN THE PROCESS, USURPED THE RIGHT OF RELIGIOUS ADHERENTS TO DETERMINE THEIR OWN VIEWS REGARDING MORAL COMPLICITY

RFRA was passed "to provide very broad protection for religious liberty."[192] Congress defined "religious exercise" expansively to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[193] Congress also specified that this concept "shall 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."[194] Following Congress's mandate, the Supreme Court has interpreted the "exercise of religion" to "involve[] 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"[195]

Under RFRA, the plaintiff has the burden of "showing that the relevant exercise of religion is grounded in a sincerely held religious belief" and that the government's "policy substantially burden[s] that exercise of religion."[196] Consistent with Congress's directives, courts generally do not dispute the sincerity of a petitioner's religious belief.[197] And none of the lower courts have questioned the sincerity of the petitioners' religious beliefs in the religious nonprofit cases.[198]

---

192. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

193. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(7)(A) (2012).

194. § 2000cc-3(g).

195. *Hobby Lobby*, 134 S. Ct. at 2770 (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 870 (1990)), *superseded by statute*, §§ 2000bb–2000bb-4, *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

196. *Holt*, 135 S. Ct. at 862.

197. Although courts frequently defer to a religious adherent's claim that a belief is sincerely held, that deference is not absolute. *Hobby Lobby*, 134 S. Ct. at 2805. As the Court stated in *Hobby Lobby*, "[A] pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Id.* at 2806 n.28. Similarly, the Court acknowledged that "by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented." *Id.* at 2774.

198. *See* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015) ("Thus, we 'accept[] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation that [their] religious exercise is substantially burdened.'" (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008))), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 217 (2d Cir. 2015) ("To be sure, the government concedes, and we do not doubt, the sincerity of Plaintiffs' belief that providing, paying for, or facilitating ac-

The problem is that the lower courts have disregarded Congress's and the Court's instruction that RFRA applies broadly to "any exercise of religion."[199] After carefully reviewing the religious nonprofits' claims, the lower courts have concluded that the Accommodation does not substantially burden the plaintiffs' sincerely held religious belief that providing notice under the Accommodation makes them complicit in a grave moral wrong.[200] As discussed above, these courts have offered two related justifications for this conclusion. First, they contend that federal law (i.e., the ACA), not the notice under the Accommodation, creates the legal obligation of insurance issuers and TPAs to provide contraceptive coverage. Consequently, the petitioners are not responsible for – and, therefore, their religious beliefs are not implicated by – their employees receiving contraception and sterilization services through the religious nonprofits' insurance providers or TPAs.[201] Second, the Accommodation is just that, an accommodation intended to remove the substantial burden of complying with the ACA. According to the lower courts, giving notice under the Accommodation serves as "a declaration that [the religious nonprofits] will *not be complicit* in providing coverage" and consequently "does not necessitate any action that interferes with the appellees' religious activities."[202]

By focusing exclusively on the legal cause of the provision of contraceptive and sterilization services, the lower courts make the same mistake that HHS made in *Hobby Lobby*: they obfuscate the central question under RFRA's substantial burden analysis ("whether the [Accommodation] imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*") and then proceed to answer a dif-

---

cess to contraceptive services is contrary to their faith. Nor do we doubt that, in Plaintiffs' religious judgment, participation in the accommodation violates this belief."), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 247 (D.C. Cir. 2014) ("Plaintiffs are correct that they – and not this Court – determine what religious observance their faith commands."), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

199. Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 19 (D.C. Cir. 2015).

200. *See* cases cited *supra* note 16.

201. *See, e.g.*, Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting) ("I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs. But *thinking* one's religious beliefs are substantially burdened – no matter how sincere or genuine that belief may be – does not make it so.").

202. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 439 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

ferent question ("whether the religious belief asserted in a RFRA case is reasonable").[203]

Under *Hobby Lobby*, though, the answer to the first (and only proper) question is unequivocally "yes." Under the ACA, religious nonprofits must either (1) provide coverage for all FDA-approved contraceptives and sterilization procedures (which would violate their sincerely held religious beliefs), (2) give notice under the Accommodation (which also would violate their sincere religious beliefs), or (3) pay the significant penalties imposed for noncompliance. Under *Hobby Lobby* and *Holt*, putting petitioners to this choice substantially burdens their religious exercise.

A. Religious Beliefs Are Substantially Burdened Under RFRA If the Government Forces an Adherent to Choose Between Complying with a Law That Violates His Religious Beliefs and Facing Serious Penalties If He Follows His Faith

Given the broad protection afforded the exercise of religion under RFRA, the substantiality of a burden is determined by the level of force the government applies to get a religious believer to contravene his religious beliefs, not a court's independent determination that a law's requirements are or are not *actually* consistent with his professed religious beliefs. As *Hobby Lobby* and *Holt* instruct, a substantial burden arises when the government puts a religious nonprofit to the choice of either "'engag[ing] in conduct that seriously violates [its] religious beliefs' . . . [or] fac[ing] serious disciplinary action" or penalties for violating the government's directive.[204] Rather than assessing the compatibility of the asserted beliefs and the law at issue, courts are limited to deciding whether the government places substantial pressure on the religious objector to violate those beliefs. Under RFRA, the religious adherent gets to define the nature of his own sincerely held beliefs, as well as what constitutes a violation of those beliefs. Hence, as the Court stated in *Hobby Lobby*, the proper question under RFRA is "whether the HHS mandate

203. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014).

204. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (quoting *Hobby Lobby*, 134 S. Ct. at 2775); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (finding a substantial burden when the government places "substantial pressure on an adherent to modify *his* behavior and to violate *his* beliefs") (emphasis added); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (finding a "clear" burden where the state supreme court's "ruling forces [a religious adherent] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand") ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (concluding that Wisconsin's compulsory-attendance law imposed a severe burden on the Amish plaintiffs because it "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*."[205] Courts can consider the degree of force the government used to ensure compliance (i.e., whether the government imposed a substantial burden), but they cannot decide whether the required action actually interferes with the *religious adherent's* asserted religious beliefs.[206]

Applying this standard in *Holt*, the Court found that the plaintiff "easily satisfied" his burden. Because the Arkansas Department of Corrections required the prisoner to either shave his beard or follow his religious beliefs and "face serious disciplinary action," the Court unanimously concluded that the government policy "substantially burden[ed] his religious exercise."[207] Similarly, in *Hobby Lobby*, the Court held that the contraceptive mandate imposed a substantial burden on the closely held corporations "[b]ecause the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs."[208] Given that no one questioned the sincerity of the closely held corporations' beliefs, and that the penalties under the ACA for not providing such coverage "are surely substantial," the Court had "little trouble concluding" that "the HHS contraceptive mandate 'substantially burden[ed]' the exercise of religion."[209]

The circuit court majority ignores *Hobby Lobby*'s and *Holt*'s emphasis on the nature of the choice and, in the process, misconstrues the role of the courts in assessing whether a burden is substantial. The lower courts start with an accurate characterization of the judicial role under RFRA: "RFRA's statutory text and religious liberty case law demonstrate that courts – not plaintiffs – must determine if a law or policy substantially burdens religious exercise."[210] But they then impermissibly substitute the legal question (what constitutes a substantial burden under *Hobby Lobby* and *Holt*) with a moral

205. *Hobby Lobby*, 134 S. Ct. at 2778; *see also Thomas*, 450 U.S. at 715 (reversing the state supreme court, which denied benefits based on concern over the line the employee drew between work that he found to be consistent with his religious beliefs and work that he found to be morally objectionable, because "it [was] not for [the Court] to say that the line he drew was an unreasonable one").

206. Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1146 (11th Cir. 2016).

207. *Holt*, 135 S. Ct. at 862.

208. *Hobby Lobby*, 134 S. Ct. at 2779.

209. *Id.* at 2759, 2775–76 ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

210. Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 612 (7th Cir. 2015) ("Although Notre Dame is the final arbiter of its religious beliefs, it is for the courts to determine whether the law actually forces Notre Dame to act in a way that would violate those beliefs."), *vacated*, 136 S. Ct. 2007 (2016).

question (whether the Accommodation actually makes religious nonprofits complicit in sin or wrongdoing): "Without testing the appellees' religious beliefs, we must nonetheless objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage."[211] While courts are the last arbiters of legal questions,[212] the Supreme Court has explained that courts should not – and cannot – resolve moral and religious questions.[213] As a result, contrary to the majority of lower courts in the religious nonprofit cases, judges cannot assess the weight or degree of burden on a religious adherent's exercise of religion; rather, all they can do is decide whether the government is improperly pressuring the religious nonprofits to conduct their business in a way that violates the nonprofits' sincerely held religious beliefs.

For example, in *Geneva College*, the Third Circuit invoked *Lyng* to support its claim that courts must make an "objective evaluation of the nature of the claimed burden and the substantiality of that burden on the [religious nonprofits'] religious exercise."[214] Specifically, the Third Circuit concluded that *Lyng* assessed the weight of the burden imposed on the religious adherents.[215] Because the plaintiffs had failed to show that "the burden on the respondents' belief was '*heavy enough* to violate the Free Exercise Clause,'" the government did not have to "demonstrate a compelling need."[216]

But *Lyng* expressly denied that courts can evaluate the weight or degree of burden imposed on a religious objector: "This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in *Roy* . . . and accordingly cannot weigh the adverse effects on the appellees in *Roy* and compare them with the adverse effects on the Indian respondents."[217]

---

211. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 435 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

212. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

213. *See, e.g.*, Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

214. 778 F.3d at 436.

215. *Id. See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

216. *Geneva Coll.*, 778 F.3d at 436 (quoting *Lyng*, 485 U.S. at 447).

217. *Lyng*, 485 U.S. at 449–50. The lower courts' attempts to determine the level of burden – i.e., whether the Accommodation actually or really burdens the religious nonprofits' exercise of religion – also leads them to contravene the Supreme Court's admonition that courts cannot judge whether religious beliefs are "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981). But the Tenth Circuit does just that: "The *Little Sisters* and *Reaching Souls* plaintiffs have

Contrary to the Third Circuit's suggestion (discussed fully below), *Lyng* determined that there was no substantial burden because there was "no tendency to coerce individuals into acting contrary to their religious beliefs."[218] The religious adherents in *Lyng* were not put to the choice that *Hobby Lobby* and *Holt* characterize as a substantial burden – having to face "serious" consequences for adhering to their religious beliefs or having to take a government-mandated action that violates those beliefs.[219]

That the substantial burden prong under RFRA relates to the degree of pressure the government brings to bear on a religious adherent to violate *her* sincerely held religious beliefs (and not a court's allegedly objective determination whether the government-required action actually violates those beliefs) is not surprising. Finding an infringement on the exercise of religion where the government forces one to follow its directives is the analogue of the coercion test in the Establishment Clause context. As the Court explained in *Yoder*, "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government."[220] If the government could neither create a state-established church nor force individuals to either adopt particular religious views or financially support a specific sect, then citizens would have greater freedom to exercise their own religion.[221] Although the Justices have disagreed as to exactly what constitutes impermissible force, they have agreed that the government cannot coerce individuals to engage in religious activities: "[A]t a minimum, the Constitution guarantees that government

---

not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not." Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1178 n.25 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

218. *Lyng*, 485 U.S. at 450.

219. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

220. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). *See also* Lee v. Weisman, 505 U.S. 577, 591–92 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.").

221. *Lee*, 505 U.S. at 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

may not coerce anyone to support or participate in religion or its exercise."[222] Post-*Lee v. Weisman*, in which the Court held that prayers at high school graduation ceremonies were unconstitutional,[223] this coercion may take different forms. Coercion may include "acts backed by threat of penalty"[224] or "public pressure, as well as peer pressure," in the school context.[225] In either case, though, the violation of the Establishment Clause results from the government's putting sufficient pressure – by force of law or psychological compulsion – to make individuals participate in a religious exercise or involuntarily support religion or a specific sect.[226]

Under the coercion test, then, courts must determine whether the force used is substantial enough to constitute coercion to participate in a religious exercise. The disagreement between the majority and the dissent in *Lee* centered on what constitutes sufficient force or coercion.[227] Justice Scalia and the dissenters in *Lee* thought that psychological coercion was an improper basis for finding an Establishment Clause violation because such determinations fell outside the courts' competence.[228] While courts are equipped to decide whether government-mandated actions are backed by a threat of penalty (like the "serious consequences" concern under RFRA's substantial burden prong),[229] they are ill-equipped to determine whether an individual has been psychologically coerced to do something: "A few citations of '[r]esearch in psychology' that have no particular bearing upon the precise issue here . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing."[230] For its part, the *Lee* majority considered external factors, such as the age of the students,[231] the importance of attending graduation,[232] and the government's control over the graduation ceremony[233] in concluding that there was sufficient pressure on students to attend the ceremony to make out an Establishment Clause violation.[234]

---

222. *Id.* at 587 (majority opinion).

223. *Id.* at 599.

224. *Id.* at 642 (Scalia, J., dissenting).

225. *Id.* at 593 (majority opinion).

226. *See, e.g.*, L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 3–4, 8–9 (1986).

227. *Lee*, 505 U.S. at 640–41 (Scalia, J., dissenting).

228. *Id.* at 646.

229. *See* Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

230. *Lee*, 505 U.S. at 636 (Scalia, J., dissenting) (first alteration in original).

231. *Id.* at 595 (majority opinion) ("And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.").

232. *Id.* ("Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.").

233. *Id.* at 597 ("At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches,

The same type of analysis applies in the free exercise context. Under *Hobby Lobby* and *Holt*, when deciding whether a religious adherent's sincere beliefs have been substantially burdened, courts must consider only whether the government has imposed significant pressure or force on the individual to contravene her religious beliefs, not whether the court believes that her beliefs have actually been violated. Courts must evaluate the external pressure brought to bear on the religious adherents and decide whether that pressure effectively prevents them from operating their organizations consistently with *their religious beliefs*.

As a result, in the wake of *Hobby Lobby* and *Holt*, the religious nonprofit cases also present "little trouble."[235] There is no question that, if the religious nonprofits do not give notice under the Accommodation or do not provide contraceptive coverage directly, they will be subject to the same "substantial" penalties that Hobby Lobby and Conestoga faced. When religious adherents are put to such a choice, *Hobby Lobby* instructs that the courts' "'narrow function . . . is to determine' whether the line drawn reflects 'an honest conviction.'"[236] Courts are restricted to considering only whether a religious nonprofit's asserted belief is sincere or reflects an "honest conviction," because courts are precluded from evaluating the veracity, consistency, or reasonableness of religious beliefs: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[237] But given that the lower courts do not question the sincerity of the religious nonprofits' belief (that providing the required notice would make them complicit in serious wrongdoing), "there is no dispute that it does" reflect an honest conviction.[238] Thus, the Accommodation constitutes a substantial burden on the religious beliefs of nonprofit organizations, such as the Little Sisters of the Poor and Priests for Life.

The lower courts avoid this conclusion only by mischaracterizing the religious nonprofits' objection to the Accommodation. According to the lower courts, the religious nonprofits object to the provision of contraceptive services generally (even if done by third parties) and not to the *de minimis* act of signing a form.[239] Drawing on the conscientious objector example, these

---

the timing, the movements, the dress, and the decorum of the students.") (citation omitted).

234. *Id.* ("In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.").

235. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

236. *Id.* at 2779 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)).

237. *See Thomas*, 450 U.S. at 716.

238. *Hobby Lobby*, 134 S. Ct. at 2757.

239. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 222 (2d Cir. 2015) ("Courts have not found a substantial burden where a plaintiff argues that her religious exercise is violated by the government's internal operations or, by extension, its

courts contend that (1) the religious nonprofits object to having any substitute provide contraceptive coverage, and (2) "[t]he party claiming the exemption is not entitled to raise a religious objection to the arrangements the government makes for a substitute."[240]

Although many religious believers disagree with the government's requiring employers to provide coverage for all FDA-approved contraception and sterilization procedures, that is not the basis for the religious nonprofits' objection to the Accommodation. Rather, they object to the government's coercing religious organizations to provide specific information (either through Form 700 or directly to HHS) that they sincerely believe violates the tenets of their faith by authorizing the ongoing use of their healthcare information and infrastructure, which, in turn, results in the provision of contraceptive and sterilization services.[241] That is, as in *Hobby Lobby*, "[T]he

---

decision to burden third parties, even where the plaintiff plays a precipitating role."), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 246 (D.C. Cir. 2014) ("An asserted burden is . . . not an actionable substantial burden when it falls on a third party, not the religious adherent."), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam); Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1181 (10th Cir. 2015) ("Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise."), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557; *id.* at 1192 ("Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves.").

240. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring), *vacated*, 136 S. Ct. 2007 (2016).

241. That signing the self-certification form is more than a simple *de minimis* administrative task without legal or moral effect is apparent from the government's claim that the required information is "the minimum information necessary . . . to determine which entities are covered by the accommodation, to administer the accommodation, and to implement" the government's policy. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51095 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318, 41323 (July 14, 2015) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147). Self-certification authorizes a third party to effectively co-opt the petitioners' plan and to use their healthcare information and infrastructure to provide coverage for services that violate their religious beliefs. 80 Fed. Reg. at 41318, 41323. As Judge Kavanaugh aptly put the point in his *Priests for Life* dissent, "After all, if the form were meaningless, why would the Government require it?" Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1, 20 (Kavanaugh, J., dissenting).

plaintiffs do assert that [signing the notice] violates their religious beliefs, and [the courts] do[] not question their sincerity."[242]

Under RFRA, the key is that the religious nonprofits have "articulated a *religious* objection to the [Accommodation]."[243] The Accommodation requires the religious nonprofits to take a specific action (submitting Form 700 to their insurance issuers or TPAs or providing detailed notice directly to HHS) that, in their view, makes them complicit in moral wrongdoing.[244] This fact distinguishes the religious nonprofit cases from situations where the plaintiffs failed to articulate a religious objection to the required action.[245] Moreover, the religious nonprofits' specific religious objection to the notice requirement also shows why the government's and the circuit court majority's reliance on *Bowen v. Roy*,[246] *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[247] and *Kaemmerling* v. *Lappin*[248] to "confirm that [courts] can, indeed should, examine the nature and degree of the asserted burden to decide whether it amounts to a substantial burden under RFRA" is misplaced.[249] Echoing the lower courts, the government, in its brief in the religious nonprofit cases, states that "*Roy* and *Lyng* are among the pre-*Smith* decisions that

242. *Hobby Lobby*, 134 S. Ct. at 2779.

243. *Id.*

244. The more generic notice provision that the Court approved in *Wheaton College* and *Little Sisters of the Poor* may provide a less restrictive means of giving notice to the government. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014); Little Sisters of the Poor Home for the Aged, Denver v. Sebelius, 134 S. Ct. 1022, 1022 (2014). In *Wheaton College*, the Court noted that "[n]othing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807.

Two points are relevant here: First, the circuit court majority did not reach the least-restrictive-means inquiry because the religious nonprofits allegedly did not satisfy their initial burden under RFRA. *Id.* Second, this Article focuses only on the plaintiffs' burden under RFRA, such that the least-restrictive-means analysis goes beyond the scope of this Article. *See infra* Part III.

245. *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (plurality opinion) (rejecting a claim that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause because plaintiffs were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"); Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 249 (1968) ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion.").

246. Bowen v. Roy, 476 U.S. 693, 706–07 (1986).

247. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

248. Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008).

249. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 441 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

give content to RFRA's substantial-burden standard."[250] And under this standard, the government contends that "just as *Roy* and *Lyng* instruct that a religious objector may not dictate the government's internal activities, the religious objections of some individuals cannot control the government's dealings with others."[251]

Contrary to the government's claim, however, none of the Court's pre-*Smith* cases involve the situation where, as here, the government coerces individuals to take (or refrain from taking) a specific action that contradicts (or is required by) their sincerely held religious beliefs. In *Roy*, the Court emphasized that there was no substantial burden because the government was not requiring the religious adherents to take an action that would violate their religious beliefs: "[I]n no sense does [the Social Security requirement] affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[252] Likewise, in *Lyng*, the Court declined to apply strict scrutiny to a free exercise claim where the Forest Services's building roads in a national forest had "no tendency to coerce individuals into acting contrary to their religious beliefs."[253] While the project might burden the Native Americans' religious practice (like Oregon's ban on peyote in *Smith* precluded the sacramental use of the drug), the government did not mandate that the religious adherents take any action that violated their religious beliefs.[254] And *Kaemmerling* does not alter the analysis. In *Kaemmerling*, a federal prisoner sought to enjoin the DNA Analysis Backlog Elimination Act, which directed prison officials to collect "a tissue, fluid, or other bodily sample" so that an analysis of the DNA identification information could be performed.[255] But the D.C. Circuit expressly held that the government's extraction and use

250. Brief for the Respondents, *supra* note 14, at 43.

251. *Id.* at 44.

252. Bowen v. Roy, 476 U.S. 693, 703 (1986). In *Roy*, the Court rejected the parents' claim because, among other things, "Never to [its] knowledge ha[d] the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699. The religious nonprofits make no such claim. Little Sisters of the Poor Home for the Aged, Denver v. Burwell 794 F.3d 1151, 1159 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam). They do not seek "to dictate the conduct of the Government's internal procedures"; rather, they seek RFRA's protection from "[c]ertain forms of governmental compulsion," namely, the detailed notice procedures that force the religious nonprofits on pain of significant financial penalties to facilitate and to enable their policies and infrastructure to be used to provide coverage that violates their sincerely held religious beliefs. *Roy*, 476 U.S. at 700.

253. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

254. *Id.* at 449.

255. Kaemmerling v. Lappin, 553 F.3d 669, 673–74 (D.C. Cir. 2008).

of DNA information did not violate the plaintiff's free exercise rights because the government program did not require him "to modify his religious behavior in any way – it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages."[256]

Furthermore, the conscientious objector example discussed in *Notre Dame*[257] and *Little Sisters of the Poor*[258] suffers from the same problem and, therefore, is inapposite. The circuit court majority invokes a conscientious objector in an attempt to show why the Accommodation does not substantially burden the religious beliefs of the nonprofits.[259] Even if the objector sincerely believes that "he will be morally responsible" and "his religious exercise will be substantially burdened" if someone is substituted for him, RFRA does not permit him to be exempted *and* to preclude the government's drafting a substitute.[260] The religious nonprofits, so the argument goes, make the same claim: they object to the government's finding a substitute to provide the required contraceptive and sterilization coverage, even though the Accommodation enables them to opt-out of providing such coverage.[261]

The problem, however, is that an accommodation removes a substantial burden only if it actually accommodates the particular adherent's sincerely held religious beliefs.[262] In Judge Hamilton's hypothetical, the exemption from service accommodates the religious objector because he does not have to take an action (serving in the military) that violates his religious beliefs.[263] The draft exemption does not require him to take any further actions and, consequently, does not infringe on the exercise of his religious beliefs.[264] That is, in the words of *Roy*, the draft exemption does not "affirmatively compel [conscientious objectors], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectiona-

256. *Id.* at 679.

257. Univ. of Notre Dame v. Burwell, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring), *vacated*, 136 S. Ct. 2007 (2016).

258. Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1183–84 (2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

259. *Id.* at 1192.

260. *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring).

261. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2813 (2014) (Sotomayor, J., dissenting) ("If a religious nonprofit chooses not to pay for contraceptive services, it is true that someone else may have a legal obligation to pay for them, just as someone may have to go to war in place of the conscientious objector. But the obligation to provide contraceptive services, like the obligation to serve in the Armed Forces, arises not from the filing of the form but from the underlying law and regulations.").

262. *See* Holt v. Hobbs, 135 S. Ct. 853, 862–63 (2015) ("[T]he protection of RLUIPA . . . is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981))).

263. *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring).

264. *Id.*

ble for religious reasons."[265] A person may object to war generally, but such a general disagreement with government policy does not "identify any coercion directed at the practice or exercise of [his] religious beliefs."[266]

The religious nonprofits, though, are in a very different position. Under the Accommodation, the government does not simply go out and find a substitute to provide contraception and sterilization coverage; rather, the government requires the petitioners to take a specific action that identifies the substitute that will provide the objectionable coverage to exactly those individuals whom the nonprofits refused to cover for religious reasons. Providing this notice, though, violates the petitioners' sincerely held religious beliefs. As a result, the conscientious objector example provides an apt analogy only if the government requires the person receiving the draft exemption either to identify specific individuals in his community who could serve as a substitute (and the objector has a sincere religious belief that precludes his doing so) or to suffer disciplinary action (such as a fine or incarceration) if he refuses to identify possible substitutes. Although the government has a right to draft a substitute, it has no right to coerce conscientious objectors to take an action that substantially burdens their sincerely held religious belief (unless, of course, the government can satisfy strict scrutiny).

The analogy breaks down even more when one considers the petitioners' claim that providing notice under the Accommodation also forces them to support indefinitely the substitute's conduct by maintaining its health plan, the infrastructure of which the substitute employs to distribute contraceptives to the petitioners' employees.[267] Thus, to be analogous, in addition to supplying possible names of the substitute, the conscientious objector would have to maintain an ongoing relationship with his substitute, providing information and logistical support related to the substitute's military service.

The fact that the draft act might be the legal cause of a substitute's being drafted does not remove the moral complicity of one who sincerely believes that identifying (and continuing to support) eligible substitutes violates his religious beliefs. Moreover, focusing on the legal cause serves to shift the attention away from the primary question under RFRA's substantial burden prong – whether the government imposes a substantial burden on religious adherents who refuse to take a government-mandated action that conflicts with *their* sincerely held religious beliefs. The government's focus on the legal cause of the insurance issuers' and TPAs' obligation to provide coverage obfuscates the proper question under RFRA regarding moral complicity: "[W]hether the HHS mandate imposes a substantial burden on the ability of

265. Bowen v. Roy, 476 U.S. 693, 703 (1986).

266. Tilton v. Richardson, 403 U.S. 672, 689 (1971).

267. *See* Joint Appendix Vol. III of III at 1216–17, 1220–21, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 94224, at *1216–17, *1220–21 (stating that Petitioner Guidestone's TPA would facilitate abortifiacient coverage by using its plan infrastructure to contact plan participants, identify participants by "payroll location," and perform "[o]ngoing, nightly feeds" of information).

the objecting parties to conduct business in accordance with *their religious beliefs*."[268] Whether the government has imposed a substantial burden (such as a penalty or other serious consequences) on the religious nonprofits that precludes them from operating their businesses in accordance with their religious beliefs is left to the courts. Whether an action is in accord with the beliefs of the religious nonprofits is left to the religious adherents to determine, not the courts. The courts have the responsibility and authority to interpret the law but are disqualified from deciding what actions violate the nonprofits' sincerely held religious beliefs.

B. Deferring to a Religious Adherent's Sincere Beliefs and Claims About What Burdens Those Beliefs Does Not Conflate the Plaintiff's Burdens Under RFRA

The government and the lower courts address the wrong question ("whether the religious belief asserted in a RFRA case is reasonable"),[269] because they misunderstand the burden-shifting framework under RFRA. While the lower courts readily defer to a petitioner's characterization of its religious beliefs,[270] they reject the religious adherent's claim that the Accommodation's notice provision contravenes those beliefs (i.e., that signing the Form 700 or giving notice makes them morally complicit in providing the objectionable contraception coverage). According to the lower courts, even though a court must "accept[] a litigant's sincerely held religious beliefs, it must assess the nature of a claimed burden on religious exercise to determine whether, as an objective legal matter, that burden is 'substantial' under RFRA."[271] On this view, to defer to a religious nonprofit's claim that a law

268. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014). *See also* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

269. *Hobby Lobby*, 134 S. Ct. at 2778.

270. *See, e.g.*, Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 247 (D.C. Cir. 2014) ("Plaintiffs are correct that they – and not this Court – determine what religious observance their faith commands."), *cert. granted sub nom.* Roman Catholic Archbishop of Wash. v. Burwell, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Priests for Life v. Dep't of Health & Human Servs., 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

271. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 217 (2d Cir. 2015), *vacated*, No. 15-1100, 2016 WL 816249 (U.S. May 23, 2016); Geneva Coll. v. Sec'y U.S. Dept. of Health & Human Servs., 778 F.3d 422, 442 (3d Cir. 2015) (concluding that because the court "dispelled the notion that the self-certification procedure is burdensome, [it] need not consider whether the burden is substantial"), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva

substantially burdens its exercise of religion would collapse the substantial burden inquiry into the sincerity of belief inquiry, permitting religious adherents to trigger strict scrutiny review of any federal law or policy.[272]

What the lower courts fail to appreciate is that under the Supreme Court's religious exercise cases, a religious objector has the burden to show three things: (1) that she has a sincere religious belief, (2) that the government is requiring the adherent to take an action that she sincerely believes contravenes her religious belief, and (3) that the government is coercing or forcing her to take that action, thereby imposing a "substantial" burden on her religious exercise. In *Hobby Lobby*, the Greens and the Hans sincerely believed that (1) "life begins at conception" and (2) "it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."[273] The Court expressly held that "it is not for us to say that their religious beliefs are mistaken or insubstantial."[274] That is, contrary to the lower courts' analyses, the Supreme Court refused to say that their religious views were wrong (that life began sometime after conception) or that providing insurance coverage did not contradict or burden their beliefs.[275] Instead, the Court deferred to the plaintiffs' expressed beliefs (stating that there was "no dispute" that they had an "honest conviction") and concluded that the ACA imposed a substantial burden because the penalties under the ACA "force[d] them to pay an enormous sum of money" if they adhered to their sincere religious beliefs.[276]

The closely held companies in *Hobby Lobby* drew the "burden" line at providing coverage for contraceptives that they believed functioned as abortifacients.[277] The petitioners, however, draw the line more broadly to also include giving notice under the Accommodation.[278] They sincerely believe both that (1) providing, facilitating, or enabling coverage for contraceptive and sterilization services (either directly or through their insurance issuers or

---

Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

272. *See Catholic Health Care Sys.*, 796 F.3d at 218 ("If RFRA plaintiffs needed only to assert that their religious beliefs were substantially burdened, federal courts would be reduced to rubber stamps, and the government would have to defend innumerable actions under demanding strict scrutiny analysis."); Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015) ("[A]ccepting any burden alleged by Plaintiffs as 'substantial' would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise."), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik III*, 136 S. Ct. at 1557.

273. *Hobby Lobby*, 134 S. Ct. at 2766.

274. *Id.* at 2779.

275. *Id.*

276. *Id.*

277. *Id.* at 2759.

278. *Id.* at 2790.

TPAs) is morally wrong and (2) giving the notice under the Accommodation makes them morally complicit in providing such coverage.[279] Under the Court's RFRA analysis, though, courts cannot decide whether petitioners' sincere belief (that giving notice "lies on the forbidden side of the line") is "mistaken or insubstantial."[280] All courts are authorized to do is to decide whether the federal law or policy imposes a substantial burden that effectively forces religious adherents to take an action that they sincerely believe is sinful.[281]

Yet deferring to religious objectors regarding the sincerity of their religious beliefs, as well as whether a required action burdens those beliefs, neither conflates the sincere belief and substantial burden inquiries nor subjects all federal policies to strict scrutiny. Courts still must determine (1) whether the petitioners are asserting a sincere religious belief or a mere pretext,[282] (2) whether the government is requiring the petitioners to take an action that burdens their exercise of religion,[283] and (3) whether the consequences for not taking the required action constitute a substantial burden.[284] Accordingly, deferring to petitioners does not obviate the role of the courts under RFRA's burden-shifting framework; rather, it ensures that courts will not do what the lower courts did in the current cases – overstep their judicial role by telling religious plaintiffs that their beliefs about what constitutes sinful action are wrong, unreasonable, or misguided.

---

279. *Id.* at 2766.

280. *Id.* at 2779. *See also* Welsh v. United States, 398 U.S. 333, 339–40 (1970) (explaining in the conscientious objector context that "religious beliefs" include beliefs that are "intensely personal convictions which some might find incomprehensible or incorrect" and that "impose upon him a duty of conscience to refrain from participating in" the action mandated by the government).

281. *Hobby Lobby*, 134 S. Ct. at 2759.

282. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; . . . the claims must be rooted in religious belief."). *See also Hobby Lobby*, 134 S. Ct. at 2774 (noting that "a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail").

283. *See* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (rejecting plaintiffs' free exercise claims because they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs"). *See also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988) (requiring plaintiffs to show that a government program has a "tendency to coerce individuals into acting contrary to their religious beliefs" to trigger strict scrutiny).

284. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (concluding that a prisoner who showed he was required to shave his beard in violation of sincere religious beliefs or "face serious disciplinary action" had "easily satisfied [his] obligation" to establish a substantial burden).

Moreover, this deference is wholly consistent with the deference given to plaintiffs in the First Amendment expressive association context.[285] In *Boy Scouts of America v. Dale*, the Boy Scouts claimed that New Jersey's public accommodations law, which the Supreme Court of New Jersey interpreted to require the Boy Scouts to readmit a scout leader who was "an avowed homosexual and gay rights activist," violated the Boy Scouts' right of expressive association.[286] Foreshadowing the lower courts' reasoning in the present cases, the Supreme Court of New Jersey concluded "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'"[287]

On appeal, the Supreme Court clarified the standard for forced association claims: "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[288] Under this standard, courts must consider two things: (1) "whether the group engages in 'expressive association'" and (2) "whether the forced inclusion of Dale . . . would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[289] Because the Boy Scouts sought to convey a system of values, it was "indisputable that [the Boy Scouts] engage[d] in expressive activity."[290]

Turning to the second prong, the Court split the significant burden inquiry into two subparts: (1) whether the Boy Scouts expressed a view about homosexuality, and, if so, (2) "whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"[291] The Supreme Court of New Jersey looked beyond the Boy Scouts' expressed views on homosexuality and determined that the exclusion of members based on

---

285. The Court has acknowledged that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." Lee v. Weisman, 505 U.S. 577, 591 (1992). As a result, that the Court evaluates an expressive association's claims about its beliefs and what violates those beliefs with the same deference as a religious adherent's claim about what it sincerely believes and which government-mandated actions violate those beliefs is not surprising. In the free speech and free exercise contexts, "A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith [or a group's political or social position] is real, not imposed." *Id.* at 592.

286. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

287. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1225 (N.J. 1999) (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)), *rev'd*, 530 U.S. 640 (2000).

288. *Dale*, 530 U.S. at 648.

289. *Id.* at 648, 650.

290. *Id.*

291. *Id.* at 653.

sexual orientation actually was "inconsistent" with the organization's commitment to a "diverse and representative membership" and "appear[ed] antithetical to the organization's goals and philosophy."[292]

The Court, consistent with its reasoning in *Hobby Lobby*, rejected the Supreme Court of New Jersey's analysis and disclaimed the ability "of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[293] In support of this position, *Dale* expressly invoked *Thomas*'s admonition that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[294] When evaluating "the sincerity of the professed beliefs," the "limited extent" of the Court's inquiry required it to defer to the organization's professed beliefs: "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."[295]

Moreover, the Court gave the same level of deference to the Boy Scouts' expressed views when deciding whether the forced inclusion of Dale would significantly burden its message regarding homosexuality: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[296] The members of an expressive association, like the members of a religious group, have a "right to choose to send one message but not the other."[297] Such deference is important in the speech and free exercise contexts because it prevents courts from substituting their views (about social issues or religious beliefs) for the professed beliefs of the organization. As a result, given that New Jersey's public accommodations law would force the Boy Scouts to alter its message, the Court held that "the forced inclusion of Dale would significantly affect its expression."[298]

In *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, the Court mandated the same level of deference to an association's rules for seating delegates at its national convention.[299] The State of Wisconsin passed a law that opened its Democratic Presidential preference primary to all voters, even those who did not publicly declare their party affiliation.[300] This alone did not violate the right of association of the Democratic Party of the United States (the "National Party").[301] But Wisconsin also sought to require the National Party to honor the binding primary results and to seat the Wis-

292. *Id.* at 650–51.
293. *Id.* at 651.
294. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).
295. *Dale*, 530 U.S. at 650–51.
296. *Id.* at 653.
297. *Id.* at 656.
298. *Id.*
299. Democratic Party of U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981).
300. *Id.* at 110–11.
301. *Id.* at 112.

consin delegation at the National Party's national convention, even though Wisconsin's delegates were chosen in a way that violated the National Party's rules.[302] On appeal, Wisconsin argued that its open primary law "places only a minor burden on the National Party."[303] The National Party, in response, contended "that the burden is substantial, because it prevents the Party from 'screen[ing] out those whose affiliation is . . . slight, tenuous, or fleeting,' and that such screening is essential to build a more effective and responsible Party."[304] Instead of entering the fray and objectively assessing the National Party's beliefs, the Supreme Court deferred to the National Party, disclaiming the authority to resolve the dispute: "[I]t is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party."[305]

According to *La Follette*, deference was required even if the "State were correct" – i.e., even if "the public avowal of party affiliation required" by the National Party's rules "provides no more assurance of party loyalty than" Wisconsin's requiring "a person to vote in no more than one party's primary."[306] Yet even assuming that the National Party's rules were predicated on a false belief, the National Party retained the exclusive right to determine its methods for selecting its members: "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide – not the courts."[307] Prefiguring *Dale*'s invocation of *Thomas*, the Court acknowledged that all First Amendment freedoms warrant such deference: "[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."[308]

Just as the right of expressive association protects against the government's dictating to groups what their views are and which messages they can propound,[309] RFRA does the same thing regarding a religious believer's exercise of religion – it prevents the government from telling adherents what their beliefs are and when they are violated.[310] Furthermore, deferring to sincerely held beliefs ensures that the exercise of religion is "broadly construed" con-

302. *Id.* at 120.
303. *Id.* at 123.
304. *Id.*
305. *Id.* at 123–24.
306. *Id.* at 123 n.25.
307. *Id.*
308. *Id.* at 124.
309. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 575 (1995) ("But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").
310. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial.").

sistent with RFRA's requirements.[311] It is not surprising, then, that the Supreme Court has given broad deference to religious adherents regarding the sincerity of their beliefs, as well as their determination that government-mandated actions conflict with these beliefs. Consistent with the Court's treatment of the right of expressive association, courts "must not be[] guided by [their] views of whether the [religious objector's] teachings with respect to [a specific issue] are right or wrong."[312]

Thus, even assuming, *arguendo*, that the lower courts are correct – that the ACA is the legal cause of insurance issuers and TPAs providing contraceptive and sterilization coverage – under *Hobby Lobby*, *Dale*, and *La Follette*, "a court[] may not constitutionally substitute its own judgment for that of the" religious adherent that sincerely believes providing notice under the Accommodation (thereby enabling coverage for morally objectionable services and establishing an ongoing relationship with the provider of such services) contradicts its religious beliefs.[313] Even if a court thinks a petitioner's view (that a religious nonprofit can be morally complicit in wrongdoing even if the court declares that it is not the legal cause of the coverage) is "unwise" or "irrational," the court "may not interfere" because the religious tenets "[are] for the [religious] association and its members to decide – not the courts."[314]

In fact, to hold otherwise would sanction a variation of the government's "too attenuated" argument in *Hobby Lobby*, an argument the Supreme Court rejected because it impermissibly told "the plaintiffs that their beliefs [were] flawed."[315] In *Hobby Lobby*, the government argued "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated."[316] According to the government, providing coverage would not in and of itself destroy any embryo; an embryo would be destroyed only if an employee used one of the challenged methods of contraception.[317]

The lower courts make the same general argument. In their view, the connection between what the religious nonprofits must do (provide notice under the Accommodation) and the end they believe is morally wrong (facilitating, enabling, or providing coverage for contraceptive and sterilization services) is too far removed because the ACA, not the provision of notice, is

311. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-3(g) (2012) (mandating that the exercise of religion "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").

312. Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

313. *Democratic Party*, 450 U.S. at 123–24.

314. *Id.* at 123 n.25.

315. *Hobby Lobby*, 134 S. Ct. at 2778.

316. *Id.* at 2777.

317. *Id.*

the legal cause of the coverage.[318] But as in *Hobby Lobby*, the religious nonprofits sincerely "believe that providing the [notice] demanded by the [Accommodation] is connected to the [provision of contraceptive coverage and, therefore, the] destruction of an embryo in a way that is sufficient to make it immoral for them to provide the [notice]."[319] Although courts can determine whether the government has *coerced* religious adherents into acting contrary to "*their religious beliefs*,"[320] courts cannot do what the lower courts did here – tell the religious believers that *their* views regarding moral complicity are flawed, wrong, inconsistent, or irrational:

> This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself [e.g., signing a form] but that has the effect of enabling or facilitating the commission of an immoral act by another [e.g., the provision of coverage for contraceptive and sterilization services].[321]

Contrary to the conclusion of the lower courts, courts are disqualified from assessing the veracity or reasonableness of such beliefs.[322]

IV. COURTS LACK THE AUTHORITY AND COMPETENCE TO DECIDE RELIGIOUS AND PHILOSOPHICAL QUESTIONS REGARDING WHICH ACTIONS MAKE RELIGIOUS ADHERENTS COMPLICIT IN WRONGDOING UNDER THEIR FAITHS

The lower courts contend that they "must . . . objectively assess whether the appellees' compliance with the self-certification procedure does, in fact, trigger, facilitate, or make them complicit in the provision of contraceptive coverage" but must do so "[w]ithout testing the appellees' religious beliefs."[323] The lower courts claim the right (and duty) to tell religious believ-

318. *Id.*

319. *Id.* at 2778.

320. *Id.*

321. *Id.*

322. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

323. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 435 (3d Cir. 2015), *cert. granted in part sub nom.* Zubik II, 136 S. Ct. 444 (2015), *and cert. granted sub nom.* Geneva Coll. v. Burwell, 136 S. Ct. 445 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

ers whether a government-mandated action actually makes them complicit in conduct that violates their sincere religious beliefs.[324] Yet while instructing the faithful, courts are not supposed to "test" those beliefs.[325] The problem with this view is that it requires courts to do incompatible things (like drawing a figure that is both a square and a circle): objectively assess whether an action (e.g., giving notice under the Accommodation) makes a religious adherent complicit in wrongdoing without "testing" that person's sincere religious belief that the action *does* make her complicit in sin. In the religious nonprofit cases, the lower courts not only have tested the sincere beliefs of organizations, but also have told them that their beliefs failed the test – that the Accommodation does not really make them morally culpable despite their sincere beliefs to the contrary.[326]

Although the courts are the last arbiters of legal questions, they should play no role regarding such ecclesiastical issues.[327] The lower courts have asserted an unprecedented and dangerous right to instruct the faithful about which actions actually violate their beliefs. But there are good reasons why courts are precluded from dictating the scope of moral culpability. One need look no further than the lower courts' "Pontius Pilate" defense to see the problem when courts assume ecclesiastical authority and pass judgment on the moral and religious claims of adherents.

According to the lower courts, religious nonprofits cannot even establish that their religious beliefs are burdened, let alone substantially burdened, because the Accommodation "washes away" their complicity in any alleged moral wrongdoing: "The accommodation in this case consists in the organization's . . . washing its hands of any involvement in contraceptive coverage, and the insurer and the third-party administrator taking up the slack under compulsion of federal law."[328]

Although Pontius Pilate disavowed personal responsibility by washing his hands, for at least some (including Pilate's wife), that official action did not remove his complicity in a grave moral wrong.[329] That the courts now tell the religious nonprofits that the Accommodation washes away their moral complicity in facilitating or enabling coverage for contraceptives does not

---

324. *Id.*

325. *Id.*

326. *Id.* at 422.

327. *See Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

328. *Geneva Coll.*, 778 F.3d at 441 (quoting Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 557 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015)); *id.* at 438–39 ("[T]he submission of the self-certification form does not make the appellees 'complicit' in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage.").

329. *Matthew* 27:24.

assuage their sincere belief that giving notice violates their faith. Even if giving notice under the Accommodation declares that a religious nonprofit does not want to provide coverage directly, it does not – and cannot – control the moral complicity issue any more than Pilate's ceremonial act resolved the issue regarding his moral culpability. Rather, contrary to the lower courts' contention, the religious nonprofit cases declare that the petitioners sincerely believe that giving notice makes them complicit.[330] And no court has challenged the sincerity of that belief.

To contend otherwise, as the lower courts have done, is to assume the mantle of a religious authority, arrogating the power to determine (1) whether a sincerely held religious belief is reasonable or consistent[331] and (2) whether such a belief is actually burdened. But the Supreme Court repeatedly has stated that in the "sensitive area" of religious belief, "it is not within the judicial function and judicial competence to inquire whether the petitioner or [the courts] more correctly perceive[] the commands of [the plaintiff's] faith" because "[c]ourts are not arbiters of scriptural interpretation."[332] Allowing courts to weigh in on the nature of a religious belief, and the extent to which a particular belief is actually burdened, threatens to conflate the religious and secular realms, giving courts the ability to tell religious adherents whether they correctly determined that a government-mandated action violated their beliefs. But courts lack such power because, as the Founders acknowledged, the legal and the spiritual realms must remain distinct: "No distinction seems to be more obvious than that between spiritual and temporal matters. Yet whenever they have been made objects of Legislation, they have clashed and contended with each other, till one or the other has gained the supremacy."[333]

---

330. *See* Little Sisters of the Poor Home for the Aged, Denver v. Burwell, 794 F.3d 1151, 1180 (10th Cir. 2015), *cert. granted sub nom.* S. Nazarene Univ. v. Burwell, 136 S. Ct. 445 (2015), *and cert. granted in part*, 136 S. Ct. 446 (2015), *and vacated and remanded sub nom.* Zubik III, 136 S. Ct. 1557 (2016) (per curiam).

331. *See id.* at 1178 n.25 (stating that the "plaintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not").

332. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981). *See also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

333. Letter from James Madison to Thomas Jefferson (Oct-Nov. 1787), *in* SELECTED WRITINGS OF JAMES MADISON 77, 79 (Ralph Ketchum ed., 2006). *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. 2, 630–32 (5th ed. 1891) ("The real object of the [First] [A]mendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages), and of the subversion of the rights of

As the Court confirmed in *Hobby Lobby*, "the federal courts have no business addressing . . . difficult and important question[s] of religion and moral philosophy."[334] Yet determining when and under what circumstances a religious believer is complicit in wrongdoing presents the courts with a paradigmatic question of religion and moral philosophy.[335] Consequently, religious organizations (and even particular individuals, given that idiosyncratic beliefs are protected) must serve as the last arbiters of what their sincerely held religious beliefs are and whether those beliefs are countermanded by a government-mandated action or policy.

As *Thomas* demonstrates, courts have only a limited role when considering a plaintiff's professed religious beliefs. In *Thomas*, the Indiana Supreme Court concluded that Thomas's position – that he could produce the raw materials needed to build tanks but not specific parts of the tanks – was inconsistent and reflected a "personal philosophical choice rather than a religious choice."[336] The Supreme Court rejected the state supreme court's analysis, holding that Thomas – and not the courts – had the right to determine whether particular actions made him morally complicit: "But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[337] The "substantial" burden resulted from the denial of unemployment benefits, not an objective determination by the Court that working directly on the production of tanks actually made Thomas "chargeable in . . . conscience."[338] In fact, the Court expressly denied having the authority to decide whether a particular religious objector properly believes that an action would make him morally culpable.[339]

Similarly, in *Holt*, the Court rejected a lower court's attempt to make an allegedly objective determination as to whether the Arkansas Department of Corrections's "no beard" policy actually burdened the plaintiff's religious beliefs.[340] The lower court (1) denied that shaving his beard really burdened the prisoner's religious exercise because he had access to a variety of other means of religious practice; (2) determined that the burden was "slight" because his religion "would 'credit' him for attempting to follow his religious

---

conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.").

334. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014).

335. *See* Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) ("Yet we are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith."), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015).

336. *Thomas*, 450 U.S. at 714 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 391 N.E.2d 1127, 1131 (Ind. 1979), *rev'd*, 450 U.S. at 707).

337. *Id.* at 715.

338. *Id.* (quoting *Thomas*, 391 N.E.2d at 1131).

339. *Id.* at 716.

340. Holt v. Hobbs, 135 S. Ct. 853, 866 (2015).

beliefs, even if that attempt proved unsuccessful;" and (3) relied on the fact that not all Muslims believe that men must grow beards.[341] The unanimous Court rejected each part of the district court's analysis, protecting the right of religious adherents to determine what their beliefs are without having to look over their shoulders to see if courts agree.[342] Given that the Department did not dispute the sincerity of the prisoner's belief, all a court could do under RFRA's substantial burden prong was to consider whether the "no beard" policy put the plaintiff to the choice "to 'engage in conduct that seriously violate[ed] [his] religious beliefs'" or to contravene that policy and "face serious disciplinary action."[343]

If a religious nonprofit asserts a sincerely held belief that performing a certain action required by law is sinful, then the courts lack the authority to tell the religious nonprofit that its views are wrong. While courts can assess whether the penalty imposed for failing to take the required action is substantial, under the Supreme Court's precedents, they cannot tell a religious practitioner that its views are misguided or inconsistent, regardless of how novel, strange, or contradictory those views might seem to the court.[344] Consequently, the circuit court majority got the analysis wrong the first time around because it told the petitioners "that their beliefs are flawed." On remand from the Supreme Court, the lower courts should apply the proper standard and find that the burden is substantial because the religious nonprofits confront the same penalties as Hobby Lobby and Conestoga if the religious nonprofits "conduct business in accordance with *their religious beliefs*."[345]

V. CONCLUSION

Given that *Smith* permits the government to pass neutral, generally applicable laws, even if those laws impose significant burdens on religious exercise, determining the proper scope of protection afforded the exercise of religion under RFRA is critically important. The majority of circuit courts have claimed the authority to tell religious adherents whether and when a government-mandated action contravenes their sincerely held religious beliefs. In so doing, the lower courts have assumed the mantle of a religious authority, telling religious nonprofits that their sincerely held religious beliefs are inconsistent with the courts' conclusion that the Accommodation removes any complicity in sin. Such a claim not only contradicts the substantial burden analysis in *Hobby Lobby* and *Holt*, but it also ignores the Court's admonition that "[i]t is not within the judicial ken to question the centrality of

341. *Id.* at 862.

342. *Id.* at 867.

343. *Id.* at 862 (second alteration in original).

344. *See Thomas*, 450 U.S. at 714 (recognizing that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

345. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014).

particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[346] As a result, courts (on remand in the religious nonprofit cases and in other RFRA cases) should recognize that under RFRA's substantial burden standard, they lack the authority and competence to pass judgment on the veracity or consistency of the free exercise claims of religious adherents. Where, as in the religious nonprofit cases, the government forces religious adherents to violate their sincerely held beliefs or suffer serious penalties or discipline, the government should bear the burden of satisfying RFRA's "exceptionally demanding" least-restrictive-means standard.[347]

346. Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).
347. *Holt*, 135 S. Ct. at 864.