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## Pushback: Title VII Takes on Hobby Lobby

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## **PUSHBACK: TITLE VII TAKES ON *HOBBY LOBBY***

*Carole Okolowicz\**

### **I. INTRODUCTION**

In 2014, in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> the U.S. Supreme Court ruled that three employers with religious objections to birth control did not have to comply with a portion of the Patient Protection and Affordable Care Act (“ACA”) that required employers to cover birth control in their employee health plans.<sup>2</sup> One of the purposes of the ACA’s contraceptive mandate was to remedy sex discrimination in the health plan employers offer to their employees.<sup>3</sup> Congress had found that without birth control coverage, women pay much more out of pocket for their health care than men,<sup>4</sup> making the plans less valuable to women. Prior to the enactment of the ACA in 2010, some lower courts had determined that an employer’s refusal to cover birth control in its otherwise comprehensive health plan was sex discrimination against female employees under a different law,<sup>5</sup> Title VII of the Civil Rights Act.<sup>6</sup> In *Hobby Lobby*, however, the employees were not a party,<sup>7</sup> and the Court did not have to consider their rights. The Court determined, without hearing from the employees, that its ruling would have no

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\* I would like to thank the University of San Francisco School of Law Professor Maria Ontiveros for her guidance and support.

<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>2</sup> 42 U.S.C. § 300gg-13(a)(4) (2010).

<sup>3</sup> *Hobby Lobby*, 134 S. Ct. at 2789; *Priests for Life v. United States HHS*, 772 F.3d 229, 259 (D.C. Cir. 2014).

<sup>4</sup> *Hobby Lobby*, 134 S. Ct. at 2788-89.

<sup>5</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); *EEOC v. UPS, Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001).

<sup>6</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1991).

<sup>7</sup> *Hobby Lobby*, 134 S. Ct. at 2759 (noting that parties were the owners of three corporations and the government.).

effect on the female employees because birth control would be covered, albeit not by the employer.<sup>8</sup> In its ruling, the Court placed the employer's religious rights above female employees' right to be treated equally to their male coworkers.

The *Hobby Lobby*<sup>9</sup> case was wrongly decided; in allowing for-profit employers with religious objections to avoid covering birth control in their employee health plans, the Court allowed the employers to discriminate against female workers in their employee benefits. Female employees should have a cause of action under Title VII to require their employers to cover birth control regardless of the employers' religious views if the plan also covers the health needs of men.<sup>10</sup> This Note analyzes the Title VII claims of female employees for sex discrimination in this situation. It finds that the one reason why plaintiffs will be precluded from bringing such claims is that under the accommodation in *Hobby Lobby*, there is no harm to employees, which is a necessary element under Title VII. However, the harm element could be met depending on the future of the ACA.

Part II explains the background of this issue, describing the importance of access to birth control for women, the ACA's contraceptive mandate, the Religious Freedom Restoration Act ("RFRA"),<sup>11</sup> and the *Hobby Lobby* ruling and dissent. Part III begins the Title VII analysis by looking at the two issues facing the plaintiffs in the prima facie stage: the proper comparator to female birth control (Part A) and the plaintiffs' harm (Part B). This section finds that as the law presently stands *Hobby Lobby* allows unequal treatment of female employees, but these employees currently suffer no material harm. If plaintiffs can prove the prima facie case, Part IV analyzes the claims under the disparate impact theory (Part

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<sup>8</sup> *Hobby Lobby*, 134 S. Ct. at 2760.

<sup>9</sup> See generally, *Hobby Lobby*, 134 S. Ct. at 2751 (2014) (holding that the ACA's contraceptive mandate violated RFRA, substantially burdening for-profit corporation's religious objections to contraception, and was not the least restrictive means).

<sup>10</sup> This recommendation does not apply to "ministers" of a church or other house of worship because those employees are exempted from Title VII. See *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 U.S. 171, 188-89 (2012) (noting that application of Title VII to ministers violates the Establishment Clause).

<sup>11</sup> Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

A) and the disparate treatment theory (Part B). The disparate treatment claim delves into the religious motives of the employer, which courts may not question, while disparate impact avoids that inquiry and is more likely to be successful because of it.

## II. BACKGROUND: BIRTH CONTROL, THE AFFORDABLE CARE ACT, RFRA, AND *HOBBY LOBBY*

### A. *Importance of Birth Control*

Birth control is important to women's preventive health care needs. First, many women who use birth control use it for reasons other than preventing pregnancy. Most forms of female birth control contain hormones and can be used as a hormonal treatment.<sup>12</sup> Fourteen percent of all women using the birth control pill, and one-third of teen users, use it exclusively for non-contraceptive reasons (58% use it to prevent both a health condition and pregnancy).<sup>13</sup> Common non-contraceptive uses include reduction of cramps and menstrual pain, menstrual regulation, treatment of endometriosis, and treatment of acne.<sup>14</sup> Second, most women use birth control to prevent unplanned pregnancies, which can have detrimental effects on a woman's health.<sup>15</sup> For women with certain health conditions, like diabetes or obesity, pregnancy can worsen their condition. Using birth control to prevent pregnancy allows these women to reduce that risk by getting their condition under control first before

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<sup>12</sup> American Society for Reproductive Medicine, *Noncontraceptive Benefits of Birth Control Pills* (2011), [https://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/Noncontraceptive%20benefits%20of%20BCP-final\\_1-5-12.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/Noncontraceptive%20benefits%20of%20BCP-final_1-5-12.pdf).

<sup>13</sup> Rebecca Wind, "Many American Women Use Birth Control Pills for Non-Contraceptive Reasons: One-third of teen users rely on the pill exclusively for these purposes", GUTTMACHER INSTITUTE (November 15, 2011) <https://www.guttmacher.org/news-release/2011/many-american-women-use-birth-control-pills-noncontraceptive-reasons>.

<sup>14</sup> *Id.*

<sup>15</sup> See generally, Institute of Medicine, *Inst. of Med., Clinical Preventive Services for Women: Closing the Gap*, 102-04 (2011), <https://www.nap.edu/read/13181/chapter/1> [hereinafter IOM].

becoming pregnant.<sup>16</sup> Women with certain other conditions, such as pulmonary hypertension and cyanotic heart disease, must avoid pregnancy altogether.<sup>17</sup> Even for healthy women, pregnancy can involve complications such as gestational diabetes, hypertension, anemia, and even death.<sup>18</sup>

Unplanned pregnancy can be detrimental to women in other important aspects of their lives as well. Women who have unintended pregnancies are more likely to experience domestic violence than women whose pregnancies are intended.<sup>19</sup> For some women, having a child could create a financial burden at a time when the woman and her family cannot shoulder such a burden without serious detriment.<sup>20</sup> Some women may have educational or professional goals they would like to achieve before devoting their time and energy to raising a child. By allowing women to control when they get pregnant, birth control gives them some measure of control over their lives. The U.S. Supreme Court has said that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>21</sup> American women know this; 88% of all sexually-active women have used or are using birth control.<sup>22</sup>

<sup>16</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 262 (D.C. Cir. 2014) (vacated and remanded by *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

<sup>17</sup> IOM, *supra* note 15, at 103.

<sup>18</sup> See generally, *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 17, 2016), <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm>.

<sup>19</sup> IOM, *supra* note 15, at 103 (noting that women with unintended pregnancies are more likely than those with intended pregnancies to experience domestic violence during pregnancy).

<sup>20</sup> *Priests for Life*, 772 F.3d at 263 (“An unintended pregnancy is virtually certain to impose substantial, unplanned-for expenses and time demands . . . [which] fall disproportionately on women.”)

<sup>21</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992).

<sup>22</sup> Kimberly Daniels, Ph.D., et al., *Contraceptive Methods Women Have Ever Used: United States, 1982-2010*, 62 NAT’L HEALTH STAT. REP. 1 (Feb. 14, 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf> (noting that 88% of women have used a female form of birth control in their lifetime and 99% have used at least one form, including male condoms).

Studies have found that unintended pregnancies can also have detrimental effects on the child.<sup>23</sup> Pregnancies that are too close together can result in low birth weight.<sup>24</sup> Women who do not know they are pregnant may delay prenatal care and may continue risky behaviors, like smoking or drinking alcohol.<sup>25</sup> Use of birth control helps to prevent unwanted pregnancies and therefore, helps prevent abortions. In 2001, 42% of all unintended pregnancies in America ended in abortion.<sup>26</sup>

Because birth control use is so common, if insurance does not cover it, women as a class pay more out of pocket for their health care than men.<sup>27</sup>

### ***B. The Contraceptive Mandate***

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act which imposes fines on employers with fifty or more full-time employees that do not offer health insurance to their employees.<sup>28</sup> The law requires the health plan to cover preventive treatments and services at no cost to employees and their dependents, including coverage of all approved contraceptive drugs and devices.<sup>29</sup> This is what has been termed “the contraceptive mandate.”<sup>30</sup>

The initial version of the law required coverage of preventive services, like vaccines, but did not include the contraceptive mandate. Congress included preventive services because it knew that if people took steps to prevent health problems, the nation’s health would improve and healthcare costs would

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<sup>23</sup> IOM, *supra* note 15, at 103.

<sup>24</sup> IOM, *supra* note 15, at 103.

<sup>25</sup> IOM, *supra* note 15, at 103.

<sup>26</sup> IOM, *supra* note 15, at 103.

<sup>27</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 263 (D.C. Cir. 2014) (“in general, women of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”) (quoting 155 CONG. REC. 28, 843 (2009)(statement of Sen. Gillbrand).

<sup>28</sup> 26 U.S.C. § 4980H(a), (c)(2)(A) (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

<sup>29</sup> 26 U.S.C. § 300gg-13(a)(4) (2010).

<sup>30</sup> *Hobby Lobby*, 134 S. Ct. at 2759 (using the term “contraceptive mandate”).

drop.<sup>31</sup> Senator Barbara Mikulski noticed that the requirements ignored the needs of women and introduced the Women’s Health Amendment, which added “preventive services specific to women’s health.”<sup>32</sup> Sen. Mikulski introduced the amendment in response to the hurdles women face in getting health insurance coverage for preventive services particular to women.<sup>33</sup> Sen. Mikulski told the New York Times “[t]he insurance companies take being a woman as a pre-existing condition. . . . We can’t get health insurance because of pre-existing conditions called a C-section.”<sup>34</sup> The Senate debate over the amendment focused on coverage of mammograms.<sup>35</sup> Senator Diane Feinstein noted that without adequate coverage, “[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men.”<sup>36</sup> The amendment aimed at addressing these disparities and improving women’s health.

After Congress passed the ACA with the Women’s Amendment, it directed a federal agency, the Health Resources and Services Administration (“HRSA”),<sup>37</sup> to determine which “preventive services specific to women’s health” should be covered. HRSA in turn commissioned a study from the independent Institute of Medicine (“IOM”).<sup>38</sup> The IOM recommended including

<sup>31</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 260 (2014).

<sup>32</sup> *Hobby Lobby*, 134 S. Ct. at 2788; *See also* David Herszenhorn & Robert Pear, *Senate Passes Women’s Health Amendment*, N.Y. TIMES (December 3, 2009), <https://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/>.

<sup>33</sup> David Herszenhorn & Robert Pear, *Senate Passes Women’s Health Amendment*, N.Y. TIMES (December 3, 2009), <https://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Hobby Lobby*, 134 S. Ct. at 2788.

<sup>37</sup> The HRSA is a component of the Department of Health and Human Resources. *Bureaus and Offices*, HEALTH RESOURCES & SERVICES ADMINISTRATION, <https://www.hrsa.gov/about/organization/bureaus/index.html> (last visited Mar. 5, 2017).

<sup>38</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 260 (D.C. Cir. 2014).

contraception with the other covered preventive services because numerous studies showed the detrimental effect unplanned pregnancies can have on women's physical health, as well as other aspects of women's lives.<sup>39</sup> HRSA adopted the IOM's recommendations, concluding that because of women's reproductive health needs and the significant costs involved, the ACA's preventive services requirement should include contraceptive coverage.<sup>40</sup> The government found that when employers do not cover the preventive services needs of women, including contraception, the resulting disparity "placed women in the workforce at a disadvantage compared to their male coworkers."<sup>41</sup>

Almost immediately, employers with religious objections to contraception began disputing the requirement and there was a powerful law to assist them in those claims – the Religious Freedom Restoration Act of 1993.

### ***C. The Religious Freedom Restoration Act***

Under the First Amendment of the U.S. Constitution, "Congress shall make no law . . . prohibiting the free exercise [of religion]."<sup>42</sup> In 1990, the U.S. Supreme Court held in *Smith* that under the Free Exercise Clause, if Congress makes a law that is "neutral" and "generally applicable," all people must abide by it even if it infringes on their religious beliefs.<sup>43</sup>

Congress disagreed. In 1993, in a direct response to *Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA"),<sup>44</sup> which created greater protection for religious rights when a neutral law infringes on a person's religious beliefs. Under RFRA, a person is relieved of complying with a neutral law of general applicability if doing so "substantially burden[s]" her exercise of her religion, unless the government can show that it has

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<sup>39</sup> See *supra*, Part II.A.; IOM, *supra* note 15, at 102-04.

<sup>40</sup> *Priests for Life*, 772 F.3d at 261.

<sup>41</sup> 77 Fed. Reg. 8725.

<sup>42</sup> U.S. Const. amend. I.

<sup>43</sup> *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990).

<sup>44</sup> 42 U.S.C. § 2000bb (1993).



a compelling interest in the law and the law is the least restrictive means of achieving that interest.<sup>45</sup> If the religious person proves her case and the government cannot meet this high burden of proof, the person is exempt from the law.

Many of the RFRA claims in the employment context have been brought by employees against their government employers.<sup>46</sup> The bulk of the cases in which employers sought RFRA's protection have been against the ACA's contraceptive mandate. However, employers have brought claims against other laws, notably anti-discrimination laws.<sup>47</sup> Prior to RFRA's enactment, employers brought free exercise claims against laws involving minimum wage and equal pay for women.<sup>48</sup> Those claims were not successful because under *Smith*, the two laws are "neutral laws of general applicability," so the employers were not successful.

There is nothing in the statutory text of RFRA that requires consideration of the effect that such an exemption would have on third parties, such as the employees.

#### ***D. Burwell v. Hobby Lobby Stores, Inc.***

In *Burwell v. Hobby Lobby Stores, Inc.*,<sup>49</sup> the U.S. Supreme Court held that RFRA protects not only an individual's right to

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<sup>45</sup> *Id.* at § 2000bb-(1)(b).

<sup>46</sup> See *Holly v. Jewell*, 196 F. Supp. 3d 1079 (N.D. Cal. 2016) (discussing that a National Park Service employee alleged the employer discriminated on the basis of his religion); *Tagore v. U.S.*, 735 F.3d 324 (5th Cir. 2013) (discussing that an IRS employee alleged employer's policy of no blades discriminated against her Sikh religion); *Francis v. Mineta*, 505 F.3d 266 (3d Cir. 2007) (discussing that a National Transportation Administration employee alleged the employer discriminated on basis of his religion when he was fired for wearing dreadlocks).

<sup>47</sup> See *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083 (E.D. Mich. Aug. 18, 2016) (on appeal) (holding compliance with Title VII to allow transgender employee to wear a skirt imposed a substantial burden on employer's religious beliefs under RFRA).

<sup>48</sup> *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (minimum wage); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (equal pay).

<sup>49</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

practice his or her religion but also a for-profit corporation's right to practice its religion.<sup>50</sup> In *Hobby Lobby*, three corporations, Hobby Lobby, Conestoga, and Mardel, claimed that the contraceptive mandate infringed on the exercise of their religion by forcing them to cover birth control<sup>51</sup> in their employee health plans, the use of which they believe to be a sin.<sup>52</sup> The Court agreed and allowed them an accommodation from the law, one that the ACA already had in place for nonprofit corporations.<sup>53</sup> If the corporation notifies the government of its religious objections to contraceptives, the government will tell the corporation's insurance provider to exclude birth control coverage under the company's health plan.<sup>54</sup> The insurer then will pay for contraception "without imposing any cost-sharing requirements on the [corporation], the group health plan, or plan participants or beneficiaries."<sup>55</sup> Justice Alito, writing for the majority in *Hobby Lobby*, determined that the effect of this accommodation on the female employees would be "precisely zero" because contraceptives would be covered.<sup>56</sup>

In holding that the corporations' religious rights were burdened, the majority noted that a corporation is a fictional legal entity that does not itself have religious beliefs.<sup>57</sup> Corporations, wrote Justice Alito, are essentially "the human beings who own, run, and are employed by them."<sup>58</sup> But somehow, the right to the

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<sup>50</sup> *Id.* at 2775.

<sup>51</sup> *Id.* at 2764-65 (discussing that the owners of the three corporations had objections only to four of the forms of birth control they were required to cover which they called "abortifacients," or like an abortion. The four forms included intrauterine devices ("IUDs") and emergency contraception (also called the "morning after" pill). The owners believe that life begins at conception. Since these four devices or pills may operate to block a fertilized egg from growing, the owners believe they are abortion-like).

<sup>52</sup> *Id.* at 2764-65.

<sup>53</sup> 45 C.F.R. § 147.131; *Hobby Lobby*, 134 S. Ct. at 2782.

<sup>54</sup> *Hobby Lobby*, 134 S. Ct. at 2751. *See also* *Priests for Life v. United States HHS*, 772 F.3d 229, 236 (2014).

<sup>55</sup> *Hobby Lobby*, 134 S. Ct. at 2782 (internal quotation marks and citations omitted).

<sup>56</sup> *Id.* at 2782.

<sup>57</sup> *Id.* at 2768.

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

free exercise of religion belongs only to “the humans who own and control” the corporation.<sup>59</sup> The *Hobby Lobby* claims were only brought by those who “own and control” the plaintiff corporations, not the employees or managers. The owners sued the government for infringing on their personal religious beliefs and the employees were not a party. Accordingly, the Court only had to consider the law’s impact on the owners, not on the employees.<sup>60</sup>

Not only did the majority opinion fail to consider whether the employees agreed with their employer’s beliefs, it only fleetingly considered what effect abiding by those beliefs would have on the employees. The government had argued that RFRA must not be used to allow an employer with religious beliefs to avoid laws intended to benefit employees, such as minimum wage laws, anti-discrimination laws, and laws regulating employee health insurance benefits, because the benefits conferred are not so much gifts as they are the employees’ rights.<sup>61</sup> It argued that employee health insurance in particular is part of the employee’s compensation.<sup>62</sup> Justice Alito disregarded that argument and held that the contraceptive mandate confers a benefit on employees and when a law confers a benefit on third parties, as opposed to relieving a burden, courts could exempt the employer from the law.<sup>63</sup> Justice Alito did not consider the contraceptive mandate’s role in relieving a burden, that is, the inequality in the health plans offered to male and female employees, as was well-documented by Congress.<sup>64</sup>

### ***E. The Hobby Lobby Dissent***

The central focus of the four-Justice dissent in *Hobby Lobby* was the rights of the female employees.<sup>65</sup> Justice Ginsburg, in dissent, wrote that “[t]he exemption sought by Hobby Lobby and

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

<sup>60</sup> *Id.* at 2769.

<sup>61</sup> Reply Brief for the Petitioners at 15, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 1536 (2014) (No. 13-354).

<sup>62</sup> *Id.*

<sup>63</sup> *Hobby Lobby*, 134 S. Ct. at 2781, n.37.

<sup>64</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 262-64 (2014).

<sup>65</sup> *Hobby Lobby*, 134 S. Ct. at 2790-91.

Conestoga would override significant interests of the corporations' employees and covered dependents."<sup>66</sup> Justice Ginsburg noted that in no prior decision had RFRA allowed an exemption from a neutral law when allowing the exemption would be harmful to the very people the law was meant to protect.<sup>67</sup> She wrote that RFRA's requirement that the government's action must be the "least restrictive means" cannot be satisfied by taking away employees' legal benefits so that their commercial employers can adhere to their own personal religious beliefs.<sup>68</sup>

The dissent provides a powerful argument for why no commercial employer should be able to avoid laws intended to protect employees due to the employer's religious objections. But the *Hobby Lobby* case provides an interesting twist. Unlike a minimum wage law which is designed to protect all employees, the contraceptive mandate was specifically designed to protect women. Justice Ginsburg explained that the mandate's purposes were to correct "the disproportionate burden *women* carried for comprehensive health services and the adverse health consequences" that *women* suffer when contraception is not covered.<sup>69</sup> Because the mandate was designed to address inequality based on a protected characteristic – sex – the *Hobby Lobby* ruling triggers Title VII of the Civil Rights Act,<sup>70</sup> which prohibits employment discrimination. The question is whether this claim can succeed.

### III. THE PRIMA FACIE CASE: IS THERE DISCRIMINATION?

Justice Kennedy and the four Justices in dissent, confirmed that the government's interest in "protect[ing] the health of *female* employees" was a "compelling interest," as required under RFRA.<sup>71</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2801.

<sup>68</sup> *Id.* at 2802.

<sup>69</sup> *Id.* at 2789 (emphasis added).

<sup>70</sup> 42 U.S.C. § 2000e (1991).

<sup>71</sup> *Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring) (confirming that the government had shown that it had a compelling interest in "providing insurance coverage that is necessary to protect the health of female

Even the majority opinion, which assumed without deciding that the government had a compelling interest, noted that the contraceptive mandate concerned women,<sup>72</sup> not employees in general.

Title VII prohibits discrimination in “compensation, terms, conditions, or privileges of employment, because of [the employee’s] . . . sex.”<sup>73</sup> “Health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’”<sup>74</sup> Ultimately, it is the plaintiff’s burden to prove that the employer discriminated “because of” sex.<sup>75</sup> If the plaintiff can make out an initial, prima facie case of discrimination, the employer will have a chance to rebut.<sup>76</sup> If the plaintiff cannot make that initial showing, the case ends there.

Under Title VII, there are generally two theories of discrimination: disparate treatment and disparate impact.<sup>77</sup> A disparate treatment claim argues that the employer intentionally treated an individual or group of employees worse than others because of the employee’s protected characteristic.<sup>78</sup> In contrast, disparate impact claims concern “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”<sup>79</sup>

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employees” and that such coverage was “significantly more costly [for females] than for a male employee.”); *See also id.* at 2799 (Ginsburg, J., dissenting) (noting there is a compelling interest in protecting “women’s well-being”).

<sup>72</sup> *Id.* at 2760 (noting that “[t]he effect of the . . . accommodation on the women employed by Hobby Lobby. . .”); *id.* at 2782 (noting that “[t]he principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women . . . . Under the accommodation, the plaintiff’s female employees would continue to receive contraceptive coverage . . .”).

<sup>73</sup> § 2000e-2(a)(1).

<sup>74</sup> *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983).

<sup>75</sup> *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

<sup>76</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

<sup>77</sup> *Teamsters*, 431 U.S. at 335, n.15.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

To make out a prima facie case of disparate treatment, a plaintiff must show that “(1) [s]he belongs to a protected class, (2) [s]he was subjected to an adverse job action; (3) [her] employer treated similarly situated employees outside [her] protected class more favorably; and (4) [s]he was qualified to do the job.”<sup>80</sup> To establish a prima facie case of disparate impact, the plaintiff must prove that a specific employment policy or practice causes a significant disparate impact on a group of employees who share plaintiff’s protected characteristic.<sup>81</sup>

Under both claims, plaintiffs alleging sex discrimination by their Hobby Lobby-like employer will face two main issues in proving their prima facie case. Ultimately, plaintiffs must show that the employer treated them worse than it treated other similarly-situated employees because of their sex. This involves finding a proper, similarly-situated comparator against which to compare the employer’s treatment of the plaintiffs, and proving that the plaintiffs actually were treated worse by showing they suffered a harm.

***A. Comparator: What is the male equivalent to birth control pills?***

In a disparate treatment claim, a plaintiff who has no direct evidence that her employer discriminated against her because she is a woman can nonetheless create an inference of sex discrimination by comparing the employer’s treatment of her to its treatment of a similarly situated male coworker.<sup>82</sup> In a disparate impact claim, plaintiffs must show that the employer’s practices “fall more harshly on one group” as compared to another.<sup>83</sup> In both cases, plaintiffs have the burden to prove that the group of coworkers to which they compare themselves is similar enough to the plaintiffs

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<sup>80</sup> 1 BARBARA LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 2-18 (5th ed. 2012); *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

<sup>81</sup> 1 BARBARA LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 3-16 (5th ed. 2012).

<sup>82</sup> *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

<sup>83</sup> *Teamsters*, 431 U.S. at 335, n.15.

so that a factfinder may infer discriminatory animus by the employer.

In deciding whether a health plan discriminates on the basis of sex, courts may consider whether the health plan excludes a treatment for women but covers a similar treatment for men.<sup>84</sup> The issue here is what male treatment is similar to female prescription birth control. This is not a simple task – the forms of male birth control are substantially different from female birth control, both in how they prevent pregnancy and in their subsequent effects, as men cannot get pregnant.

There is a circuit split as to how similar comparators must be to a plaintiff, with some circuits holding they must be “nearly identical,”<sup>85</sup> while other circuits hold they need only be similar “in all material respects.”<sup>86</sup> Regardless, the purpose of making the comparison is “to eliminate other possible explanatory variables [in order to] isolate the critical independent variable - discriminatory animus.”<sup>87</sup> The differences between the plaintiff and the comparators may not be “so significant that they render the comparison effectively useless.”<sup>88</sup>

Few federal courts have decided the issue of whether exclusion of contraception from an employee health plan is sex discrimination under Title VII and what the proper comparator is.<sup>89</sup>

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<sup>84</sup> *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp't. Practices Litig.)*, 479 F.3d 936, 944 (8th Cir. 2007).

<sup>85</sup> *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001); *Trask v. Sec'y Dep't. of Veterans Affairs*, 822 F.3d 1179, 1192 (11th Cir. 2016); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995).

<sup>86</sup> *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012); *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998); *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1125 (9th Cir. 2009).

<sup>87</sup> *Coleman*, 667 F.3d at 846 (citations omitted).

<sup>88</sup> *Id.* at 846.

<sup>89</sup> In prior cases on this issue (*see supra* note 80), many of the plaintiffs brought claims under Title VII as amended by the Pregnancy Discrimination Act (“PDA”) for discrimination based on the ability to get pregnant. *See* 42 U.S.C. § 2000e(k). This paper will not discuss the dispute over whether the PDA applies to contraception and will focus on Title VII without the PDA.

To date, there are only two relevant cases that are published, reported, and still good law.<sup>90</sup> In *Erickson v. Bartell Drug Co.*,<sup>91</sup> a federal district court in Washington held that the employer's exclusion of contraceptives was sex discrimination.<sup>92</sup> However, in *In re Union Pac. R.R. Empl. Practices Litig.*,<sup>93</sup> the Eighth Circuit Court of Appeals held that it was not.<sup>94</sup> The remaining cases are either unreported or fall under Eighth Circuit precedent.<sup>95</sup> Most of the courts that have dealt with this issue have used one of two comparators: male contraception or preventive treatment.<sup>96</sup>

### 1. Male Contraception

A few courts, including the Eighth Circuit, have held that health plans that exclude both male and female contraception are gender-neutral, because male contraception is the proper comparator to female contraception.<sup>97</sup> In *Union Pacific*, the

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<sup>90</sup> *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp't. Practices Litig.)*, 479 F.3d 936 (8th Cir. 2007); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

<sup>91</sup> *Erickson*, 141 F. Supp. 2d 1266.

<sup>92</sup> *Id.* at 1272.

<sup>93</sup> *Union Pacific*, 479 F.3d at 944.

<sup>94</sup> *Id.*

<sup>95</sup> *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003) (falling under Eighth Circuit precedent); *Alexander v. Am. Airlines, Inc.*, No. 4:02-CV-0252-A, 2002 WL 731815 (N.D. Tex. Apr. 22, 2002); *Cummins v. State*, No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006), *vacated*, *Stocking v. AT&T Corp.*, No. 03-0421-CV-W-HFS, 2007 U.S. Dist. LEXIS 78188 (W.D. Mo. Oct. 22, 2007); *Wright v. DaimlerChrysler Corp.*, No. 4:03CV1843 CDP, 2005 U.S. Dist. LEXIS 42366 (E.D. Mo. Jan. 10, 2005) (falling under Eighth Circuit precedent).

<sup>96</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001) (holding that the comparison should be with preventive drugs, as well as prescription contraceptives); *UPS*, 141 F. Supp. 2d at 1217, 1219 (holding that since the employee's wife took birth control pills for hormone regulation, the comparison should be with male hormonal treatments.).

<sup>97</sup> *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp't. Practices Litig.)*, 479 F.3d 936, 944 (8th Cir. 2007); *Cummins*, 2005 U.S. Dist. LEXIS 42634, at \*23-25; *Alexander*, 2002 WL 731815, at \*6.



employer's health plan excluded male and female birth control "when used for the sole purpose of contraception" but did cover female birth control when used for non-contraceptive reasons such as "regulating menstrual cycles, treating skin problems or avoiding serious health risks associated with pregnancy."<sup>98</sup> A class of female employees who used birth control for contraceptive purposes brought a lawsuit against their employer. In determining whether the plan provided worse coverage to females as compared to males, the Eighth Circuit held that male forms of contraception, such as condoms and vasectomies, are similar in all relevant respects to female forms, such as birth control pills, "sponges, diaphragms, intrauterine devices, [and] tubal ligation" because they provide the same benefit: prevention of pregnancy.<sup>99</sup>

The federal district court in *Cummins v. State* similarly held that a plan was gender-neutral when it excluded all non-surgical contraception<sup>100</sup> because male and female contraception both stop conception.<sup>101</sup> The court took on a removed, academic tone when explaining that although conception only takes place inside a woman's body, "the process clearly requires the participation of both males and females and, critically, the process may therefore be prevented by either the male or the female, each of whom is consequently equally affected by the exclusion at issue in this case."<sup>102</sup>

The *Union Pacific* and *Cummins* courts were wrong; male birth control is not similar enough to female birth control to make a proper comparator. The two decisions rest on the assumption that the prevention of pregnancy equally affects men and women, which presumes that pregnancy equally affects men and women. But that assumption simply is not true. For men, contraception does not address a health care need; their bodies will never become pregnant. For men, preventing pregnancy will ensure that a man does not have

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<sup>98</sup> *Union Pacific*, 479 F.3d at 938.

<sup>99</sup> *Id.* at 944.

<sup>100</sup> *Cummins*, 2005 U.S. Dist. LEXIS 42634, at \*2 (noting the health plan covered vasectomies and tubal ligations, surgical sterilization for men and women respectively).

<sup>101</sup> *Cummins*, 2005 U.S. Dist. LEXIS 42634, at \*25.

<sup>102</sup> *Id.* at \*24-25.

to raise another child. For women, in addition to not having to raise another child, preventing pregnancy will ensure that a woman's body will not undergo the changes and stress that may negatively affect her health.<sup>103</sup> This distinction is important in the context of an employee health plan. The proper comparison should be between treatments for similar health care needs that could be covered by health insurance.

Birth control for men presently takes two forms: condoms and vasectomies. In addition to the argument above, condoms are not a good comparator to female birth control because they are available without a prescription. Health insurance plans generally do not cover non-prescription drugs or devices, like condoms. For example, Medicare does not cover non-prescription medicines.<sup>104</sup> By contrast, most female forms of birth control require a prescription. Birth control pills, IUDs, implants, and even diaphragms require a visit to the doctor and the pharmacy in order to access them.<sup>105</sup> The dissent in *Union Pacific* noted that condoms were not a good comparator because the employer had not identified "any health insurance policy which would provide coverage for non-prescription, contraceptive devices available in drug stores and gas stations nationwide."<sup>106</sup> The purpose of comparing similar

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<sup>103</sup> *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1017 (W.D. Mo. 2006), vacated, *Stocking v. AT&T Corp.*, No. 03-0421-CV-W-HFS, 2007 U.S. Dist. LEXIS 78188 (W.D. Mo. Oct. 22, 2007) (judgment vacated following *Union Pacific* ruling) (noting that contraception has "a major social significance for men but avoidance of pregnancy has both social and physical significance for women.").

<sup>104</sup> Joseph Matthews, *Services Not Covered by Medicare Part B*, NOLO, (<http://www.nolo.com/legal-encyclopedia/services-not-covered-medicare-part-b.html>) (last visited Dec. 1, 2016).

<sup>105</sup> FDA News Release, *FDA approves Plan B One-Step emergency contraception for use without a prescription for all women of child-bearing potential*, U.S. FOOD & DRUG ADMINISTRATION (June 20, 2013), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm358082.htm> (discussing that one notable exception is emergency contraception, which the Food and Drug Administration ("FDA") approved for sale without a prescription in 2013).

<sup>106</sup> *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp't. Practices Litig.)*, 479 F.3d 936, 945 (8th Cir. 2007).

treatments is to “eliminate other explanatory variables.”<sup>107</sup> The explanation of why an employer would exclude condoms from coverage is simple; non-prescription condoms are never covered by health insurance.

The second form of male birth control previously discussed is vasectomies. Vasectomies are also not similar enough “in all relevant respects” to female birth control to allow for a meaningful comparison. Vasectomies are permanent, surgical forms of birth control.<sup>108</sup> If the dispute was over an employer’s exclusion of tubal ligations, the female permanent, surgical form of birth control, perhaps comparing the employer’s treatment of vasectomies would be apt.<sup>109</sup> But the dispute in *Hobby Lobby* was only over reversible, non-surgical forms of female birth control. Permanent birth control is much different than reversible forms for several reasons. First, vasectomies are a form of surgery. An employer could decide not to cover a type of surgery for reasons that would not apply to pills or IUDs, such as cost. Second, vasectomies are permanent. An employer could decide to cover a permanent form of birth control because it may be more cost effective than a temporary form.

If the basis of the comparison is the medical effect of birth control, vasectomies still do not make good comparators to reversible forms of contraception used by women. The medical

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<sup>107</sup> *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012).

<sup>108</sup> *Contraception: Permanent Methods of Birth Control*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 21, 2016), <http://www.cdc.gov/reproductivehealth/contraception/index.htm> (noting that “sterilization is a permanent, safe, and highly effective approach for birth control,” and that although most who undergo sterilization “do not regret having had the procedure, the permanence of the method is an important consideration, as regret has been documented in studies.”).

<sup>109</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765-66 (2014) (noting that the employers objected to two IUDs and two forms of emergency contraception known as “morning after” pills); *Contraception: Permanent Methods of Birth Control*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 21, 2016), <https://www.cdc.gov/reproductivehealth/contraception//index.htm> (noting IUDs and “morning after” pills are reversible).

effect of a vasectomy is permanent sterilization.<sup>110</sup> Men get vasectomies when they are either done having children or have decided not to have them.<sup>111</sup> That is quite different from the medical effect of reversible forms of female birth control, which allow women to choose to have children by stopping use of the birth control. This is important for women who want to have children but must get a medical condition under control before their bodies are safe for pregnancy. Men do not have to worry if their bodies will be safe for childbirth when deciding to father a child.

## 2. Preventive Treatments

Other courts have used preventive drugs and devices as a comparator, since the function of birth control is the prevention of pregnancy and related health risks. In *Erickson*, the court held that an employer's health plan discriminated against women because it excluded contraception but covered many preventive drugs.<sup>112</sup> The employer argued that birth control is different from preventive drugs because of what they prevent; the covered drugs prevent diseases but pregnancy is not a disease and contraceptive use is voluntary.<sup>113</sup> But the court held that the function of birth control and the covered drugs was the same: although pregnancy is a natural state, not a disease, it is "not a state that is desired by all women or at all points in a woman's life."<sup>114</sup> It found that birth control, like the other preventive drugs, helps its user avoid certain "health consequences," like "unwanted physical changes" associated with pregnancy, as well as emotional, economic, and social consequences.<sup>115</sup> The comparison between preventive drugs and birth control allows the court to "eliminate other explanatory

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<sup>110</sup> *Contraception: Permanent Methods of Birth Control*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 21, 2016), <http://www.cdc.gov/reproductivehealth/contraception/index.htm>.

<sup>111</sup> *Id.*

<sup>112</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

<sup>113</sup> *Id.* at 1272.

<sup>114</sup> *Id.* at 1273.

<sup>115</sup> *Id.*

variables” and focus on how the employer regards women’s health needs.<sup>116</sup>

In *Union Pacific*, the lower court had chosen as a comparator treatments “that prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees’ health than does pregnancy.”<sup>117</sup> The majority explicitly disagreed with this comparator without explanation.<sup>118</sup>

### 3. Proper Comparators: Preventive Treatments

The proper comparator that courts should use when deciding if exclusion of birth control is discriminatory is preventive treatments, as they serve the same functions. In addition to the arguments discussed above, the argument that birth control is similar to other preventive treatments has ample support in the ACA and *Hobby Lobby*. The ACA itself treats birth control as a preventive treatment, as both the *Hobby Lobby* majority and dissent note.<sup>119</sup> The majority explained that the mandate is part of the “Women’s Preventive Services Guidelines,” which includes not only coverage of contraception but also screening and testing services.<sup>120</sup>

Further, birth control can prevent the worsening of certain health conditions and the onset of other, more common pregnancy-related health risks. The CDC lists several other complications associated with pregnancy, including high blood pressure, gestational diabetes, depression, preeclampsia, and anemia.<sup>121</sup>

<sup>116</sup> *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012).

<sup>117</sup> *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp’t. Practices Litig.)*, 479 F.3d 936, 944 (8th Cir. 2007).

<sup>118</sup> *Id.*, n.5.

<sup>119</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762-63 (2014); see also *Hobby Lobby*, 134 S. Ct. at 2788 (Ginsburg, J., dissenting).

<sup>120</sup> Health Resources and Services Administration (“HRSA”), *Women’s Preventive Services Guidelines*, <http://www.hrsa.gov/womensguidelines/> (last visited Dec. 1, 2016).

<sup>121</sup> *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 17, 2016), <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm>.

Thus, to counter the employer's argument in *Erickson* that birth control use is voluntary, it is not voluntary for all women, just as preventive treatment is not mandatory for everyone.

### **B. Harm**

A prima facie case of either disparate treatment or disparate impact requires a plaintiff to show that the employer's action affected her adversely.<sup>122</sup> An employment action is adverse under Title VII if it "materially affects the compensation, terms, conditions, or privileges of employment."<sup>123</sup> It has also been defined as "a significant change in employment status, such as . . . a decision causing significant change in benefits."<sup>124</sup> But "not everything that makes an employee unhappy is an actionable adverse action."<sup>125</sup> Discriminatory acts by employers that are not adverse "fail as a matter of law."<sup>126</sup>

In the prior Title VII birth control cases,<sup>127</sup> which all occurred before the contraceptive mandate, the plaintiffs did not face a problem proving that there was an adverse employment action because the employer's exclusion of birth control "materially affected" the value of their health plan. Like the male employees, the female employees were given health insurance as a benefit to their employment, but that benefit was worth less to female

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<sup>122</sup> *Perry v. Donovan*, 733 F. Supp. 2d 114, 119 (D.C. Cir. 2010).

<sup>123</sup> *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089-90 (9th Cir. 2008) (holding that giving employee a disproportionate amount of dangerous and strenuous work was an adverse employment action; giving her gloves and vest of only slightly inferior quality were not adverse actions).

<sup>124</sup> *Perry*, 733 F. Supp. 2d 114 (holding that failure to allow employee to compete for a promotion which would have increased her salary was an adverse employment action).

<sup>125</sup> *Smart v Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (holding that adverse actions must affect the terms and conditions of employment but that negative evaluations, without more, are not adverse employment actions).

<sup>126</sup> *Id.*

<sup>127</sup> *See supra* Part II.A.

employees than to males because females had to pay out of pocket for birth control prescriptions.<sup>128</sup>

With the ACA's contraceptive mandate and the *Hobby Lobby* ruling, however, a for-profit employer's decision not to cover birth control for religious reasons does not mean that the employee has to pay full price. Under the accommodation devised in *Hobby Lobby*, "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to face minimal logistical and administrative obstacles because their employers' insurers would be responsible for providing information and coverage."<sup>129</sup> The only difference between the plan's coverage of birth control and its coverage of other drugs or devices, from the female employees' perspective, is that they will know that their employer has played no role in providing contraceptive coverage.<sup>130</sup> Plaintiffs could argue that that is a "significant change in benefits," but it is not one that "materially affects" them. Without a material harm, there is no claim.

When analyzing the adverse employment action, courts should address what the employer provides to its employees, not what employees obtain by other means. For example, if an employer offers health insurance only to its male employees but not to its female employees, the employer should not be able to satisfy its legal obligations under Title VII by arguing that its choice was non-discriminatory because its female employees get insurance through their husbands' employers. Likewise, Title VII should analyze what the employer provides to the employee, not what the insurer pays for and provides under the *Hobby Lobby* arrangement.

### 1. *Zubik v. Burwell*

The hypothetical above foreshadows one development of the law in this area. While *Hobby Lobby* was being decided by the Court, employers with religious objections to birth control

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<sup>128</sup> *Mauldin v. Wal-Mart Stores, Inc.*, No. Civ.A.1:01-CV2755-JEC, 2002 WL 2022334, at \*10 (N.D. Ga. Aug. 23, 2002).

<sup>129</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2782 (2014).

<sup>130</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 236 (D.C. Cir. 2014).

continued to demand that they be released from having any involvement in the provision of birth control coverage to their employees. The next wave of cases was brought by religious nonprofits that argued that the accommodation itself unlawfully burdened their religious exercise under RFRA.<sup>131</sup> These cases are important because the more detached the Court allows employers to become from the provision of their employees' birth control coverage, the better the argument is that the employer is not actually providing the birth control coverage and therefore, the health plan the employer provides discriminates against women. Additionally, the majority opinion in *Hobby Lobby* stated that for-profit corporations should be treated the same as nonprofits in terms of accommodating their religious beliefs,<sup>132</sup> which means that the Court's decision regarding nonprofits will eventually be extended to for-profits corporations and organizations.

On May 16, 2016, the U.S. Supreme Court issued a ruling in *Zubik v. Burwell*,<sup>133</sup> a consolidation of seven cases dealing with the same issue. The plaintiffs were several religious nonprofits, Catholic colleges and charity organizations that were allowed an accommodation under the ACA.<sup>134</sup> The nonprofits argued that the religious accommodation under the ACA forces them to perform an action (notifying the government of their religious objections) that triggers birth control coverage, which makes them complicit in the sin of facilitating birth control use.<sup>135</sup> The plaintiff employers wanted to be released from having any connection to the provision of birth control in their employee health plan.

The Court ultimately did not make a decision in *Zubik* on the merits of the case.<sup>136</sup> Instead, it asked the employers and the government to work out a deal on their own.<sup>137</sup> The nonprofit

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<sup>131</sup> *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

<sup>132</sup> *Hobby Lobby*, 134 S. Ct. at 2771.

<sup>133</sup> *Zubik*, 136 S. Ct. at 1557

<sup>134</sup> *Priests for Life*, 772 F.3d at 236. *Priests for Life* was one of the cases that was consolidated into *Zubik v. Burwell* when the Court granted certiorari.

<sup>135</sup> *Priests for Life*, 772 F.3d at 236.

<sup>136</sup> *Zubik*, 136 S. Ct. at 1560.

<sup>137</sup> *Id.* (holding that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by



employers said that they would not feel their religious exercise was infringed if they could purchase a plan for their employees that did not include birth control coverage.<sup>138</sup> The government said that it could modify the existing accommodation in such a way that the employer would not have to notify the government and the government could still ensure that contraceptive coverage was provided.<sup>139</sup> Under this scheme, the employer is not actually providing contraceptive coverage; the insurer is providing it. While there still may be an issue of harm, there is a stronger argument under these cases that the employer is providing unequal benefits to its employees because of their sex.

## 2. New Administration

Another, more dramatic change may take place regarding this area of the law with the recent change in governmental administration. On January 20, 2017, Donald Trump became the 45<sup>th</sup> President of the United States.<sup>140</sup> Additionally, Republicans currently hold the majority in both the House of Representatives and the Senate.<sup>141</sup> The fate of the ACA and the contraceptive mandate is unknown under this administration. Mr. Trump and the Republican members of Congress have vowed to “repeal and replace” the ACA but to date, they have not been successful.<sup>142</sup>

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petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'”).

<sup>138</sup> *Id.*

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

<sup>140</sup> Peter Baker and Michael D. Shear, *Donald Trump is Sworn In as President, Capping His Swift Assent*, N.Y. TIMES (January 20, 2017), [https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html?\\_r=0](https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html?_r=0).

<sup>141</sup> United States Senate Press Gallery, 115<sup>th</sup> Congress: Party Lineup, (January 3, 2017), [https://www.dailypress.senate.gov/?page\\_id=228](https://www.dailypress.senate.gov/?page_id=228) (noting 52 Republican Senators, 46 Democrats, 2 Independents); United States House of Representatives Press Gallery, Party Breakdown, 115<sup>th</sup> Congress, (April 25, 2017), <https://pressgallery.house.gov/member-data/party-breakdown> (noting 238 Republicans, 193 Democrats, 4 vacancies).

<sup>142</sup> On May 4, 2017, the House passed a healthcare bill to repeal the ACA, which would not repeal the contraceptive mandate. Thomas Kaplan and

If the new administration repeals the contraceptive mandate, there will be no need for *Hobby Lobby's* accommodation mechanism; employers will be free to exclude contraception in health plans for any reason, unless a state law applies.<sup>143</sup> The main obstacle to the Title VII claim in this Note is the lack of harm because *Hobby Lobby* requires contraceptive coverage by the insurer, if not the employer.<sup>144</sup> But if that requirement is repealed and employees have to pay out of pocket, they will suffer a material harm, and will have a viable claim under Title VII.

#### IV. DISPARATE IMPACT AND DISPARATE TREATMENT

If plaintiffs can prove their prima facie case of discrimination, then the claim proceeds to the next phase in the

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Robert Pear, *House Passes Measure to Repeal and Replace Affordable Care Act*, N.Y. TIMES (May 4, 2017); Timothy Jost, *Executive Order Addresses Religious Objections to Contraception*, HEALTHAFFAIRSBLOG (May 5, 2017), <http://healthaffairs.org/blog/2017/05/05/executive-order-addresses-religious-objections-to-contraception/> (explaining that the House's healthcare bill, the American Health Care Act, does not repeal the contraceptive mandate). Also on May 4, 2017, the President issued an Executive Order, in part directing the Secretary of Health and Human Services and other agency heads to "consider issuing amended regulations to address" religious objections to the contraceptive mandate. Presidential Executive Order Promoting Free Speech and Religious Liberty, Sec. 3, 2017 WL 1734772, (May 4, 2017); Timothy Jost, an emeritus professor at Washington and Lee University School of Law, wrote that "HHS could, through notice and rulemaking" remove contraceptives from the list of preventive services insurers must cover, but that that would be "politically and legally risky." Timothy Jost, *Executive Order Addresses Religious Objections to Contraception*, HEALTHAFFAIRSBLOG (May 5, 2017), <http://healthaffairs.org/blog/2017/05/05/executive-order-addresses-religious-objections-to-contraception/>.

<sup>143</sup> Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of Hobby Lobby's Implications for State Law*, 9 HARV. L. & POL'Y REV. 89, 98-101 (2015) (explaining that most states have contraceptive equity laws requiring insurance companies, and possibly employers, to cover contraceptives but that many also allow a religious exemption from the law); see also Jost, *supra* note 142 (noting that 28 states require insurers to offer women contraceptive coverage).

<sup>144</sup> See *supra* Part II.B.

litigation. This section analyzes both the disparate impact and the disparate treatment causes of action, since most of the plaintiffs in the prior cases brought their case under both.<sup>145</sup> Part A analyzes the disparate impact cause of action first, because that claim avoids inquiry into the employer's religious motive, and Part B considers the disparate treatment claim.

### *A. Disparate Impact*

Once plaintiffs have proven the prima facie case of disparate impact, that the employer's exclusion of birth control from the health plan caused an adverse impact on female employees, the employer can escape liability only if it proves that its action was "job related for the position in question and consistent with business necessity."<sup>146</sup> The employer has the burden to persuade the factfinder of this.<sup>147</sup> Courts have interpreted "business necessity" to mean "necessary to the safe and efficient operation of the business."<sup>148</sup>

An employer could argue, for example, that it excluded birth control from its health plan to control costs, which businesses must be permitted to do.<sup>149</sup> In *Erickson*, the court held that while an employer may take measures to control costs, it may not do so in a discriminatory manner.<sup>150</sup> Hobby Lobby could argue that excluding contraception is consistent with business necessity because the purpose of its business is to "[h]onor[] the Lord" by "operating the

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<sup>145</sup> EEOC v. UPS, Inc., 141 F. Supp. 2d 1216 (Minn. 2001); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); *Mauldin v. Wal-Mart Stores, Inc.*, No. Civ.A.1:01-CV2755-JEC, 2002 WL 2022334 (N.D. Ga. Aug. 23, 2002); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003); *Cummins v. State*, No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill. Aug. 30, 2005); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014 (W.D. Mo. 2006).

<sup>146</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>147</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1004 (1988).

<sup>148</sup> *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

<sup>149</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001).

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

company in a manner consistent with Biblical principles.”<sup>151</sup> But that is not related in any way “to the safe and efficient operation of the business.”<sup>152</sup>

In summary, if plaintiff employees can prove a prima facie case of disparate impact, the claim will be successful because the employer will not be able to show that the policy of excluding contraception is consistent with business necessity.

### ***B. Disparate Treatment***

The prima facie case of disparate treatment is similar to the prima facie claim of disparate impact. As noted above, a plaintiff must show that “(1) she belongs to a protected class, (2) she was subjected to an adverse job action; (3) the employer treated similarly situated employees outside her protected class more favorably; and (4) she was qualified to do the job.”<sup>153</sup> If the plaintiff can prove that she suffered an adverse job action,<sup>154</sup> and, that she was treated unequally,<sup>155</sup> she can prove a prima facie case because she can easily meet the remainder of the requirements, as she is a woman, and for the sake of argument, she is qualified for her job.

#### **1. Employer’s Legitimate, Non-Discriminatory Reason**

After a plaintiff proves her prima facie case, the burden shifts to the employer to prove that it had a legitimate, non-discriminatory reason for taking the action it took.<sup>156</sup> This is a light burden as it is a burden of production, not persuasion.<sup>157</sup> All the employer has to produce is an affidavit from the business owners, explaining their religious beliefs about contraception. The employer may also produce a copy of the notice it submitted to the

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<sup>151</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014).

<sup>152</sup> *Robinson*, 444 F.2d at 798.

<sup>153</sup> *Lindemann*, *supra* note 80.

<sup>154</sup> *See supra* Part II.B.

<sup>155</sup> *See supra* Part II.A.

<sup>156</sup> *Texas Dep’t of Comty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

<sup>157</sup> *Id.* at 256.

government, explaining the reason for requesting the accommodation.<sup>158</sup> The employer can easily meet this burden.

## 2. Pretext

Upon producing an affidavit or notice submitted to the government, the burden shifts back to the employee to prove, by a preponderance of the evidence, that the employer's purported reason for the action is pretextual.<sup>159</sup> The employees can succeed at this stage by showing that the employer's reason is "unworthy of credence" or "that a discriminatory reason more likely motivated the employer."<sup>160</sup>

When the employer asserts a religious reason for its action, the plaintiff may not question whether the religious reason is "plausible in the sense that it is reasonably or validly held."<sup>161</sup> However, courts have held that plaintiffs can inquire as to whether that reason is the real reason that motivated the action.<sup>162</sup> When analyzing whether a religious reason is pretextual, courts should look at "factual questions such as . . . whether the rule applied to the plaintiff has been applied evenly."<sup>163</sup> In *Redhead v. Conference of Seventh Day Adventists*, the court found that although it accepted that the employer's reason for firing a pregnant, unmarried teacher was honestly based on its religious beliefs forbidding sex outside of marriage, the court could still inquire as to whether or not the employer applied that belief equally to its male and female employees.<sup>164</sup>

In the legal situation addressed here, the issue is whether the employer applied its belief that contraception is a sin to both men and women in its healthcare plan. As previously noted, it is difficult to determine whether the employer intentionally discriminated

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<sup>158</sup> *Priests for Life v. United States HHS*, 772 F.3d 229, 249 (D.C. Cir. 2014).

<sup>159</sup> *Burdine*, 450 U.S. at 255.

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

<sup>161</sup> *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 223 (E.D.N.Y. 2006) (citations omitted).

<sup>162</sup> *Redhead*, 440 F. Supp. 2d at 223.

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

<sup>164</sup> *Id.*

because there is no prescription male birth control that it could have also excluded. It may be relevant to consider if the employer also excluded vasectomies because that is the only form of male birth control it could affirmatively exclude,<sup>165</sup> although vasectomies are not equivalent to female birth control.<sup>166</sup> In the case of *Hobby Lobby*, it is especially difficult to make this inquiry because the employers' legitimate reason is based on their religious beliefs about conception,<sup>167</sup> which only takes place inside a woman's body.<sup>168</sup> Unlike in *Redhead*, where men could also violate the employer's prohibition on sex outside of marriage, only women can use prescription birth control so only they can be targeted by the employer's beliefs. This is another reason why preventive treatments are a better comparator than male birth control.

### 3. Mixed Motive

A mixed motive case is one in which the plaintiffs have proven that the employer's consideration of their sex played a "motivating part"<sup>169</sup> in its decision, even though the employer has shown that it was legitimately motivated by its religious beliefs. One way to prove that sex played a "motivating part" in the decision

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<sup>165</sup> See Part II.A. There are only two forms of male birth control: condoms and vasectomies. Exclusion of condoms does not indicate the employer made an affirmative choice because most health plans do not cover condoms.

<sup>166</sup> See *supra* Part II.A(i).

<sup>167</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764-65 (2014).

<sup>168</sup> *Id.* at 2765. As explained earlier, the employers in *Hobby Lobby* objected to the forms of birth control they believed functioned like an abortion, which they called "abortifacients." The employers believe life begins at conception and these forms of birth control may operate to block a fertilized egg from growing. See *supra* note 36.

<sup>169</sup> 42 U.S.C. § 2000e-2(m) (1991) ("[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex was a motivating factor for any employment practice, even though other factors also motivated the practice."); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989), *superseded by statute* 42 U.S.C. § 2000e-2(m) (1991) (noting that plaintiff may show that gender played a "motivating part" in the decision).

is by showing that the employer systematically treated female employees worse than male employees.<sup>170</sup>

Under Title VII, a plaintiff will prevail in a mixed motives case and get full damages unless the employer can prove that it would have made the same decision regardless of the discriminatory motive.<sup>171</sup> If the employer proves this, the plaintiffs may still prevail, but the remedies available will be limited.<sup>172</sup> The employer's burden is one of persuasion, not simply of production.<sup>173</sup>

Even if the court agrees that the employer considered both its religious beliefs and its employees' sex in its decision, and even if the employer can prove it would have made the same decision regardless, plaintiffs may still prevail. They would still have access to injunctive relief, meaning they could require their employers to comply with the contraceptive mandate and cover birth control.

## V. CONCLUSION

Title VII provides legal protection from employment discrimination on the basis of sex but it is not the only law that fights sex discrimination in the workplace. The ACA's contraceptive mandate remedies inequality in employee health insurance plans by requiring equal coverage for female healthcare needs. Without birth control coverage, the employee health plan is worth less to female employees than to males. In *Hobby Lobby*, however, the U.S. Supreme Court allowed three employers to avoid complying with the contraceptive mandate because of their religious objections to contraception, a treatment so common that 88% of American women have used it in their lifetime.<sup>174</sup> The Court did not consider that the employer would be discriminating against its female employees by allowing this. Title VII should be able to remedy this discrimination.

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<sup>170</sup> *Troupe v. May Dep't. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

<sup>171</sup> 42 U.S.C. § 2000e-5(g)(2)(B).

<sup>172</sup> *Id.* (limiting remedies to injunctive relief, declaratory relief, and attorneys' fees and costs when an employer proves it would have made the same decision regardless of the discriminatory motive).

<sup>173</sup> *Price Waterhouse*, 490 U.S. at 245.

<sup>174</sup> DANIELS, *supra* note 22.

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While it is fortunate that the ACA requires contraceptive coverage so that female employees suffer no loss of benefits, it is unfortunate that this allows the employer with religious objections to discriminate against its female employees. But changes are imminent and female employees may suffer a loss of benefits if the new administration takes action. If and when that happens, Title VII must once again stand up for women's rights in the workplace.