ABSOLUTION FOR OPTING OUT OF THE CONTRACEPTION MANDATE: SUBSTANTIAL BURDEN GONE AWRY

Patrick J. McNulty & Joseph F. Moser***

ABSTRACT

The contraception mandate requires employer healthcare plans to provide FDA-approved contraceptive services to women as part of a no-cost preventive care and screening program. Employers with religious objections can opt out by sending a certification of exemption to their healthcare representative or a notice to the government. Their insurers or third-party administrators are then charged with effectuating the mandate with no further involvement by the employers. Religious nonprofits objected to this procedure under the Religious Freedom Restoration Act of 1993 (RFRA), claiming that sending either form substantially burdened their religious exercise by making them complicit in the delivery of immoral and evil services.

Originating from dicta in Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), this claim is unprecedented and transforms a health-based mandate into a religious commandment to be obeyed by all. Although the United States Supreme Court took a pass on judging the validity of this claim in 2016, the debate surrounding this issue continues unabated. The next intervention by the Supreme Court should be an unqualified statement that RFRA does not empower a person—through the ministerial act of sending a single sheet of paper—to insist that others conform to his or her own religious necessities.*

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* Of Counsel, Grefe & Sidney, P.L.C.; B.A., University of Iowa, 1974; J.D., University of Iowa College of Law, 1977.

** Attorney, Finley Law Firm, P.C.; B.A, Saint Louis University, 2008; J.D., University of Iowa College of Law, 2011.

I. INTRODUCTION

Once upon a time, when the Free Exercise Clause of the First Amendment commanded center stage against federal government interference, only reverence for God the Creator, obedience to his will, and worship of his supreme and almighty presence were protected.[1] How times have changed since that occasion in 1890 when the United States Supreme Court, decrying the notion that promiscuous intercourse between the sexes could ever amount to religious exercise, excoriated the arguments of Samuel Davis that polygamy was immunized from criminal prosecution by the Book of Mormon.[2] Today, same-sex marriage is a constitutional right;[3] belief in God the Creator or a supreme being is not a prerequisite to religious liberty and expression; [4] for-profit, closely held corporations enjoy the same

1. Davis v. Beason, 133 U.S. 333, 342 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620 (1996).

2. *Id.* at 341–42.

3. Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015).

4. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877–78 (1990) (holding that sacramental and religiously inspired use of the hallucinogenic drug peyote is an exercise of religion), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). Emphasizing the exercise of religion involves the performance of (or abstention from) physical acts, the Court noted in passing it would doubtless be unconstitutional to ban the casting of statues that are to be used for worship purposes or to prohibit bowing down before a golden calf. *Id.*; *see also* United States v. Seeger, 380 U.S. 163, 180–83 (1965) (granting conscientious-objector status to individuals whose claimed religious belief occupies the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption). Although the Court's holding in *United States v. Seeger* was limited to construing section 6(j) of the

religious protections as individuals;[5] and business practices compelled or limited by religious belief fall under the umbrella of religious exercise, as does the decision by a storekeeper not to create a wedding cake for a same-sex couple.[6] The source of religious protection and sanctuary also has shifted. Federal and state statutes "restoring" religious rights have supplanted the neutral and generally applicable principles of the Free Exercise Clause as the bastion of greater religious protection.[7] The federal statute—the Religious Freedom Restoration Act of 1993 (RFRA)—specifically prohibits the government from substantially burdening a person's exercise of religion unless it demonstrates its action furthers a compelling government interest and is the least restrictive means of furthering that interest.[8]

What is not new or surprising under the twenty-first century sun, however, is the landscape on which the flares of religious exercise, culture, and law continue to burn. Sex—or more euphemistically phrased, sexual mores surrounding the contraception mandate and religious exemptions

Universal Military Training and Service Act, 62 Stat. 604, 612–13 (1958) (current version at 50 U.S.C. § 3806(j) (2012)), it is commonly understood the Court's decision commands a constitutional dimension, as holding otherwise raises Establishment Clause issues. Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 538 (1989); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978).

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

6. *Id.* at 2770; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1739–40 (2018).

7. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2760–61 (stating that in order to ensure broader protection for religious liberty, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), effectuating a complete separation from existing First Amendment case law and applying its protections against state action as well); *see also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 171–73 (1995) (stating that RFRA purports to force a sharp reversal of Free Exercise jurisprudence and a return to a more rigorous approach to protecting religious liberties). Since the decision by the Court in *City of Boerne v. Flores*, holding RFRA's application to the states unconstitutional, 21 states have enacted their own versions of religious-freedom restoration statutes. 521 U.S. 507, 533–34 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803; *see Religious Freedom Restoration Act Information Central*, BECKET, https://www.becketlaw.org/Research%20Central/%20RFRA%20Info%20Central/ (last visited Oct. 11, 2018).

8. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated as to states and subdivisions by* City of Boerne v. Flores, 521 U.S. 507 (1997).

and accommodations thereto—has engulfed the notice-and-comment administrative process[9] and swelled the dockets of the federal judiciary[10] for the last several years. After nine circuit courts of appeal decisions, three United States Supreme Court opinions, two sets of diametrically-opposed administrative regulations, a purported global settlement between the Trump Administration and religious nonprofits, and, more recently, the issuance of a series of preliminary injunctions blocking the enforcement of Trump-era rules, the debate still rages.[11] Although the Supreme Court resolved one issue—a for-profit, closely held corporation is a person whose religiously compelled business practices can offer sanctuary from offering contraceptive insurance coverage[12]—it mysteriously left unanswered whether the regulatory process for obtaining such sanctuary or exempt status is lawful. Objecting employers argued the requirement for them to certify to their insurance representative or, in the alternative, notify the government of their opposition imposes a burden on religious freedom.[13] In their view, either event triggers an obligation by their insurer (or third-party administrators, if self-insured) to fill the gap and provide coverage, thereby making them complicit in the delivery of immoral and sinful services.[14] This complicity constitutes a substantial burden on religious exercise, they argue, because it forces them to choose between either violating their religious belief by sending the certification or notice or, in contrast, honoring their belief by refusing to send the pertinent document and incurring a monetary penalty for such refusal.[15] The Court had a chance to decide the issue, but after granting certiorari to settle a conflict within the circuits and hearing oral arguments, it took a pass, ordering the parties to

9. *See infra* Parts II, IV.B.

10. *See infra* Part III.

11. *See infra* Part III.

12. Hobby Lobby Stores, Inc., 134 S. Ct. at 2775.

13. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam) (remanding the case so the parties could be afforded an opportunity to resolve the issue). This was ultimately unsuccessful. *See infra* notes 121–27 and accompanying text.

14. *See, e.g.*, Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1143 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-13239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Wheaton Coll. v. Burwell, 791 F.3d 792 (7th Cir. 2015).

15. Brief for Petitioners at 4, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 93988.

attempt to resolve their differences.[16] That effort at compromise soon sputtered, after which the Trump Administration unveiled a radical two-part strategy to safeguard and augment the rights of employers that harbored anticontraceptive beliefs. The first part involved the issuance of interim final regulations, effective immediately, that expanded the exemption and abolished the certification requirement.[17] The second piece of the plan was equally decisive and immediate: dismissal of all pending litigation with religious nonprofits and the public recognition that the prior accommodation process substantially burdens religious exercise in violation of RFRA.[18] This plan was soon foiled, however, by the entry of two federal court orders, pursuant to applications by the states of Pennsylvania and California, that enjoined the enforcement of the new regulations and reinstated the Obama-era rules.[19] Then, a year later, just as the regulations lost their interim tag and became final, both courts again blocked enforcement, with the Pennsylvania federal court issuing a nationwide injunction.[20]

So here we are, several years into this legal fracas, with states now leading the charge against the "paradoxical and virtually unprecedented" theory that the RFRA requires an exemption to the process of obtaining an exemption.[21] The Authors argue the professed conscientious objection to a notice-of-objection requirement—spawned by the flawed logic of a

16. *Zubik*, 136 S. Ct. at 1560.

17. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,808 (Oct. 13, 2017); *see also* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,850 (Oct. 13, 2017).

18. Settlement Agreement Between Various Plaintiffs and the U.S. Gov't 1 (Oct. 13 2017), https://www.justice.gov/civil/page/file/1044351/download.

19. California v. Health & Human Servs., 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017), *aff'd in part*, *vacated in part sub nom.* California v. Azar, Nos. 18-15144, 18-15166, 18-15255, 2018 WL 6566752 (9th Cir. Dec. 13, 2018); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), No. 18-1253 (3d Cir. Feb. 15, 2018).

20. Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *33 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019 WL 178555, at *25 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019).

21. 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).

few sentences in *Hobby Lobby Stores, Inc.*[22]—is not an act of protected conscience but an interdiction that obstructs the will of Congress in mandating no-cost preventive care to women.[23] It empowers opponents of the contraception mandate with a religious veto and, if sustained, effectively establishes a mini-anticontraception theocracy.[24] This Article chronicles the litigious and administrative tale of the religious exemption. The Authors contend that after the Trump regulations are dispatched and the Obama rules reincarnated, the Supreme Court should follow the lead of the vast majority of circuits[25] (whose decisions were imprudently vacated)[26] and finally extinguish the claim that a mere act of sending a certification or notification of an objection substantially burdens religious exercise under RFRA.[27]

II. OVERVIEW OF THE CONTRACEPTION MANDATE AND THE ENSUING POLARIZATION

No-cost contraceptive care for women mandated by the 2010 Patient Protection and Affordable Care Act (ACA) generally requires employer healthcare plans to provide coverage for specified services to women as part of a comprehensive preventive care and screening program.[28] What

22. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014) (conflating the standard for scrutiny of the plausibility of religious belief with an evaluation of substantial burden on religious exercise); *see also infra* Part V.

23. *See infra* Part V.

24. *See infra* Part V.

25. Sam Schwartz-Fenwick & Jules Levenson, *Complicit in Sin: The Burden of the Opt-Out Form*, ERISA & EMP. BENEFITS LITIG. BLOG (Nov. 19, 2015), https://www.erisa-employeebenefitslitigationblog.com/2015/11/19/complicit-in-sin-the-burden-of-the-opt-out-form/.

26. *See* discussion *infra* Part III.

27. The Authors recognize that in order for Justices Neil Gorsuch and Brett Kavanaugh to vote to extinguish the claim of religious exercise, they would have to change the positions they staked out as court of appeal judges. *See* Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315, 1317–18 (10th Cir. 2015) (Hartz, J., dissenting) (then-Judge Gorsuch joined in this dissent); Priests for Life v. U.S. Dept. of Health & Human Servs., 808 F.3d 1, 16–21 (D.C. Cir. 2015) (Kavanaugh, J., dissenting). Their respective positions are discussed in greater detail at note 293 *infra*.

28. 42 U.S.C. § 300gg-13(a)(4) (2012). Employers with less than 50 full-time employees are not required to provide a health plan. 26 U.S.C. § 4980H(c)(2) (2012 & Supp. V 2017). In addition, health plans existing prior to March 23, 2010, that have not made specified changes after that date are not required to comply with the mandate. 42 U.S.C. § 18011(a)(1) (2012).

these covered services entail were not specified by Congress; that was delegated to the Health Resources and Service Administration (HRSA), an arm of the Department of Health and Human Services (HHS).[29] After consultation with the Institute of Medicine, HRSA recommended coverage for all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.[30] FDA-approved contraceptive methods include oral contraceptives, barrier methods, implants and injections, emergency oral contraceptives, and intrauterine devices.[31] Other types of female preventive services were also recommended, such as well-women visits, papillomavirus testing, breastfeeding support, and counseling for interpersonal and domestic violence.[32] HHS formally accepted all the recommendations and promulgated rules specifying those services.[33] Rules were also published granting an exemption to group healthcare plans maintained by religious employers whose purpose is the inculcation of religious values, who primarily employ and serve people of their own faith, and who are nonprofit organizations within the meaning of the Internal Revenue Code.[34]

29. 42 U.S.C. § 300gg-13(a)(4).

30. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVS. ADMIN., https://www.hrsa.gov/womens-guidelines/index.html (last visited Nov. 27, 2018). The Institute of Medicine is now known as the National Academy of Medicine. *See Press Release: Institute of Medicine to Become National Academy of Medicine*, NAT'L ACADS. SCI. (Apr. 28, 2015), http://www.nationalacademies.org/hmd/Global/News%20Announcements/IOM-to-become-NAM-Press-Release.aspx.

31. *Birth Control*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last updated Mar. 6, 2018).

32. *See Women's Preventive Services Guidelines*, *supra* note 30.

33. *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,759 (July 19, 2010) (to be codified at 45 C.F.R. pt. 147). These regulations and those published in subsequent years implementing the Affordable Care Act and religious accommodations were issued under the auspices of the Departments of Health and Human Services, Labor, and Treasury. For ease of reference and avoidance of repetition, citations are generally to HHS codifications.

34. *See* Group Health Plans and Health Insurance Issues Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (Aug. 1, 2011) (previously codified at 45 C.F.R. § 147(a)(1)(iv) (2011)).

Cries of protest and moral outrage erupted over the narrow scope of the exemption,[35] and dozens of lawsuits were filed seeking injunctive relief.[36] Formal comments submitted to government agencies totaled 400,000.[37] As a result, HHS clarified and expanded the exemption in July 2013. Churches and religious orders were now categorically exempt.[38] An exemption was also formulated for "eligible organizations" if they (1) are organized and operate as a nonprofit entity; (2) hold themselves out as a religious organization; (3) oppose providing coverage for some or all of the mandated contraceptive services on account of religious objections; and (4) certify they meet the preceding criteria.[39] The certification was to be accomplished and the exemption effective upon the organization sending an executed government form (ESBA 700) to its insurer or, if self-insured, to its third-party administrator.[40] With the organizations' divorce from the mandate deemed complete, the insurer or third-party administrator then assumed the sole responsibility for the delivery and payment of contraceptive services.[41] As part of this responsibility, an insurer must expressly exclude

35. *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemption from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 n.17 (2014) (collecting examples of heated religious-liberty rhetoric).

36. *HHS Case Database*, BECKET, http://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database (last visited Mar. 22, 2018).

37. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,869, 39,871 (July 2, 2013).

38. *Id.* at 39,896 (previously codified at 45 C.F.R. § 147.131(a)–(b) (2013)). Defined as "religious employers," these organizations must meet the definition of a nonprofit entity under pertinent sections of the Internal Revenue Code. *See id.*

39. *Id.* Religious nonprofits would include, for example, schools, hospitals, or social service agencies with a religious mission or affiliation. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 238 (D.C. Cir. 2014), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

40. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. at 39,896. Although it has since been amended, ESBA Form 700 has always contained language that "in order for the [insured or self-insured] plan to be accommodated," it must be provided to an insurer or third-party administrator, as the situation warrants. *Compare* Wheaton Coll. v. Burwell, 134 S. Ct. 2806 app. at 2816 (2014) (Sotomayor, J., dissenting), *with* ESBA FORM 700—CERTIFICATION 1–2 (2017), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/ebsa-form-700-revised.pdf.

41. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,894–95 (previously codified at 29 C.F.R. § 2590.715-2713A(b) (2014)) (self-insured group health plans), 39,896–97 (previously codified at 45 C.F.R. § 147.131(c)–(d) (2013)) (insured group health plans).

contraceptive coverage from the group health plan; make separate payments for contraceptive services without any cost sharing from the employer or recipients of the services; and provide plan participants a written notice of the availability of such separate payments.[42] The notice must be sent separately from enrollment and application materials, and it must further make known the employer has nothing to do with funding or administering contraceptive benefits.[43] The accommodation for self-insured employers whose plans are governed by ERISA has a few different twists. Under Department of Labor regulations, Form 700 is treated as a designation of the third-party administrator as the "plan administrator" within the meaning of ERISA.[44] Upon receipt of the executed form, the third-party administrator assumes the obligation to make payments for contraceptive services—either directly or through an arrangement with an insurer.[45] Reimbursement can then be sought through the federally-funded exchange.[46] Like an insurer, a third-party administrator bears the same separate notification and payment requirements.[47]

This regulatory revision did not stem the cavalcade of criticism and litigation. Instead, two lines of attack emerged, both relying on the RFRA. First, for-profit, closely held corporations argued they also should be accommodated because, like their nonprofit counterparts, they believe life begins at conception, that it is immoral to facilitate any act in contravention of that belief, and that they should be allowed to commit to the operation of

42. *Id.* at 39,896–97. The same obligations apply to student health insurance coverage arranged by an eligible organization that is an institution of higher learning. *Id.* at 39,897 (previously codified at 45 C.F.R. § 147.131(f) (2013)).

43. *Id.* at 39,896–97 (previously codified at 45 C.F.R. § 147.131(d) (2013)).

44. *Id.* at 39,894 (previously codified at 29 C.F.R. § 2510.3-16 (2014)), 39,895 (previously codified at 29 C.F.R. § 2590.715-2713A(b)(2)(i) to (ii) (2014)).

45. *Id.*

46. *Id.* at 39,895 (previously codified at 29 C.F.R. § 2590.715-2713A(b)(3) (2014)).

47. *Id.* (previously codified at 29 C.F.R. § 22590.715-2713A(d) (2014)). Self-insured church plans that cover employees of religious nonprofits are not governed by ERISA. 29 U.S.C. §§ 1002(33), 1003(b)(2) (2012). Thus, the government lacks the authority to compel a third-party administrator of such a plan to comply with the mandate if an employer opts out. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,317, 41,323 n.22 (July 14, 2015). If the administrator voluntarily chooses to provide or arrange for separate payments of contraceptive services, reimbursement is available. *Id.*

their businesses consistent with that belief.[48] Second, eligible organizations objected to certifying their exempt status to their insurers or third-party administrators because it (1) triggers their representatives' obligations to provide payments for contraceptive services and (2) makes the eligible organization complicit in the delivery of these evil and immoral services.[49]

48. Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. ILL. U. L.J. 475, 483 n.74 (2015).

49. *See, e.g.*, Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1143 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-13239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016); Mich. Catholic Conference v. Burwell, 807 F.3d 738, 740 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Dordt Coll. v. Burwell, 801 F.3d 946, 948–49 (8th Cir. 2015), *vacated*, 136 S. Ct. 2006 (2016); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 933 (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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018); Grace Sch. v. Burwell, 801 F.3d 788, 791 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016), *and vacated sub nom.* Diocese of Fort Wayne-S. Bend, Inc. v. Burwell, 136 S. Ct. 2010 (2016); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 214 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 454–55 (5th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016); Wheaton Coll. v. Burwell, 791 F.3d 792, 794 (7th Cir. 2015); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 430 (3d Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 235 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 449–50 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015); Zubik v. Sebelius, 983 F. Supp. 2d 576 (W.D. Pa. 2013), *rev'd*, Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Roman Catholic Archdiocese of Atlanta v. Sebelius, No. 1:12-cv-03489-WSD, 2014 WL 1256373, at *9 (N.D. Ga. Mar. 26, 2014), *vacated in part*, Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs., 818 F.3d 1122 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-13239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016); Catholic Diocese of Nashville v. Sebelius, No. 3:13-01303, 2013 WL 6834375, at *1 (M.D. Tenn. Dec. 26, 2013), *aff'd sub nom.* Mich. Catholic Conference v. Burwell, 755 F.3d 372 (6th Cir. 2014), *vacated*, 135 S. Ct. 1914 (2015), *and aff'd*, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Roman Catholic Archbishop of Wash. v. Sebelius, 19 F. Supp. 3d 48, 72 (D.D.C. 2013), *aff'd in part*, *rev'd 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 per curiam sub nom.* Zubik v. Burwell, 136

The first issue was resolved in *Burwell v. Hobby Lobby Stores, Inc*.[50] Finding for-profit, closely held corporations are "persons" under RFRA and capable of exercising religion,[51] the Supreme Court held their exercise extends to business practices compelled or limited by religious belief.[52] As the mandate imposes a substantial burden on anticontraceptive beliefs because of financial penalties for noncompliance and because it is not the least restrictive means of furthering a compelling government interest, the corporate owners were excused from including contraceptive coverage in their group health plans.[53] The Court was quick to point out, however, that contraceptive services are still readily accessible because, as noted above, the regulations require health insurers and third-party administrators of self-insured plans to fill in the gap and make separate payments for the services.[54]

It took the Court all of three days after issuing its opinion in *Hobby Lobby Stores, Inc.* to weigh in on the second issue—the religious implications of the certification process.[55] Wheaton College, a religious nonprofit institution indisputably eligible for an exemption, had objected to certifying its eligible status on EBSA Form 700 and to sending it to the third-party administrator of its health plan.[56] Claiming this process made it complicit in the delivery of the grave moral evil of emergency contraceptives,[57] it filed an application for an emergency injunction with the Court, seeking an order barring HHS from enforcing the Form 700

S. Ct. 1557 (2016). Of the 400,00 comments received prior to the July 2013 amendments, apparently only one pertained to this issue. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg at 39,871, 39,887.

50. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

51. *Id.*

52. *Id.* at 2770.

53. *See id.* at 2785. The Court assumed the interest in guaranteeing cost-free access to the contraception methods at issue are compelling within the meaning of RFRA. *Id.* at 2780. Although the Christian anticontraceptive believers had objected to just 4 of the 20 FDA-approved forms of contraception—those they considered abortifacients—their counsel conceded at oral argument that their objections extended to all forms of artificial contraception. *Id.* at 2765–66; Transcript of Oral Argument at 27–28, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

54. *Hobby Lobby Stores, Inc*., 134 S. Ct. at 2782.

55. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014); *see also* Wheaton Coll. v. Azar, No. 13-cv-8910, slip op. at 2 (N.D. Il. Feb. 22, 2018) (entering a final injunction against the Obama-era accommodation process).

56. *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting).

57. Emergency Application for Injunction Pending Appellate Review at 11, Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014) (No. 13A-1284).

requirements.[58] Noting the division among the circuit courts on the issue, the Court enjoined HHS from enforcing the use of the form, pending final disposition on appellate review.[59] The only condition was that the college inform HHS (as opposed to its administrator) in writing that it meets the other eligibility criteria for an accommodation—something it already had done.[60]

Joined by the other female Justices, Justice Sonia Sotomayor dissented. She accused the majority of misleading the country by retreating from its assurances made three days previous that the extension of a religious accommodation to Hobby Lobby would have "precisely zero"[61] impact on the delivery of contraceptive services.[62] The Court in *Hobby Lobby Stores, Inc.* had made that declaration, of course, precisely because the mandate and its attendant regulations require an insurer or third-party administrator to pick up the baton of coverage after receipt of an employer's certification of exemption.[63] By giving credence to a claim that the mere act of processing a religious exemption is, in itself, a substantial burden on religious exercise, Justice Sotomayor accused the Court of jeopardizing the essential operations of the mandate.[64] How can the seamless delivery and cost-free payment of services exist if there is no viable process of exemption notification?[65] In a refrain that would echo through the circuit court of appeals the next couple of years,[66] Justice Sotomayor reminded her brethren the obligation to provide contraceptive coverage is mandated by law—not a person's decision to opt out.[67]

Two months after the injunction was issued in *Wheaton College*, HHS issued interim final regulations to provide an alternate procedure for

58. *Id.*

59. *Wheaton Coll.*, 134 S. Ct. at 2807 (majority opinion).

60. *Id.*

61. *Id.* at 2813 (Sotomayor, J., dissenting) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014)).

62. *Id.* at 2808. Further commenting on this retreat, Justice Sotomayor wrote Americans could not take the Court at its word and that the Court's action evinces disregard for even the newest of precedent and undermines confidence in the Court. *Id.*

63. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2782.

64. *See Wheaton Coll.*, 134 S. Ct. at 2814 (Sotomayor, J., dissenting) (stating the Court's injunction imposes an unwarranted and unprecedented burden on the government's ability to administer the regulatory scheme of the contraception mandate).

65. *Id.*

66. *See* discussion *infra* Part III.

67. *Wheaton Coll.*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting).

processing an exemption in which eligible organizations could—instead of self-certifying to its insurer or third-party administrator—provide the agency with its certification and the contact information of their insurers or third-party administrators.[68] HHS would then send a separate notice to the insurer or administrator, advising of their obligations under the mandate.[69] These amendments had no impact; the requests for injunctive relief continued unabated. In the ensuing 14 months, nine federal courts of appeal determined whether either means of opting out of the mandate made an employer complicit in sinful conduct, thereby substantially burdening their religious rights.[70] The argument fell on deaf ears in eight of the circuits; only the Eighth Circuit thought the argument had any merit.[71]

III. THE CIRCUIT DIVIDE

The District of Columbia Circuit,[72] Second Circuit,[73] Third Circuit,[74]

68. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,101 (Aug. 27, 2014) (previously codified at 45 C.F.R. § 147.131(c)(1) (2014)).

69. *Id.* On the same date, HHS, the Department of Labor, and the Department of the Treasury published a proposed regulation amending the definition of an eligible organization to include a closely held for-profit entity. *Id.* at 51,127 (previously codified at 45 C.F.R. 147.131(b)(2)(ii) (2014)). It took the agencies another year, after considering comments received in the interim, to actually define a closely held for-profit entity. *See id.*

70. *See* discussion *infra* Part III. All challengers were religious nonprofits; no closely held for-profit entities joined the fray.

71. 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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018).

72. Priests for Life v. U.S. Dep't. of Health & Human Servs., 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Roman Catholic Archbishop of Wash. v. Sebelius, 19 F. Supp. 3d 48, 72 (D.D.C. 2013), *aff'd in part, rev'd 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 per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

73. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 218 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

74. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 443 (3d Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Zubik v. Sebelius, 983 F. Supp. 2d 576, 608 (W.D. Pa. 2013), *rev'd*, Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015), *vacated per curiam sub nom.* Zubick v. Burwell, 136 S. Ct. 1557 (2016).

Fifth Circuit,[75] Sixth Circuit,[76] Seventh Circuit,[77] Tenth Circuit,[78] and Eleventh Circuit[79] categorically rejected the notion that the accommodation process creates a substantial burden of any sort. Some of the courts appeared frustrated by the assertion that the accommodation process imposes any burden on religious exercise,[80] while others used simple and unique analogies to illustrate the illogic of the argument.[81] Regardless of the means

75. E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 463 (5th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016).

76. Mich. Catholic Conference v. Burwell, 807 F.3d 738, 755 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Catholic Diocese of Nashville v. Sebelius, No. 3:13-01303, 2013 WL 6834375, at *1 (M.D. Tenn. Dec. 26, 2013), *aff'd sub nom.* Mich. Catholic Conference v. Burwell, 755 F.3d 372 (6th Cir. 2014), *vacated*, 135 S. Ct. 1914 (2015), *and aff'd*, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

77. Grace Sch. v. Burwell, 801 F.3d 788, 807 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016*), and vacated sub nom.* Diocese of Fort Wayne-S. Bend, Inc. v. Burwell, 136 S. Ct. 2010 (2016); Wheaton Coll. v. Burwell, 791 F.3d 792, 800–01 (7th Cir. 2015); Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 559 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015).

78. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1180–81 (10th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

79. Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1151 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-13239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016); Roman Catholic Archdiocese of Atlanta v. Sebelius, No. 1:12-cv-03489-WSD, 2014 WL 1256373, at *18 (N.D. Ga. Mar. 26, 2014), *vacated in part*, Eternal Word Television Network, Inc. v. Sec'y of the U.S. Dep't of Health & Human Servs., 818 F.3d 1122 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-13239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016).

80. *See, e.g.*, *Wheaton Coll.*, 791 F.3d at 797, 800 ("All that the government requires of an opt out like Wheaton—and it isn't much. . . . Quite apart from the merits of [Wheaton's] arguments, or lack thereof . . . ."); *see also Mich. Catholic Conference*, 807 F.3d at 750 (calling appellee's arguments on burden a "clever (but incorrect) sleight of hand"); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 250 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (referring to objection as "the written equivalent of raising a hand" as means to opt out of providing contraceptive coverage); *Univ. of Notre Dame*, 743 F.3d at 547.

81. *See, e.g.*, E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 461 (5th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016) (describing a passport applicant voicing religious objections to the State Department's assignment of a number to the application); *Univ. of Notre Dame*, 743 F.3d at 556 (detailing how a pacifist's religious

or method by which they reached their conclusions, the courts consistently cut through the rhetorical posturing to identify the real focus of the objections, namely, the subsequent action of third parties.[82] For example, the Third Circuit stated, "The appellees' real objection is to what happens after the form is provided—that is, to the actions of the insurance issuers and the third-party administrators, required by law, once the appellees give notice of their objection."[83]

In holding that it is the *law*, not the notice of objection, that triggers the obligation to cover contraception, each of these eight circuits rejected claims of a substantial burden on religious exercise.[84] All eight concurred that the issue of whether a law creates a substantial burden is a question of law for the court to decide, not a question of religious fact.[85] In doing so, each of the courts summarily rejected any framework that would eliminate the courts' role in independently determining the effect or impact of government action, as such a demurral would shepherd the triumph of religious belief over the judicial declaration of law.[86] Moreover, it "improperly conflate[s] the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise."[87] And in resolving whether a substantial burden indeed exists, all eight courts declined to accept the invitation to focus on the religious consequences of the act of opting out of the mandate.

The Eighth Circuit, however, accepted the invitation. Relying on *Hobby Lobby Stores, Inc.*, the court concluded it could not question the

objection to a military draft extends to the government conscripting another in his place).

82. *See, e.g.*, Geneva Coll. v. Sec'y U.S. Dept. of Health & Human Servs., 778 F.3d 442, 439 (3d Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

83. *Id.*

84. *Eternal World Television Network, Inc.*, 818 F.3d at 1166; *Mich. Catholic Conference*, 807 F.3d at 749; Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 218 (2d. Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1186 (10th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ.*, 793 F.3d at 463; *Wheaton Coll.*, 791 F.3d at 796; *Geneva Coll.*, 778 F.3d at 437; *Priests for Life*, 772 F.3d at 237.

85. *Eternal Word Television Network, Inc.*, 818 F.3d at 1144 ("We agree with our seven sister circuits that the question of substantial burden also presents 'a question of law for courts to decide.'").

86. *See, e.g.*, *id.*

87. *Little Sisters of the Poor Home for the Aged, Denver, Colo.*, 794 F.3d at 1176.

plausibility of the religious nonprofits' claims that they were substantially burdened by participation in the government's regulatory scheme, including the accommodation process.[88] The court bypassed the reasoning relied on by its eight sister circuits by determining it "must accept" the assertion that "self-certification under the accommodation process—using either Form 700 or HHS Notice—would violate their sincerely held religious beliefs," such that it was necessary to take the next step: determining whether the violation substantially burdens religious exercise.[89] It did, according to the court, because it compels religious nonprofits to act in a manner they sincerely believe would make them complicit in a grave moral wrong as the price of avoiding a ruinous financial penalty.[90] The court coined a new phrase to encapsulate this legally forbidden complicity: "conscience-violating consequences," in which an otherwise neutral or innocent act may result in a legally cognizable burden too heavy to bear.[91] The court then went on to consider whether the Government had established a compelling interest and whether the contraceptive mandate and accommodation process were the least restrictive means of furthering the government's compelling interests.[92] For the sake of argument, the court assumed a compelling interest existed but found the accommodation process was not the least restrictive means of furthering that interest.[93]

With the filing of the court's opinion on September 17, 2015, the stage was set for the Supreme Court to consider and, potentially, resolve this substantial burden issue once and for all.[94] As the following section discusses, the Supreme Court considered the issue but declined to resolve it,

88. Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015), *vacated*, 136 S. Ct. 2006 (2016); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 945 (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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018).

89. *Sharpe Holdings, Inc.*, 801 F.3d at 941.

90. *Id.* ("[W]e conclude that compelling their participation in the accommodation process by threat of severe monetary penalty is a substantial burden on their exercise of religion."); *id.* at 942 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step." (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778 (2014))).

91. *Id.* at 941.

92. *Id.* at 943.

93. *Id.* at 943–45.

94. *Id.* at 927.

leaving that to the parties. The day of compromise and resolution, however, never came.

IV. THE *ZUBIK* COMPROMISE ATTEMPT AND REGULATORY AFTERMATH

A. *Dodge and Mirage*

On November 6, 2015, the Court agreed to hear the appeals of seven of the eligible organizations challenging the exemption process.[95] Although variously phrased, the central (and obvious) question accepted for consolidated review was whether the notification requirement of the religious accommodation constitutes a substantial burden under RFRA.[96] Before oral argument was held on March 23, 2016, however, Justice Antonin Scalia died.[97] Six days after the argument, the Court ordered the parties to file supplemental briefs on whether contraceptive coverage could be provided to employees through each of their employers' group health insurance companies, but in a way that does not require the employers to notify either the insurer or the government.[98] To this end, the Court directed

95. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 454–55 (5th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 443 (3d Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 238 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Roman Catholic Archbishop of Wash. v. Sebelius, 19 F. Supp. 3d 48, 72 (D.D.C. 2013), *aff'd in part*, *rev'd 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 per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

96. *See, e.g.*, *Geneva Coll.*, 778 F.3d at 435; Petition for Writ of Certiorari at i, 1, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418), 2015 WL 3486599 (explaining that if a substantial burden were established, the Court also agreed to decide whether the Government has proven that any compelling interest advanced by the contraception mandate can be achieved by less restrictive means).

97. *Antonin Scalia*, OYEZ, https://www.oyez.org/justices/antonin_scalia (last visited Oct. 15, 2018).

98. Order at *2, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418), 2016 WL 1203818. One can surmise the Court was deadlocked at 4–4. One can further surmise Justice Anthony Kennedy, the swing vote in *Hobby Lobby Stores, Inc.*, joined the other members of the *Hobby Lobby Stores, Inc.* majority in upholding the petitioners' position as he viewed the substantial burden issue as one of theological fact, not law. Transcript of Oral Argument at 30–31, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418).

the parties to weigh in on a hypothetical situation in which eligible organizations would contract to provide health insurance for their employees without contraceptive coverage, leaving the insurer with the task of notifying employees that contraceptive coverage would be separately provided and paid for without their involvement.[99] If this scenario could realistically be implemented, the Court postulated, any religious objections to the notification requirement of employers could be eliminated without affecting the delivery of no-cost contraceptive care.[100] Two takeaways from this order are evident: (1) the Court assumed contraception-only health insurance policies are viable[101] and (2) its proposal did not extend to self-insured plans in which employers are both the insurer and religious objector.[102]

The parties completed their briefing in three weeks, simultaneously filing opening and then reply briefs.[103] In a striking feat of interpretation of the parties' positions, the Court issued an order vacating the judgments of the courts of appeal on the basis the parties had indicated a compromise along the lines suggested by the Court was feasible.[104] Described as a punt

99. Order, *supra* note 98, at *2.

100. Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam). The Court welcomed other proposed solutions along similar lines. *Id.*

101. At oral argument, Justice Samuel Alito, Justice Anthony Kennedy, and Chief Justice John Roberts had inquired of the Government why a contraceptive-only policy issued to the employees of an objecting employer would not be a less restrictive alternative, an option the Solicitor General resisted, as well as discounted, as unauthorized under current law. Transcript of Oral Argument, *supra* note 98, at 50, 53, 60–61. Petitioners were not interested in the limited scope of the proposal, as evidenced by one of their attorney's comments that religious exercise could be safeguarded only if the government chose a single insurer to provide contraceptive coverage to all women in the country at the government's expense. *Id.* at 43. Notwithstanding the above, the Court persisted.

102. Supplemental Brief for Petitioners at 17, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418); Supplemental Brief for Respondents at 15–16, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (No. 14-1418).

103. *Zubik v. Burwell*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/zubik-v-burwell/ (last visited Nov. 28, 2018) (listing dates of filings).

104. *Zubik*, 136 S. Ct. at 1560.

by President Obama[105] and a dodge by others,[106] the order is particularly striking because the language from the briefs manifesting this so-called feasibility—read as a whole—does not come close to supporting even a potential meeting of the minds of the parties. Focusing solely on the parties' initial briefs, the Court noted the eligible organizations had clarified their position by conceding that if they are excused from the regulatory opt-out notification, their religious exercise is not burdened by employees receiving cost-free contraceptive coverage as long as it is separate and independent from their own group health plan, which does not include such coverage.[107] In explaining their position, the religious employers insisted that complete noninvolvement in providing coverage and paying for services could be achieved only if single-benefit contraception insurance policies became available in the marketplace.[108] This would take the form of either a government-sponsored group health contraception plan or individual contraception policies and would result in two separate government mandates: one to employers to provide healthcare coverage exclusive of contraception and the other to health insurers to cover solely contraceptive services.[109] Without the creation of separate insurance plans and the concomitant extinguishment of a certification or notice requirement, compromise was not possible.[110] Employees of self-insured plans, petitioners added, could simply convert to contraception-only policies.[111]

These clarifications, the Court proclaimed, dovetail with the Government's confirmation in its opening brief that a written notification procedure for employers with insured plans could be modified to operate in the manner posited in the Court's order without affecting the delivery

105. *BuzzFeedNews Exclusive Interview with President Obama*, YOUTUBE (May. 16, 2016), https://www.youtube.com/watch?v=WVqZ269kUr8 ("I won't speculate as to why they punted, but my suspicion is that if we had nine Supreme Court Justices instead of eight, there might have been a different outcome."); *see also* Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 SAN DIEGO L. REV. 53, 68 n.59 (2016); Ilya Shapiro, *Introduction*, 2015–2016 CATO SUP. CT. REV. 1, 3.

106. *See, e.g.*, 1 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 6.1, Westlaw (database updated Mar. 2017).

107. *Zubik*, 136 S. Ct. at 1560.

108. Supplemental Brief for Petitioners, *supra* note 102, at 4.

109. *See id.* at 4–5.

110. *See id.* at 4.

111. *Id.* at 2.

of contraceptive services.[112] However, the Government's confirmation assumed that some form of employer notification of objection to its insurer or the government—informal or otherwise—would still be necessary.[113] This, of course, runs contrary to the scenario outlined in the Court's hypothetical and the contentions of petitioners.

In any event, this so-called confirmation only had a shelf life of eight days. In its reply brief, the Government unequivocally called for the Court to reject petitioners' new and clarified position.[114] Any separate plan for contraceptive services, the Government argued, is unworkable and the nonprofit petitioners know it.[115] They know it because HHS already considered and rejected contraception-only policies during the initial round of rulemaking.[116] The Government reiterated several of those original grounds for rejection: State laws do not recognize single-benefit policies (other than dental or vision); cost-free contraceptive policies do not satisfy state laws that condition policy approval on the policyholder providing consideration through payment of a reasonable premium; and licensing restrictions, both intrastate and interstate in nature, may prohibit group insurers from selling individual policies.[117] Combined with their unyielding position that some form of notification of claiming an exemption is essential[118] and that contraceptive-only polices place an unjustified burden on women to affirmatively enroll,[119] the Government pleaded with the Court to definitively resolve the challenges originally made to the accommodation and the alternative opt-out mechanisms.[120] But it was not to be. The mirage of a feasible solution imagined by a deadlocked Court[121] managed to linger

112. *Zubik*, 136 S. Ct. at 1560.

113. *See* Supplemental Brief for Respondents, *supra* note 102, at 6–7.

114. Supplemental Reply Brief for the Respondents, *supra* note 102, at 1.

115. *Id.* at 2.

116. *Id.*

117. *See id.* at 3–4.

118. *See id.* at 6–7.

119. *See id.* at 3.

120. *See id.* at 8–11 (contending every one of petitioners' arguments—old and new—would severely undermine the government's compelling interest in ensuring that women receive equal healthcare coverage).

121. Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 129 (2017) (remarking the possibility of settlement advanced by the *Zubik* remand order exists only in the imagination of a deadlocked Court).

for several more months and then suddenly, one January day in 2017, it disappeared.[122]

B. *Obama's Request for Information and Trump's Reversal*

The lingering mirage took the form of a comment period resulting from a Request for Information (RFI) issued by HHS in mid-July 2016.[123] In addition to soliciting comments on how the Court's claim of compromise could practically be effectuated, HHS also requested interested stakeholders to propose alternative accommodation procedures.[124] Any such procedures would not only have to satisfy religious objections but also ensure the seamless delivery of contraceptive care.[125] Fifty-four thousand responses to the RFI were received, but to no avail.[126] On January 9, 2017, HHS threw up its hands and announced it was not modifying the existing opt-out procedures.[127] The Court's attempt at fashioning a compromise was now officially dead. However, it did not take long for another approach to come to life—one clearly intended to expand the scope of the exemption and to limit the reach of the mandate. On May 4, 2017, President Trump, heralding a reversal of the long-held Obama Administration position, issued an executive order directing applicable agencies to consider issuing amended regulations to address conscience-based objections to the mandate.[128] The Attorney General was directed to provide guidance to the agencies in complying with and interpreting federal religious liberty protections.[129] Five months later, the Attorney General's guidance and the amended regulations were announced.[130] These Trump-directed and Attorney General-guided

122. EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36, at 4 (2017), http://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

123. Coverage for Contraceptive Services, 81 Fed. Reg. 47,741 (July 22, 2016).

124. *Id.* at 47,743–44.

125. *Id.* at 47,744.

126. EMP. BENEFITS SEC. ADMIN., *supra* note 122, at 4.

127. *See id.* (concluding no feasible approach has been identified that would resolve the concerns of religious objectors while still ensuring that affected women would receive full contraceptive coverage).

128. *See* Promoting Free Speech and Religious Liberty, Exec. Order No. 13798, 82 Fed. Reg. 21,675, 21,675 (May 4, 2017).

129. *See id.*

130. *See* Memorandum from Jefferson Beauregard Sessions, Attorney Gen., U.S. to All U.S. Attorneys (Oct. 6, 2017), http://www.justice.gov/opa/press-release/file/1001886/download/?utm_medium=email&utm_source=govdelivery. Of the 20 principles enumerated by the Attorney General, 7 specifically invoked the protections of RFRA.

amendments effectively laid the groundwork for dismantling the contraception mandate. First, these interim final regulations (which were effective immediately and which, in pertinent part, were made final a year later) [131] expand the class of individuals and organizations eligible for an automatic religious exemption. Formerly limited to churches and religious orders, any nongovernmental employer is now excused from compliance.[132] Second, a new justification for noncompliance was conceived: "moral

See id.; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,861–62 (Oct. 13, 2017); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792–835 (Oct. 13, 2017). Although this guidance was not officially published until October 2017, it had already been dispensed, as evidenced by a set of draft amended regulations that had been leaked to the media in May. *See* Dylan Scott & Sarah Kliff, *Leaked Regulation: Trump Plans to Roll Back Obamacare Birth Control Mandat*e, VOX (May 31, 2017), http://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation.

131. *Compare* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47833–34 (Oct. 13, 2017) (interim final regulations), *and* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47861–62 (Oct. 13, 2017) (interim final regulations), *with* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57537, 57589–90 (Nov. 15, 2018) (final regulations), *and* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592, 57630–31 (Nov. 15, 2018) (final regulations). *See also* Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *16 n.19, *33 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction and quoting commentary of the federal agencies that the changes were largely "non-substantial technical revisions"), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019 WL 178555, at *8, *24 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction and stating the final rules are nearly identical in substance to the 2017 interim final rules), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019).

132. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,835 (codified at 45 C.F.R. 147.132(a)(1)(i) (2018)). *But see* California v. Health & Human Servs., 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017) (enjoining enforcement of this new regulation), *aff'd in part*, *vacated in part sub nom.* California v. Azar, Nos. 18-15144, 18-15166, 18-15255, 2018 WL 6566752 (9th Cir. Dec. 13, 2018); Pennsylvania v. Trump, 281 F. Supp. 3d 553, 585 (E.D. Pa. 2017) (enjoining enforcement of this new regulation), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), No. 18-1253 (3d Cir. Feb. 15, 2018). As noted previously, these amended interim regulations were finalized in nearly identical substantive form and enjoined again by the same California and Pennsylvania federal courts. *See supra* notes 20, 131.

convictions."[133] Although limited to nonprofit organizations and for-profit, closely held corporations,[134] those with such sincerely held convictions—such as those with religious objections—can avoid offering contraceptive coverage without certification, without notice, and without invoking any procedural mechanism for the hand-off of coverage.[135] The regulations are conspicuously silent on how these exempt employers are to communicate their objections to group plan administrators, insurers, the government, or to employees. How then are employees and eligible dependents of these employees to receive no-cost contraceptive services mandated by Congress? Evidently, through a back door, with access controlled by the whims and discretion of an objecting employer.

Standing the previous opt-out accommodation on its head, the government also concocted a procedure it labeled "optional accommodation,"[136] by which objecting employers certify to their healthcare representative or notify the government of their election to waive their religious or moral objections and facilitate coverage.[137] Upon receipt of the

133. Moral Exemptions in Connection with Coverage of Certain Preventive Health Services, 82 Fed. Reg. at 47,862 (codified at 45 C.F.R. § 147.133(a)(2) (2018)). *But see* California v. Health & Human Servs., 281 F. Supp. 3d at 832 (enjoining enforcement of this new regulation); Pennsylvania v. Trump, 281 F. Supp. 3d at 585 (enjoining enforcement of this new regulation). As noted previously, these amended interim regulations were finalized in nearly identical substantive form and enjoined again by the same California and Pennsylvania federal courts. *See supra* notes 20, 131.

134. Moral Exemptions in Connection with Coverage of Certain Preventive Health Services, 82 Fed. Reg. at 47,862 (codified at 45 C.F.R. § 147.133(a)(1)(i) (2018)). *But see* California v. Health & Human Servs., 281 F. Supp. 3d at 832 (enjoining enforcement of this new regulation); Pennsylvania v. Trump, 281 F. Supp. 3d at 585 (enjoining enforcement of this new regulation). As noted previously, these amended interim regulations were finalized in nearly identical substantive form and enjoined again by the same California and Pennsylvania federal courts. *See supra* notes 20, 131.

135. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,808 (disallowing self-certification or notice required for a new class of exempt organizations).

136. *Id.* at 47,830–31 (codified at 29 C.F.R. § 2590.715-2713A(b) (2018)) (self-insured plans), 47,834 (codified at 45 C.F.R. § 147.131(d)) (insured plans). *But see* California v. Health & Human Servs., 281 F. Supp. 3d at 832 (enjoining enforcement of this new regulation); Pennsylvania v. Trump, 281 F. Supp. 3d at 585 (enjoining enforcement of this new regulation). As noted previously, these amended interim regulations were finalized in nearly identical substantive form and enjoined again by the same California and Pennsylvania federal courts. *See supra* notes 20, 131.

137. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,830–31, 47,834.

certification or notice, the insurer or third-party administrator—much like it did under Obama-era protocols—assumes the obligation to issue or administer separate plans of contraceptive coverage, payment, and notice to employees.[138] This optional accommodation or opt-in is necessary, the federal government now believes, in order to insulate objecting employers from any required involvement in the delivery and payment of contraceptive services.[139] In other words, religious freedom and moral sensibility can be safeguarded only if an employer is given the choice to voluntarily waive religious and moral principles as opposed to being coerced by the government to choose between violating their beliefs or paying a penalty. Remarkably, the government assumed that not one entity with moral objections would actually use this optional accommodation and provide coverage.[140]

One week after these interim final regulations were published, the government formally gave up its defense of the accommodation process, entering into a settlement agreement with scores of nonprofits in which it agreed to pay three million dollars in costs and fees; to acknowledge the Obama-era accommodation process imposes a substantial burden on religious exercise in violation of RFRA; and to terminate all pending and pertinent litigation.[141] Several states soon jumped into the breach, however, and filed suits seeking injunctions against enforcement of the new regulations, contending women would generally lose access while low-income earners would specifically wreak havoc on state coffers by turning to state-funded programs for their care.[142] Two courts granted relief.[143] A

138. *Id.*

139. *See id.* at 47,812. By making the accommodation process optional, objecting employers are no longer required to choose between direct compliance or compliance through accommodation, i.e., opting-out. *Id.*

140. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,854 (Oct. 13, 2017).

141. Settlement Agreement, *supra* note 18, at 3–4, 6–7.

142. *See, e.g.*, Pennsylvania v. Trump, 281 F. Supp. 3d 553, 566–67 (E.D. Pa. 2017), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), No. 18-1253 (3d Cir. Feb. 15, 2018). Delaware, Maryland, New York, and Virginia joined California's challenge to the rules. California v. Health and Human Servs., 281 F. Supp. 3d 806, 813 (N.D. Cal. 2017), *aff'd in part*, *vacated in part sub nom.* California v. Azar, Nos. 18-15144, 18-15166, 18-15255, 2018 WL 6566752 (9th Cir. Dec. 13, 2018). Massachusetts's suit was dismissed for lack of standing. Massachusetts v. U.S. Dep't of Health & Human Servs., 301 F. Supp. 3d 248, 266 (D. Mass. 2018).

143. *See* California v. Health and Human Servs., 281 F. Supp 3d at 814; Pennsylvania v. Trump, 281 F. Supp. 3d at 585.

federal district court in California imposed a nationwide injunction—limited on appeal to the plaintiff states of California, Delaware, Virginia, Maryland, and New York[144]—finding the Government did not establish good cause to excuse proceeding with the notice-and-comment requirement of the Administrative Procedure Act.[145] A federal court in Pennsylvania also granted an injunction in a suit brought by the Commonwealth of Pennsylvania.[146]

The Trump Administration appealed the entry of both preliminary injunctions[147] and simultaneously opened a 60-day after-the-fact comment period.[148] After the expiration of the comment period on December 5, 2017, matters ground to a halt for nearly a year. Then, a predictable course of events unfolded in rapid order: the finalization of rules nearly identical to the interim final rules on the substance of religious and moral exemptions;[149]

144. California v. Azar, 911 F.3d 558, 584 (9th Cir. 2018).

145. *See* California v. Health & Human Servs., 281 F. Supp. 3d at 832. The same district court stayed a similar action brought by the American Civil Liberties Union and a California labor union, pending the disposition of the Government's appeal of the nationwide injunction. Order at *1, ACLU v. Wright, No. 4:17-cv-5772-HSG (N.D. Cal. Mar. 8, 2018), ECF No. 50.

146. Pennsylvania v. Trump, 281 F. Supp. 3d at 585. Nineteen states filed a brief supporting the Commonwealth of Pennsylvania's request for an injunction. Amici Curiae Brief of Massachusetts et al. in Support of Plaintiff's Motion for a Preliminary Injunction at 1, Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017) (No. 2:17-cv-04540-WB), ECF No. 32-1.

147. Notice of Appeal at 1, California v. Health & Human Servs., 281 F. Supp. 3d 806 (N.D. Cal. 2017) (No. 4:17-cv-05783-HSG), ECF No. 142; Notice of Appeal at 1, Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017) (No. 2:17-cv-04540), ECF No. 68.

148. 82 Fed. Reg. 44,792; 82 Fed. Reg. 47,838.

149. *Compare* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47833–-34 (Oct. 13, 2017) (interim final regulations), *and* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47861–62 (Oct. 13, 2017) (interim final regulations), *with* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57537, 57589–90 (Nov. 15, 2018) (final regulations), *and* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57592, 57630–31 (Nov. 15, 2018) (final regulations). *See also* Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *16, n.19, *33 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction and quoting commentary of the federal agencies that the changes were largely "non-substantial technical revisions"), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019

amended requests for injunctive relief in the California and Pennsylvania federal district courts;[150] and the entry of new preliminary injunctions by both courts as the final rules were to go into effect.[151]

In its order, the California district court held the expanded religious exemption has the effect of depriving female beneficiaries, without notice, of their rights to seamlessly provided contraceptive coverage at no cost.[152] The moral exemption, the court declared, was simply contrary to the plain language of the Affordable Care Act.[153] Agreeing with the other circuits (save the Eighth) that had addressed the issue, the court rejected the defendants' argument that sending a certification or notice constituted a substantial burden on religious exercise and reinstituted the Obama-era rules pending a trial on the merits.[154]

WL 178555, at *8, *24 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction and stating the final rules are nearly identical in substance to the 2017 interim final rules), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019).

150. States' Notice of Motion and Motion for Preliminary Injunction, with Memorandum of Points and Authorities at 1, California v. Health & Human Servs., 281 F. Supp. 3d 806 (N.D. Cal. 2017) (No. 4:17-cv-05783-HSG), ECF No. 174 (including Virginia, District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, and Washington); Amended Complaint for Declaratory and Injunctive Relief, Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017) (No. 2:17-cv-04540), ECF No. 89 (by Pennsylvania and New Jersey).

In affirming (but limiting the scope of) the California district court's order enjoining the enforcement of the amended interim regulations, the Ninth Circuit recognized its opinion would have a life expectancy of one month. California v. Azar, 911 F.3d 588, 569 (9th Cir. 2018). The Government's appeal of the Pennsylvania federal district court order enjoining the amended interim rules is now presumably moot.

151. Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *33 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019 WL 178555, at *24 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019).

152. California v. Health & Human Servs., 2019 WL 178555, at *20.

153. *Id.*

154. *Id.* at *24. The injunction applies to the plaintiff states only. *Id.* at *24–25. To further illustrate the Trump Administration's antipathy to the contraception mandate, it had proposed in a separate rule that female employees and other beneficiaries denied coverage by religiously or morally-motivated employers could be considered to be from a "low-income family." 83 Fed. Reg. 25502, 25530 (June 1, 2018). This places women in competition for limited federal dollars with families whose total income does not exceed 100 percent of the government-established poverty guidelines. *See* States' Notice of Motion and Motion for Preliminary Injunction, with Memorandum of Points and

The Pennsylvania federal court likewise reinstituted the Obama-era rules and accommodation, enjoining the finalized Trump rules on a nationwide basis.[155] Reiterating its prior conclusions, the court held the new rules exceeded the scope of the government's authority under the Affordable Care Act and cannot be justified to avoid the unfounded claim that religious exercise is substantially burdened by a certification or notification requirement.[156] The court's comments on the interim final rules—equally applicable to the final rules[157]—are particularly instructive and incisive. Commenting on the remarkable breadth of the exemptions, the court noted their self-effectuating nature eviscerated the congressional mandate.[158] The "Moral Exemption Rule"[159] was particularly insidious.[160] Suppose, the court hypothesized, an employer objected to contraception coverage because of the sincere belief that women do not have a place in the workplace.[161] What recourse does a female employee have? How are she and her covered dependents notified of this supposed moral decision? How can they contest it? Who determines whether the objection is within the bounds of morality?[162] How is it to be defined?[163] As a moral exemption occupies its own regulatory fortification, it must be different in source and content than the religious exemption.[164] If so, how can that be squared with the language

Authorities, *supra* note 150, at 8; Amended Complaint for Declaratory and Injunctive Relief, *supra* note 150, at 28–29.

155. Pennsylvania v. Trump, 2019 WL 190324, at *28–33.

156. *Id.* at *17, *23–25.

157. *Id.* at *17–20.

158. *See* Pennsylvania v. Trump, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017) (finding the new rules are the proverbial exception that swallows the general rule), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), No. 18-1253 (3d Cir. Feb. 15, 2018).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. It is undefined in the regulation. *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47838, 47846 (Oct. 13, 2017).

164. In attempting to justify a separate moral exemption, the drafters of the rules hurled a smorgasbord of reasons against the wall, the specific ingredients including letters of Presidents Washington and Jefferson; an essay by James Madison; a plurality opinion of the Court discussing conscientious objections to the military draft; a couple of comments from congressmen; other federal statutes; and President Trump's recent executive order concerning conscientious objections to the contraception mandate. *See id.* at 47,845–48. How the dictates of conscience mesh with the exercise of religion—either from a constitutional or statutory perspective—is beyond the scope of this Article.

of RFRA that only speaks to religious exercise? And finally, how can a silent and undisclosed exercise of morality (or religion) be squared with an act of Congress that mandates contraceptive coverage?[165] The court's assessment was pointed: "It is difficult to comprehend a rule that does more to undermine the Contraception Mandate or that intrudes more into the lives of women."[166] The "Religious Exemption Rule"[167] fared no better; the court rejected the Government's argument the rule was justified because the old accommodation process substantially burdened religious exercise.[168] According to the court, the Third Circuit's decision rejecting this argument in the case leading up to the *Zubik* remand was still binding, as the Supreme Court's vacation of the judgment was "on other grounds."[169]

So where do we go from here? According to the federal district courts in California and Pennsylvania, the answer is to return to the state of affairs existing before October 6, 2017, the day the Trump Administration published its regulations.[170] Under this disposition, the exemption and

Suffice it to say, it is more often than not a difficult and delicate task. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981); *see also* Welsh v. United States, 398 U.S. 333, 342–43 (1970) (plurality opinion) (distinguishing—for purposes of a military draft statutory exemption—between, on the one hand, religious beliefs and moral convictions held with the strength of more traditional religious convictions and, on the other hand, a personal moral code). Although the Supreme Court performed a bit of a tease in *Hobby Lobby Stores, Inc.*, declaring that Congress had struck a new definitional path in the 2000 amendments of RFRA by effecting "a complete separation from First Amendment case law," it refused to step over the threshold of the door it opened. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014). Instead, the Court resorted to its belief/action model of *Smith*, concluding that anticontraceptive business practices fell comfortably within the action component. *Id.* at 2770 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990)).

165. *See* Pennsylvania v. Trump, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017) (finding the rules inconsistent with the statute), *appeals filed*, No. 17-3752 (3d Cir. Dec. 21, 2017), No. 18-1253 (3d Cir. Feb. 15, 2018).

166. *Id.*

167. *Id.* at 580.

168. *Id.*

169. *Id.*

170. *See* Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *33 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019 WL 178555, at *25 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019). As noted, these decisions have already been appealed. The Authors contend this demonstrates the ongoing need for this legal squall to reach a final resolution, as discussed herein.

accommodation apparatus in place following the *Zubik* remand controls.[171] This return to the status quo ante did not stop the Department of Justice, however, from refusing to oppose subsequent actions challenging the legality of the Obama-era rules. On at least six occasions, the department did not contest efforts by various religious nonprofits to obtain *permanent* injunctions against the enforceability of the "certify-or-notify" procedure.[172] As a result, all these efforts were successful.[173] Six groups of religious nonprofits (and some for-profits) are now permanently excused from the task of opting out of the contraception mandate because the federal government believes that task has untoward and immutable religious consequences. Although these permanent injunctions do not conflict with the newest preliminary injunction against implementation of Trump Administration rules,[174] something has got to give—eventually. Either the contraception mandate is operational and the accommodation procedure protective of an act of conscience or the contraceptive mandate is undercut by extending protection to conscience-violating consequences. Either the

171. *See* California v. Health & Human Servs., 2019 WL 178555, at *17.

172. *See* Geneva Coll. v. Azar, No. 2:12-cv-00207, 2018 WL 3348982, at *3 (W.D. Pa. July 5, 2018); Dordt Coll. v. Azar, No. 5:13-cv-04100, slip op. at 2–3 (N.D. Iowa June 12, 2018); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12 CV 92 DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018) (finding it free to reach any result as a result of the Zubik remand, a magistrate judge invoked the reasoning of the Eighth Circuit (his circuit) in permanently enjoining the Obama-era rules); Reaching Souls Int'l, Inc. v. Azar, No. CIV-13-1092-D, 2018 WL 1352186, at*1–2 (W.D. Okla. Mar. 15, 2018); Catholic Benefits Ass'n v. Azar, No. CIV-14-240-R, CIV-14-685-R, slip op. at 3 (W. D. Okla. Mar. 7, 2018) (including injunctive relief for some for-profit corporations); Wheaton Coll. v. Azar, No. 13-cv-8910, slip op. at 2 (N.D. Ill. Feb. 22, 2018).

173. *See Geneva Coll.*, 2018 WL 3348982, at *3; *Dordt Coll.*, slip op. at 2–3; *Sharpe Holdings, Inc.*, 2018 WL 1520031, at *3–4 (finding it free to reach any result as a result of the *Zubik* remand, a magistrate judge invoked the reasoning of the Eighth Circuit (his circuit) in permanently enjoining the Obama-era rules); *Reaching Souls Int'l, Inc.*, 2018 WL 1352186, at *1–2; *Catholic Benefits Ass'n*, slip op. at 3 (including injunctive relief for some for-profit corporations); *Wheaton Coll.*, slip op. at 2.

Geneva College was part of the *Zubik*-consolidated cases before the Supreme Court. *See supra* notes 68, 86 and accompanying text. Wheaton College got the injunction ball rolling three days after the *Hobby Lobby* decision. *See supra* notes 51–62 and accompanying text.

174. *Geneva Coll.*, 2018 WL 3348982, at *1 n.2; Pennsylvania v. Trump, 2019 WL 190324, at *28 n.27.

position of the states prevails or the revised federal and Trumpian model (or some variation thereof) rules the day.

Granted, issues of standing and compliance with federal rulemaking procedures exist,[175] but nearly three years have passed since the *Zubik* remand. The time for dodging and miraging is over. When the "certify-or-notify" accommodation rule is again before the Supreme Court, the Court should side with the states and uphold its validity. For the reasons expressed in the following Part, the Court should hold RFRA does not compel an exemption to the accommodation process put in place in 2013 and supplemented in 2014.

V. THE PROCESS OF ACCOMMODATION AS A BURDEN ON RELIGIOUS EXERCISE

A. *The Written Equivalent of Raising Your Hand*

The now resurrected Obama-era accommodation of 2014 is equivalent to raising your hand in response to the government's question of whether you want out of the contraception mandate.[176] Raising your hand takes a few seconds, and completing the accommodation process takes no more than five minutes.[177] Government regulators prematurely concluded, upon receipt of the self-certification or notice, exemption from compliance with the mandate is effective,[178] and thereby, objecting organizations are relieved from the substantial burden of choosing whether to live with the mandate and violate their religious beliefs or to disobey the mandate and incur a monetary penalty. Objecting organizations, however, took their position a

175. *Compare* California v. Health & Human Servs., 2019 WL 178555, at *10, *and* Pennsylvania v. Trump, 2019 WL 190324, at *7–10, *with* Massachusetts v. U.S. Dep't of Health & Human Servs., 301 F. Supp. 3d 248, 257–58 (D. Mass. 2018). The courts in *Pennsylvania v. Trump* and *California Health & Human Services* easily found that an injury in fact existed given the impact of the interim rules on state coffers, insofar as the states would have to increase expenditures for state and local programs providing contraceptive services. In contrast, the court in *Massachusetts v. U.S. Department of Health and Human Services* found such injury was speculative, citing a lack of evidence that Massachusetts employers would have availed themselves of the interim final rules, as would be necessary to impact state fiscs.

176. Priests for Life v. U.S. Dep't. of Health & Human Servs., 772 F.3d 229, 250 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

177. Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 554 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015).

178. EBSA FORM 700—CERTIFICATION, *supra* note 40, at 1.

step further. They continued their fight for complete separation from the mandate, manipulating three sentences in *Hobby Lobby Stores, Inc.* to justify the claim that their free exercise rights are substantially burdened by sending either accommodation form and thus enabling sinful conduct by others.[179] This innocent-enabling-act theory of protected religious exercise—floated in dicta by the majority in *Hobby Lobby Stores, Inc.* and finally accepted by the Eighth Circuit in *Sharpe Holdings, Inc.*—became the rallying cry around which religious objectors tried to thwart the will of Congress.

B. *The* Hobby Lobby *Conflation*

The language in *Hobby Lobby Stores, Inc.* that spawned this two-year crusade leading up to the *Zubik* punt is the following:

> The [conscientious objectors] believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide coverage. 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 but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent *in effect* tell the plaintiffs that their beliefs are flawed.[180]

Not only were these passages unnecessary to the Court's holding,[181] they also immunized from judicial scrutiny the legal legitimacy of any

179. *See, e.g.*, Eternal Word Television Network, Inc. v. Sec'y of the U.S. Health & Human Servs., 818 F.3d 1122, 1146 (11th Cir. 2016), *vacated per curiam*, Nos. 14-12696-CC, 14-12890, 14-14239-CC, 2016 WL 11503064 (11th Cir. May 31, 2016), *modified per curiam*, Nos. 14-12696, 14-12890, 14-3239, 2016 WL 11504187 (11th Cir. Oct. 3, 2016); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 941 (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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018); Univ. of Notre Dame v. Burwell, 786 F.3d 606, 620–21 (7th Cir. 2015) (Hamilton, J., concurring), *vacated*, 136 S. Ct. 2007 (2016).

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

181. *See infra* notes 193–202, 216–224 and accompanying text.

purported substantial burden.[182] First manifested in *Wheaton College* three days later,[183] this dicta opened a path by which religious objectors attempted to transform the assessment of substantial burden from one of law to one of religious deference.[184] Judicial construction of a statute would now be out of bounds—deference to theological views, the new norm, and the distinction between sincerely held belief and substantial burden, obliterated.[185]

The Court brought about this doctrinal mutation in dismissing the principal dissent's argument that the connection between employers offering contraceptive coverage and female employees and dependents actually using contraceptives was too attenuated to rank as substantial.[186] This insubstantial link, Justice Ruth Bader Ginsburg argued, is exhibited by the reality that employers do not purchase or procure contraceptives and do not have any say in a woman's decision to use them.[187] The independent decision made by a woman to enroll in no-cost coverage, to seek counseling, to obtain a prescription for drugs or devices, and to use FDA-approved contraceptives are all contingent events that interrupt the chain of causation between offering coverage and burdening religious exercise.[188] Contrary to the majority's assertion, Justice Ginsburg was not questioning the sincerity of the religious nonprofits' anticontraceptive beliefs nor the legitimacy, importance, reasonableness, or content of those beliefs.[189] Rather, she was interpreting and construing a statutory term—*substantial burden*—by appearing to analogize to principles of intervening force and superseding cause.[190] Under this doctrine (which has undergone material changes in recent years), an act of a third party may operate as an active and intervening force in a chain of events tortiously initiated by another.[191] In some circumstances, this operating force may constitute a superseding cause,

182. *See infra* notes 236–44 and accompanying text.

183. *See supra* notes 55–67 and accompanying text.

184. *E.g.*, *Eternal Word Television Network, Inc.*, 818 F.3d at 1144; Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 248–49 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

185. *Priests for Life*, 772 F.3d at 249.

186. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2777 (2014).

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

188. *See id.*

189. *Id.* at 2780.

190. *Id.*

191. *See* RESTATEMENT (SECOND) OF TORTS §§ 441, 442(d), 452(2) (AM. LAW INST. 1965). The material changes are found in RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 34 (AM. LAW INST. 2010).

thereby relieving the original tortfeasor from responsibility.[192] Because a woman's decision to use contraceptives rests entirely with her, it analogously serves as an independent and intervening force that interrupts the original connection between the employer funding a group health plan and the religious objection thereto.

Justice Ginsburg's analogy is misplaced. A woman's decision to take advantage of a health benefit offered by an employer is a natural consequence of the offering. The government wants women to have access to and use cost-free preventive care, including contraceptives.[193] Why would the government force an employer to pay a premium or fund a service that will not be used? It would defeat the purpose of the mandate. The decision to use contraceptives does not break or weaken the original connection between the mandate and religious exercise; it merely completes the expected downstream journey. Why the majority in *Hobby Lobby Stores, Inc.* did not challenge Justice Ginsburg's contention of causal remoteness is unclear. It simply could have relied on its holding that the existence of a substantial burden pivots on whether the government can coerce an employer to engage in a business practice that violates religious beliefs.[194] A traditional religious practice illustrates this point. By papal decree, contraception is a grave moral evil in the Roman Catholic Church.[195] If the government were to coerce a priest teaching a health class at a public high school to espouse the virtues of female contraceptive devices or risk losing his teaching certificate, no one would seriously dispute the substantial burden placed on his religious exercise. The same is true for business decisions motivated by religious beliefs that are now protected under RFRA.[196] By coercing a religiously motivated employer to subsidize an evil human-resource benefit or face a monetary penalty, the government places just as much of a burden on that employer as it would on a priest violating

192. RESTATEMENT (SECOND) OF TORTS § 452(2).

193. *See, e.g.*, Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 235 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 548–49 (7th Cir. 2014) *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015).

194. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2770, 2775.

195. *Priests for Life*, 772 F.3d at 236 ("[T]he Papal Encyclical *Humanae Vitae*, declares that 'any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means'—including contraception and sterilization—is a grave sin." (citation omitted)).

196. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779.

an encyclical decree of the pope.[197] But the Court did not employ this line of reasoning in rejecting Justice Ginsburg's superseding cause analogy.[198] Instead, it fashioned a new framework for evaluating the existence of substantial burden, one that looks to "the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[199] As such an inquiry is religious or moral in nature, the answer is self-evident: it is wrong in *all* circumstances.[200] To hold otherwise, the Court states, would tell religious objectors their beliefs are flawed, a judicial practice long condemned.[201] This approach folds the analysis of substantial burden into a judicial acquiescence of religious sincerity and plausibility.[202] As a result, a substantial burden can now exist because an objecting organization says so.[203]

In embracing this mutation of judicial deference, the Court found *Thomas v. Review Board of Indiana Employment Security Division* dispositive.[204] In that case, Thomas, a Jehovah's witness, worked in a foundry fabricating sheet metal for various industrial uses.[205] When the foundry closed, he was transferred to another job in the company, making turrets for tanks.[206] After being transferred, he realized that his job was weapons related and requested layoff.[207] When his layoff request was denied, he quit, claiming his religious beliefs prohibited him from participating in the manufacture of weapons, and applied for unemployment compensation benefits.[208] At his administrative hearing, he testified he had no religious objection to engaging indirectly in the production of materials that might ultimately be used to fabricate weapons.[209] It was the direct, hands-on role in the manufacture of arms that he found morally repugnant.[210] Benefits

197. *Priests for Life*, 772 F.3d at 236.
198. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2779.
199. *Id.* at 2778.
200. *Id.* at 2757.
201. *Id.*
202. *Priests for Life*, 772 F.3d at 249.
203. *See id.*
204. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2778–79.
205. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 710 (1981).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 711.
210. *Id.* at 714.

were denied, and the case worked its way through the state appellate process.[211] The Indiana Supreme Court upheld the denial of benefits, finding Thomas's testimony that he could, in good conscience, engage in the processing of raw materials that might be used as weapons inconsistent with his opposition to directly participating in the production of armaments.[212] Debunking the authenticity of Thomas's religious beliefs, the court ruled that he had quit voluntarily.[213] The Supreme Court reversed, concluding it is not the role of a court to immerse itself in the logic, correctness, consistency, or comprehensibility of religious belief.[214] The line in the sand Thomas drew was an honest one based on religious conviction, and it is not for the Court to determine whether it is an unreasonable one.[215]

Drawing lines in the sand on what is or is not a religious belief or practice does not, however, bear upon whether a sincere belief or practice is substantially burdened by the government. The legal concept of substantial burden deals with coercive choices.[216] In *Thomas*, it was the government pressuring him to modify his behavior and violate his beliefs in order to receive a government benefit.[217] In *Hobby Lobby Stores, Inc.*, it was the government coercing for-profit corporations to violate their anticontraceptive beliefs by the threat of severe monetary sanctions.[218] Unlike the state of Indiana in *Thomas*, the federal Government in *Hobby Lobby Stores, Inc.*[219] (and Justice Ginsburg)[220] was not disputing the religious nature of the petitioners' beliefs nor was it challenging the consistency or comprehensibility of those beliefs.[221] Rather, the Government was arguing

211. *Id.* at 710–13.

212. *Id.* at 715.

213. *Id.* at 713.

214. *Id.* at 714.

215. *Id.* at 715.

216. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–50, 457 (1988) (rejecting the free exercise claim due to a lack of government coercing individuals into violating their religious beliefs). As RFRA's stated purpose is to restore the substantial burden/compelling interest test that existed before *Smith*, 42 U.S.C. § 2000bb(b)1, coercion is likewise the polestar of a substantial burden analysis under RFRA. *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068, 1070 (9th Cir. 2008).

217. *Thomas*, 450 U.S. at 717–18.

218. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014).

219. Reply Brief for Petitioner at 12, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985095 at *12.

220. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting).

221. *Id.*; Reply Brief for Petitioner, *supra* note 219, at 12.

the burden on religious belief caused by the government pressuring employers to provide contraceptive insurance coverage—a question of law—was insubstantial because the actual decision to claim benefits under the group health plan was not theirs, but the woman's.[222] For whatever reason, the Court recast this remoteness-of-causation argument as a backdoor attack on the plausibility of the religious connection between contraceptive coverage and contraceptive use.[223] In doing so, the Court ignored its finding that business practices compelled or limited by the tenets of religious doctrine constitute an exercise of religion and, more specifically, that the "performance of [the] physical act" of providing contraceptive coverage is immoral and sinful in and of itself[224]—just like a priest advocating contraceptive use.

With substantial burden now reformulated with the connective tissue of religious plausibility, as opposed to an issue of law to be independently examined, it was but a small step for religious objectors to claim another act of contraceptive facilitation—sending a certificate of exemption or a notice of objection—possesses the same immunity from legal scrutiny.[225] This small step immediately found traction with the issuance of an injunction in *Wheaton College*,[226] and a new frontier of litigation quickly crystallized. Only one circuit, however, accepted the "conscience-violating consequences" dogma advanced by religious objectors before the issue slipped into judicial limbo as a result of the *Zubik* punt.[227] The frontier has opened up again with

222. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2789–90 (majority opinion).

223. *See id.* at 2770.

224. *Id.*

225. *See, e.g.*, Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 248-49 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016). In the first case to reach the circuit level after *Hobby Lobby Stores, Inc.*, pro-life organizations contended a court is bound to accept their view on the existence and substantiality of any burden, even if the subjective understanding is at odds with what the law requires. *Id.*

226. *See supra* notes 55–67 and accompanying text.

227. *See generally* 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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018).

the issuance of injunctions prohibiting the enforcement of Trump Administration regulations.[228] The Court should reevaluate the relevance and wisdom of its holding and rationale that launched this crusade, permanently close the gates of this frontier in which the tail of consequences wags the dog of conscience, and hold the written equivalent of raising one's hand to opt out of a government regulation does not substantially burden the very belief that prompted the opt-out in the first place.

C. *Opting Out and Conscience-Violating Consequences: A Theory Unmasked*

The religious accommodation for the contraception mandate is unique in that the government uses a human-resource benefit originated by the employer—group health insurance—to accomplish its mission after the employer has opted out of one aspect of it. This practice lies at the heart of the religious-based objection; employers complain the government has hijacked their insurance plans and made them a vehicle for the delivery of immoral services.[229] Simply excusing them from any involvement in the delivery of these services is religiously insufficient, they contend, because their faith prohibits any complicity in evil and immoral conduct.[230] Is the government's hijacking offensive and distasteful? Perhaps. Is it abhorrent to religious sensibilities? It certainly can be. Can opting out lead to conscience-violating consequences? Absolutely. But does all of this constitute a substantial burden on religious exercise within the meaning of RFRA? Not unless you want to ignore the language of RFRA and Supreme Court precedent on which it is based;[231] not unless you want to create a system in which the religious sensibility of every citizen is a law unto itself;[232] not unless

228. *See* Pennsylvania v. Trump, No. 2:17-cv-04540, 2019 WL 190324, at *4–7 (E.D. Pa. Jan. 14, 2019) (granting preliminary injunction), *appeals filed*, No. 19-1129 (3d Cir. Jan. 23, 2019), No. 19-1189 (3d Cir. Jan. 24, 2019); California v. Health & Human Servs., No. 4:17-cv-05783-HSG, 2019 WL 178555, at *5–9 (N.D. Cal. Jan. 13, 2019) (granting preliminary injunction), *appeal filed*, No. 19-15150 (9th Cir. Jan 28, 2019).

229. E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 460 (5th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016); *Priests for Life*, 772 F.3d at 239.

230. *Priests for Life*, 772 F.3d at 241.

231. *See* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 440 (3d Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) ("Pre-*Smith* free exercise cases, which RFRA was crafted to resurrect, have distinguished between what a challenged law requires the objecting parties to do, and what it permits another party . . . to do.").

232. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)

you want to grant a veto to each person who sincerely believes their excusal from "civic obligations of almost every conceivable kind" is religiously compelled;[233] not unless you want to lay open all government action to strict scrutiny;[234] and not unless you want to stamp this religiously based veto with a government imprimatur in violation of the Establishment Clause.[235]

1. *A Question of Law for the Courts to Decide*

The existence of substantial burden is one for courts to determine as an issue of law.[236] Empowering nonprofit and for-profit corporations with the authority to bind courts on whether a government action substantially burdens religious exercise is unprecedented and injudicious.[237] Congress never intended to vest religious litigants with the power to decide their own fate in the very RFRA action they initiate. In *Bowen v. Roy,* the Court summarily rejected the right of self-determination for religious conscientious objectors.[238] Parents of a Native American child opposed on religious grounds the government's requirement they obtain a social security number for their two-year-old daughter as a condition for receiving welfare benefits.[239] Mr. Roy testified a social security number would rob the uniqueness of her person and prevent her from attaining greater spiritual power.[240] In rejecting the parents' free exercise claim, the Court held the First Amendment, not the parents' sincere religious views, supplies the frame of reference for the adjudication of the substantial burden issue.[241] The same is true with respect to RFRA. Courts, not litigants, determine

(quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *as recognized in* Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

233. *Id.* at 888.

234. *Id.*

235. *See infra* notes 295–304 and accompanying text.

236. *See* E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 458 (5th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016); *Geneva Coll.*, 778 F.3d at 435–36; Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 247 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

237. *See* 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).

238. Bowen v. Roy, 476 U.S. 693, 701 n.6 (1986) (plurality opinion).

239. *Id.* at 695.

240. *Id.* at 696.

241. *Id.* at 701 n.6.

whether a law substantially burdens religious exercise.[242] It is a question of law, not fact.[243] If conscientious objectors can merely assert that a burden is substantial without any possibility of judicial scrutiny, the statutory standard becomes wholly devoid of independent meaning, and courts are reduced to rubber stamps.[244]

2. *A Term of Art*

Authorizing, *obligating*, *incentivizing*, *complicity*,[245] and *hijacking*[246] are a few of the buzz words employed by religious objectors in dramatizing the substantiality of the burden placed on them by signing off on a certification or notice. The specter of government overreach raised by the quasi-criminal connotations of this rhetoric does very little, however, in fleshing out or refining the meaning of a statutory standard. The Court's discussion in *Lyng v. Northwest Indian Cemetery Protection Ass'n* illustrates why measuring the effects or consequences of legislation on religious exercise is imprudent. In *Lyng*, Native American tribes challenged the government's plan to permit timber harvesting in and constructing a road through a portion of a national forest that had traditionally been used by them for religious purposes.[247] They claimed the harvesting and construction violated the Free Exercise Clause by diminishing the sacredness of the area and interfering "with training and ongoing religious exercise of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power."[248] The Court accepted these beliefs as sincere.[249] The Court also acknowledged the substantiality of the burden imposed by the government's proposed actions, variously describing the effects as extremely grave, seriously adverse, and devastating.[250] The interference was so significant that the Court assumed for

242. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 217 (2d Cir. 2015) (quoting *Priests for Life*, 772 F.3d at 247), *vacated*, 136 S. Ct. 2450 (2016).

243. *Id.* (quoting *Priests for Life*, 772 F.3d at 229.

244. *Id.* at 217–18.

245. Brief for Petitioners, *supra* note 15, at 5, 11.

246. Transcript of Oral Argument, *supra* note 98, at 7.

247. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

248. *Id.* at 448.

249. *Id.* at 447.

250. *Id.* at 447, 451.

purposes of its analysis the Native Americans' ability to practice their religion would be virtually destroyed.[251]

Sincere beliefs and catastrophic consequences were not enough, however, to carry the day.[252] Constitutional protections for free exercise cannot be formulated, the Court held, by calculating the effects government action has on religious practices or spiritual development.[253] Satisfying every citizen's religious needs and desires would simply render the workings of government inoperable.[254] In language cited nearly 20 years later to debunk the conscience-violating consequences theory of religious freedom, the Court in *Lyng* asserted:

> A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.[255]

Central to the Court's holding was the absence of government coercion.[256] The government was not forcing the Native Americans to make a choice between violating religious beliefs or paying a penalty for following their faith like it did to Amish parents in *Wisconsin v. Yoder*.[257] In *Yoder* (a case expressly relied on by Congress in enacting RFRA[258]), parents faced the choice of either defying their religious belief if they complied with the state's compulsory education statute or going to jail if they adhered to their belief.[259] The danger presented by compelling these parents to make this choice, the Court held, is precisely what the Free Exercise Clause is designed to

251. *Id.* at 451.
252. *Id.* at 451–52.
253. *Id.* at 451.
254. *Id.* at 452.
255. *Id.*
256. *Id.* at 450–51.
257. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
258. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated as to states and subdivisions by* City of Boerne v. Flores, 521 U.S. 507 (1997).
259. *Yoder*, 406 U.S. at 208–09.

prohibit.[260] In contrast, timber harvesting and road construction, although devastating to the ability to practice religion, had "no tendency to coerce individuals into acting contrary to their religious beliefs."[261] There were no decisions to make, no competing choices to ponder, no threat of civil sanctions, and no criminal penalties looming. Although sympathetic to the Native Americans' situation, the Court was not about to embark on a course of assessing the fallout or consequences of government action—even if frustrating or devastating—on religious practice.[262] Only government coercion of religious exercise permits judicial intervention and a determination whether a substantial burden is present and, if so, justified.[263] As RFRA was intended to restore the Court's free exercise jurisprudence prior to the 1990 decision of *Smith*,[264] there is no doubt the substantial burden standard requires a showing of government coercion.

Recognizing this, eligible organizations argued that sending the self-certification or notice requirement facilitated the commission of a grave moral evil by another, thereby forcing them to choose between following the accommodation process and betraying their religious conscience or disregarding the process and incurring a monetary penalty.[265] Religious objectors conveniently ignore how the contraception mandate works, fail to acknowledge the scope of impermissible coercive government action, and refuse to acknowledge the ramifications of attacking an accommodation procedure. *Substantial burden* is not merely an adjective modifying a noun whose meaning can be gleaned from a dictionary; rather, it is a legal term of art with a specific meaning in which context is paramount.[266]

The contraception mandate is characterized as a mandate for good reason: it is a charge, a command, a decree, an edict directing group health plans and insurers that offer group or individual health insurance to include contraceptive services in their offerings.[267] This congressional directive

260. *Id.* at 218.

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

262. *Id.* at 456.

263. *See id.* at 457 (citing *Yoder*, the Court emphasized that coercion is the sine qua non for evaluating whether a free exercise violation has occurred).

264. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2(a)(5)–(b)(1), 107 Stat. 1488, 1488 (codified as amended at 42 U.S.C. § 2000bb(a)(5)–(b)(1) (2012)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

265. Brief for Petitioners, *supra* note 15, at 3–4.

266. *See* Gedicks, *supra* note 121, at 119.

267. *See* 42 U.S.C. § 300gg-13 (a)(4) (2012).

cannot be waived or excused, even if religious objectors refuse to initiate the accommodation process.[268] If the process is initiated and a form completed and sent, the mandate and supporting regulations ensure coverage not as a result of a decision to opt out, but *in spite* of that decision.[269] They also ensure no further involvement by religious objectors in the delivery of contraceptive services.[270] This separation is accomplished through regulations that:

- require that the group health plan expressly exclude contraceptive coverage from the eligible organization's group health plan[;]
- fully divorce the eligible organization from payments for contraceptive coverage[;]
- require that the insurer or TPA notify the beneficiaries in separate mailings that it will be providing separate contraceptive coverage[;]
- require that the insurer or TPA specify to the beneficiaries in those separate mailings that their employer is in no way "administer[ing] or fund[ing]" the contraceptive coverage . . . ; and
- demand separate mailings and accountings on the part of the insurer or TPA, keeping contraceptive coverage separate for all purposes from the eligible organization's plan that exclude it[.][271]

In short, either process of attaining accommodated status allows eligible organizations to totally remove themselves from the burden of providing contraceptive coverage; to pay nothing toward such coverage; and to have their health insurers or administrators inform their employees that they do not administer, endorse, or fund the program.[272]

Notwithstanding this reality, eligible organizations maintain they are coerced into participating in an accommodation process that facilitates the commission of sinful conduct by others.[273] Mere participation in the accommodation process, they allege, imposes a substantial burden on the

268. E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016), *and vacated sub nom.* Univ. of Dall. v. Burwell, 136 S. Ct. 2008 (2016).

269. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 222 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

270. *Id.*

271. *See* Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 250 (D.C. Cir. 2014) (citing individual regulations), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

272. *Id.*

273. *See* 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).

exercise of their religious faiths.[274] The implausibility of this argument is analogous to a conscientious objector to a military draft claiming the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then "trigger" the draft of another registrant in his place, thereby implicating him in facilitating war.[275] Is the fact the government utilizes an objecting employer's intangible asset—health insurance coverage—to accomplish its public policy goals and also requires the transmission of a single sheet of paper to effectuate the exemption legally burdensome? No. The former is a valid exercise of congressional power; the latter is a ministerial act.[276] Sending the equivalent of a preprinted postcard does not trigger coverage for the simple reason it is already in place. The accommodation paperwork permits the insurer or third-party administrator to continue providing coverage and services, albeit under a different administrative framework.[277] Parties like Bishop Zubik claim they are suffering from the pressure of government coercion, when in fact they are protesting their inability to prevent their healthcare representatives from complying with the law after they opt out.[278] The inviolability of conscience is not at stake, only displeasure that Congress has exercised its constitutional power to provide for the general welfare.

If the Court in *Lyng* would not provide constitutional protection for the performance of religious acts—the burden of which was devastating if not destructive[279]—why would the court safeguard nonreligious, ministerial acts that have no legal effect on the delivery of contraceptive services? It should not. Proof of this is demonstrated by the fact petitioners in *Zubik* could not cite—with one ill-chosen exception—a single precedent that supports the innocent-enabling-act theory of religious exercise. That single exception is *Hobbie v. Unemployment Appeals Commission of Florida,* a case in which an employee was fired for refusing to work on her Sabbath.[280] She was denied unemployment compensation benefits.[281] The state agency

274. *See id.*

275. *See, e.g.*, *Priests for Life*, 772 F.3d at 246 (quoting *Univ. of Notre Dame*, 743 F.3d at 557).

276. *See id.* at 245–47.

277. Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 222 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

278. *See Priests for Life*, 772 F.3d at 245–47.

279. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988).

280. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 138 (1987).

281. *Id.* at 139.

attempted to justify the denial, in part, because her refusal arose after she had begun employment.[282] The Court made quick work of this flimsy argument, holding the First Amendment protects the free exercise rights of employees from government coercion regardless of whether the pertinent religious beliefs are adopted after they are hired.[283] Unconstitutional coercion was brought to bear on Hobbie's choice, the Court concluded, because the employee was forced to choose between fidelity to religious beliefs and forfeiting unemployment benefits or violating religious beliefs by continuing to work.[284] Contrary to the assertion of the *Zubik* petitioners, *Hobbie* does not implicate a difficult question of religious philosophy, namely the circumstances under which an innocent act has the effect of facilitating the commission of an immoral act by another.[285] It deals with the government coercing a choice that burdens the performance of a physical and religious act—observing the Sabbath.[286]

This innocent-enabling-act theory also misconstrues, if not ignores, the purpose of a religious accommodation process. That purpose, according to the Tenth Circuit, is to permit the religious objectors both to avoid a religious burden and to comply with the law.[287] If they wish to avail themselves of a legal means—an accommodation—to be excused from compliance with the mandate, they cannot then rely on the possibility of violating that very same mandate and subjecting themselves to paying a fine.[288] In other words, if the accommodation to opt out of the mandate is invoked, a religious objector cannot simultaneously repudiate the accommodation by effectively opting back in and claiming a penalty for refusing to abide by the mandate.

Moreover, extending the umbrella of legal protection to acts of opting-out effectively creates a religious veto on any legislative or government action. Again, *Lyng* is instructive. Mirroring the language of Justice Sandra Day O'Connor in that case, it surely can be said the contraception mandate is a controversial social welfare program that sparks religious repugnancy in

282. *Id.* at 143–44.

283. *Id.* at 144, 146.

284. *Id.* at 146.

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

286. *Hobbie*, 480 U.S. at 144.

287. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1185 (10th Cir. 2015), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

288. *Id.*

some; moral and spiritual fulfillment in others; and no doubt, a sense of relief, health, and peace for many.[289] Just as the First Amendment applies to all citizens and should not be construed to grant a veto to a select group of religious adherents to undermine public programs, so should RFRA.[290] Once anticontraceptive believers wash their hands of the mandate, they do not then get to control their employees' relationships with other entities willing to provide health insurance coverage to which the employees are legally entitled.[291] Were it otherwise, conscientious objectors could exercise a veto over the administration of the mandate and, indeed, any piece of legislation that had a negative effect on religious sensibilities.[292] Although Congress rejected the dire warnings of anarchy noted by the Court in *Smith* if a substantial burden/strict scrutiny test were to be the law of the land,[293] it

289. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

290. *See id.*

291. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 247, 256 (D.C. Cir. 2014), *vacated per curiam sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

292. *See* Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 225 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

293. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). But this is precisely how then-Judge (now Justice) Kavanaugh viewed the issue. Priests for Life v. U.S. Dept. of Health & Human Servs., 808 F.3d 1, 17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting). Reducing the substantial burden analysis to mathematical symbols, he reasoned that by the government compelling X (providing contraceptive coverage) or allowing Y (submitting an opt-out form), it has placed anticontraceptive religious believers at risk of facing a monetary penalty. *Id.* Like the Eighth Circuit in *Sharpe Holdings, Inc.*, (which cited his dissent with approval) Justice Kavanaugh fails to recognize the act of providing contraceptive coverage violates conscience, unlike the act of opting out of coverage which grants legal absolution from the violation of conscience. Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 941 (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) (mem.) (quoting *Priests for Life*, 808 F.3d at 17), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018).

Then-Judge (now Justice) Gorsuch does not distinguish between conscience-violating acts and the status quo ante demands of legislation placed on others after absolution is granted by sending an opt-out form. Relying on *Thomas v. Review Board of Indiana Employment Security Division,* Justice Gorsuch and his fellow dissenters in *Burwell* view the answer to the substantial burden inquiry as one of a simple deferral to the unquestioned sincere religious belief of those opposed to contraception. Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315, 1317–18 (10th Cir. 2015)

defies belief that it intended the mere certification or notification of conscientious-objector status be weaponized to kill otherwise valid legislation. Government simply cannot afford the luxury of deeming every law or regulation of conduct presumptively invalid and subject to a finding of a compelling interest framed and depicted in the most restrictive fashion possible.[294]

Finally, the insistence by anticontraceptive employers that their employees acquiesce to their religious beliefs is unconstitutional under the Establishment Clause of the First Amendment. In *Estate of Thornton v. Caldor, Inc.*, the Court held a statute that favors one religion over all other interests violates the Establishment Clause because "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[295] Accordingly, the Court struck down a Connecticut statute providing Sabbath observers with an absolute and unqualified right not to work on their Sabbath—for the reason its primary effect impermissibly advances religion.[296] RFRA would suffer a similar fate if it were to be interpreted to permit anticontraceptive beliefs to become the law of the land via a refusal to send a single sheet of paper. Such an interpretation would stamp the government seal of approval on Roman Catholic doctrine decreed by Pope Paul VI over 50 years ago: "We wish to speak to rulers of nations . . . . [D]o not tolerate any legislation which would introduce into the family those [artificial contraceptive] practices which are opposed to the natural law of God."[297] It would also, contrary to the Court's proclamation in *Hobby Lobby Stores, Inc.* that the effect of the accommodation on women

(Hartz, J., dissenting) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981)). Employing a somewhat condescending tone, the dissenters proclaimed any resolution to the contrary is "clearly and gravely wrong," and "will not long survive." *Id.* at 1315, 1317. The Trump Administration attempted to fulfill this prophecy but have been challenged every step of the way. *See supra* notes 143–69 and accompanying text.

In any event, *substantial burden* is a legal term of art. It is not a simple grammatical relation between adjective and noun that can be expressed in X's and Y's, nor is it a concept that can be cloaked in an impenetrable vestment of sincere religious belief.

294. *Smith*, 494 U.S. at 888.

295. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (quoting Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

296. *Id.* at 710–11; *see* McNulty & Zenor, *supra* note 48, at 510.

297. Pope Paul VI, *The Regulation of Birth*, LIBRERIA EDITRICE VATICANA (July 25, 1968), https://w2.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

is precisely zero,[298] eviscerate the will of Congress that no-cost contraception is in the best interests of the country. And finally, it runs afoul of *Cutter v. Wilkinson*, a decision involving RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[299] In *Cutter*, the Court stated that courts must take adequate account of the burdens a requested accommodation may impose on nonrecipients and be satisfied that the statutory accommodations are administered neutrally among different faiths.[300]

Granting a religious veto over effective implementation of the contraception mandate empowers conscientious objectors with the right to insist that, in pursuit of their own interests, others must conform their conduct. It blesses anticontraceptive beliefs with the government's imprimatur while simultaneously burdening nonbeneficiaries of the accommodation (employees and enrollees in the group health plan) from seamlessly receiving no-cost preventive care as envisioned by the ACA. How is HHS to be notified if an eligible organization invokes the exemption?[301] Is it supposed to create a nationwide database that tracks every employer's insurer or third-party administrator?[302] How is the government to perform the administrative tasks necessary to make the permissive accommodation work?[303] Exempting conscientious objectors from the accommodation process demolishes any "room for play in the joints"[304] between RFRA and the Establishment Clause. Unless the Supreme Court rethinks the application of its innocent-enabling-act theory of religious freedom, the joints will freeze in a state of religious favoritism with no thaw possible.

VI. CONCLUSION

Panned as a punt, the per curiam remand by the Court in *Zubik*, giving the parties time to settle the case, failed.[305] The Trump Administration's

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

299. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended 42 U.S.C. § 2000cc (2012)).

300. Cutter v. Wilkinson, 544 U.S. 709, 709 (2005).

301. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2815 (2014) (Sotomayor, J., dissenting).

302. *Id.*

303. *See id.*

304. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970).

305. *See generally* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,

mutation of the contraception mandate and opt-out procedures is doomed to failure.[306] The accommodation framework put into place in 2013 and supplemented in 2014—weeks after the *Wheaton College* injunction—has now been revitalized and is back in regulatory play with state governments leading the charge.[307] It is incumbent upon the Court to confront, once and for all, the validity of the Obama-era accommodation procedures, particularly the "certify-or notify" rule. The future of the contraception mandate is at stake, and the need for administrative certainty, essential. And when it does confront the issue, the Court must spurn the unfounded *Hobby Lobby Stores, Inc.* predicate that gave rise to the arguments of Zubik and like-minded conscientious-notification objectors; recognize that substantial burden is a question of law, not theological fact; and declare RFRA does not vest individuals with a right to veto a congressional mandate and attendant regulations. Although upset by the hijacking of one of their human-resource benefits to further a social welfare program they find religiously distasteful, religious objectors cannot legally transform their anger into a cognizable substantial burden. If that were to be the case, "government simply could not operate."[308] There is no exemption to the accommodation process.[309] Although the Establishment Clause serves as a backstop against a contrary result, the inevitable intervention of the Court lies with interpreting and construing a term of art—*substantial burden*—that is guided by precedent and tradition. This legal term of art has never been applied in an accommodation context to gut underlying legislation. It should not now. At the end of the day, the certification and notification components of the accommodation process create plenty of room in the joints for religious acts of conscience (as opposed to innocent-enabling acts yielding religious disfavor) to coexist with the acts of third parties mandated to follow the provisions of law.

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) (mem.), *remanded sub nom. to* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDN, 2018 WL 1520031, at *3–4 (E.D. Mo. Mar. 28, 2018) (showing inability to settle).

306. *See supra* Part V.C.

307. *See supra* Part V.B.

308. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

309. *See* 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).