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## My Body is Not My Choice Anymore? How Conscience Protections for Doctors Violate an Individual's Right to Use Contraceptives and the Establishment Clause

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# MY BODY IS NOT MY CHOICE ANYMORE? HOW CONSCIENCE PROTECTIONS FOR DOCTORS VIOLATE AN INDIVIDUAL’S RIGHT TO USE CONTRACEPTIVES AND THE ESTABLISHMENT CLAUSE

WANYING YANG\*

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## I. INTRODUCTION

After a month of waiting, Evann finally met her gynecologist for a consultation on her first intrauterine device (IUD).<sup>1</sup> However, before Evann told the gynecologist her request and symptoms, the gynecologist emphasized she was in a Catholic hospital and that they only prescribe oral contraceptives to patients with heavy cramping.<sup>2</sup> The gynecologist then passed Evann an unofficial paper with an IUD provider's number and expressed sorrow regarding Evann's decision to use contraceptives.<sup>3</sup> Evann walked out of the hospital without any information on the IUD, but instead with frustration and shame.<sup>4</sup>

Evann's story is common in the United States. After the Supreme Court ruled on *Roe v. Wade*, states and the federal government enacted laws known as "conscience clauses" to balance two fundamental rights – the right to contraceptives and the right to religious freedom.<sup>5</sup> Conscience clauses allow healthcare providers, such as doctors, pharmacists, and nurses, to legally refuse to provide reproductive healthcare due to religious or moral beliefs.<sup>6</sup> Twelve states have enacted laws to protect doctors from being liable for

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1. See Evann Normandin, *Catholic Hospitals Can Deny Patients Contraception. This Is My Story*, REWIRE NEWS (May 24, 2019), <https://rewire.news/article/2019/05/24/catholic-hospitals-deny-contraception/> (demonstrating the length of time the patient had to wait for an appointment for contraceptive services).

2. See *id.* (showing how the doctor with religious beliefs rejected the patient who requested contraceptive services).

3. See *id.* (illustrating the religious doctor had a workaround solution for her conscience objection).

4. See *id.* (presenting the emotional impacts on the patient after being rejected for contraceptive services by the doctor).

5. See *Roe v. Wade*, 410 U.S. 113, 114 (1973) (holding that under the Due Process Clause of the Fourteenth Amendment, the right to privacy includes an individual's right to choose whether to have an abortion); see also Esther Ju, Comment, *Unclear Conscience: How Catholic Hospitals and Doctors Are Claiming Conscientious Objections to Deny Healthcare to Transgender Patients*, 2020 U. ILL. L. REV. 1289, 1293-94 (2020) (demonstrating the background of where conscience clauses started).

6. See Ju, *supra* note 5, at 1293-94 (explaining how conscience clauses apply to doctors).

refusing to provide contraceptives.<sup>7</sup> In 2018, the U.S. Department of Health and Human Services (HHS) created a new Conscience and Religious Freedom Division, and the Trump administration enacted a nationwide “Conscience Rule,” which allows healthcare workers to opt out of procedures that violate their personal or moral beliefs.<sup>8</sup> The rule indirectly authorizes discrimination against an individual who requests contraceptives and restricts an individual’s access to reproductive health services.<sup>9</sup>

Catholic-affiliated healthcare systems are expanding at the same rate as the scope of conscience clauses.<sup>10</sup> By 2016, the number of Catholic hospitals increased by twenty-two percent, and four of the ten largest health systems are now affiliated with Catholic churches.<sup>11</sup> The increased merging of secular and religious hospitals is even more concerning, as the new hospitals are more likely to follow religious directives.<sup>12</sup> The growing number of religious hospitals impedes individuals’ access to reproductive services because when individuals are admitted to hospitals, they often do not know whether hospitals are religiously affiliated.<sup>13</sup>

This Comment argues that current state and federal conscience clauses that allow doctors to refuse to provide contraceptive services due to religious or moral beliefs are unconstitutional, since the clauses violate an individual’s right to contraceptives and the Establishment Clause.<sup>14</sup> Part II illustrates the

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7. See *Conscience and Refusal Clauses*, REWIRE NEWS (Sept. 12, 2018), <https://rewire.news/legislative-tracker/law-topic/conscience-and-refusal-clauses/> (presenting the number of states that have conscience clauses related to contraceptives).

8. See Ju, *supra* note 5, at 1297-98 (describing the recent government’s actions for promoting religious freedom).

9. See Lawrence Gostin, *The “Conscience” Rule: How Will It Affect Patients’ Access to Health Services?*, JAMA NETWORK (May 15, 2019), <https://jamanetwork.com/channels/health-forum/fullarticle/2759640> (emphasizing that the rule discriminates against women and hurts women’s right to contraceptives).

10. See Ju, *supra* note 5, at 1297-98 (asserting that the number of Catholic hospitals is increasing).

11. See Frank Brodhead, *Growing Number of Catholic-Run Hospitals Raises Concerns*, 119 AM. J. NURSING, Dec. 2019, at 15 (stating Catholic hospitals are common health providers in the United States).

12. See Ju, *supra* note 5, at 1298 (detailing the negative effects on individuals because the merging results in more religious hospitals).

13. See Brodhead, *supra* note 11 (emphasizing the negative effect that the growth of Catholic hospitals has had on women).

14. See U.S. CONST. amend. XIV (prohibiting the government from depriving any person of life, liberty and property without the due process of law); *see also* U.S. CONST. amend. I (prohibiting Congress from promoting certain religions).

establishment of the right to use contraceptives and the framework of the *Lemon* test.<sup>15</sup> Part II also examines the historical development of conscience clauses after *Roe v. Wade* established an individual's right to abortion.<sup>16</sup> Part II further discusses current conscience clauses and the effects of such restrictions on individuals.<sup>17</sup>

Part III demonstrates how conscience protections for doctors are unconstitutional by applying the Due Process framework established by the Supreme Court and examining current state conscience clauses and the federal Conscience Rule.<sup>18</sup> Further, Part III reviews the unconstitutionality of current conscience clauses under the *Lemon* test.<sup>19</sup> Part IV recommends that the federal government should permit oral contraceptives to be over-the-counter medicine.<sup>20</sup> Part V concludes by reiterating how current conscience clauses are unconstitutional because the clauses violate an individual's right to contraceptives and the Establishment Clause.<sup>21</sup>

## II. BACKGROUND

### A. Definition of "Contraceptives"

The term "contraceptives" covers various methods to prevent the implantation of a fertilized egg.<sup>22</sup> Barrier-method contraceptives, such as condoms, prevent sperm from uniting with the egg, whereas birth control

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15. See *infra* Part II (demonstrating how the Supreme Court established the right to use contraceptives as a fundamental right and discussing how to apply the *Lemon* test).

16. See *infra* Part II (presenting conscience clauses that have passed Congress); see also *Roe v. Wade*, 410 U.S. 113, 114 (1973) (holding that under the Due Process Clause of the Fourteenth Amendment, the right to privacy includes an individual's right to choose whether to have an abortion).

17. See *infra* Part II (illustrating how the broad scope of current conscience clauses hurts individuals' rights to contraceptives).

18. See *infra* Part III (arguing that current conscience clauses are not narrowly tailored to achieve compelling government interests).

19. See *infra* Part III (showing how current conscience clauses do not satisfy the three prongs of the *Lemon* test).

20. See *infra* Part IV (proposing a solution for the conflict between religion and an individual's need for contraceptives).

21. See *infra* Part V (concluding that current conscience clauses are unconstitutional).

22. See Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237, 246 (2006) (stating that contraceptives are used to prevent pregnancy and pregnancy begins with the implantation of a fertilized egg in the womb).

pills suppress ovulation and are commonly used by individuals.<sup>23</sup> Emergency Contraceptives (EC) prevent ovulation and the implantation of the egg if it is fertilized, which can be contrasted with mifepristone, which is an abortifacient that ends the pregnancy.<sup>24</sup> Although people have religious or moral beliefs regarding when a baby's life begins, the American College of Obstetricians and Gynecologists has clarified that pregnancy begins with a fully implanted fertilized egg in the womb.<sup>25</sup> The Supreme Court has also recognized "contraceptives" as devices or medication that prevent the fertilization or implantation of an egg in a womb.<sup>26</sup> Under this definition, contraceptives are legally and functionally distinct from abortion.<sup>27</sup>

This Comment will specifically focus on non-emergency contraceptives that require prescriptions from doctors, such as birth control pills and IUDs.<sup>28</sup> Many jurisdictions have enacted conscience clauses, which permit doctors to refuse to provide contraceptive services based on their religious or moral beliefs.<sup>29</sup> These clauses hurt an individual's access to contraceptives.<sup>30</sup>

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23. *See id.* (emphasizing that different types of contraceptives all have one purpose to prevent the implantation of a fertilized egg in the womb).

24. *See id.* at 246-47 (explaining that contraceptives are used to prevent pregnancy and not to end a potential life); *see also* Kelly Lyall & Nicholas Schneider, *Access to Contraception*, 13 GEO. J. GENDER & L. 145, 163 (2012) (stating that the medical definition of contraceptives indicates that oral contraceptives have no inherently abortive effect).

25. *See* Miller, *supra* note 22, at 249-50 (asserting that under the medical definition, contraceptives do not end a potential life).

26. *See id.* at 250 (showing that under the legal definition, contraceptives do not end a potential life).

27. *See id.* (stating abortion intends to end a life, but contraceptives intend to prevent pregnancies).

28. *See infra* Part III (discussing the unconstitutionality of conscience clauses because they allow doctors to refuse to prescribe contraceptives based on conscience objections).

29. *See* MISS. CODE ANN. § 41-41-215 (West 1999) (stating health providers may refuse to provide care based on their conscience); *see also* KAN. STAT. ANN. § 65-443 (West 2012) (allowing doctors to refuse to provide medical care if they reasonably believe the result will terminate pregnancy).

30. *See* Sarah Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 YALE J.L. & FEMINISM 93, 95 (2017) (demonstrating how conscience clauses burden individuals with time, emotional harm and health risks).

*B. The Right to Use Contraceptives as a Fundamental Right Protected by the Due Process Clause of the Fourteenth Amendment*

Individuals in the United States have made substantial efforts to fight for the access to contraceptives since 1916 when Margaret Sanger opened the first birth control clinic in the United States, against governmental pressure.<sup>31</sup> In 1965, the Supreme Court struck down the Comstock Act in *Griswold v. Connecticut* after its nearly ninety-year governance.<sup>32</sup> The Court also legalized the use of contraceptives among married couples in *Griswold* and recognized that the protection of marital sexual intimacy fell within the right to privacy, which is a fundamental right under the Due Process Clause of the Fourteenth Amendment.<sup>33</sup> Further, in 1972, the Supreme Court expanded the right to use contraceptives to unmarried individuals in *Eisenstadt v. Baird*.<sup>34</sup> The Court concluded, under the Equal Protection Clause, that the statute discriminated against unmarried individuals by blocking their access to contraceptives without a fair and substantial legal reason.<sup>35</sup>

The Court did not decide which level of scrutiny applied to the right to contraceptives until *Carey v. Population Services International*.<sup>36</sup> In this case, the Court held that any state regulation related to contraceptives must be narrowly tailored to achieve compelling governmental interests, and the Court affirmed that strict scrutiny review applies to the right to contraceptives.<sup>37</sup> The Court also expanded the legal protection for using

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31. See Dennis Hodgson, *Review of A History of the Birth Control Movement in America*, by Peter C. Engelman, POPULATION & DEV. REV. 38, no. 3, 561, 562-5625612 (Sept. 2012) (describing major birth control movements led by women beginning in 1914 until 1965).

32. See Comstock Law, ch. 258, § 2, 17 Stat. 598 (1873) (stating no one shall distribute contraceptive information); see also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that the state law forbidding the use of contraceptives was unconstitutional because it intruded on the right of marital privacy).

33. See *Griswold*, 381 U.S. at 485 (concluding that the marriage relationship is within the zone of privacy protected by the Constitution).

34. See *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (holding that single persons have the same right to contraceptives as married couples under the Equal Protection Clause).

35. See *id.* at 447 (recognizing that states could not treat individuals differently by using classifications that are irrelevant within the purpose of the legislation).

36. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 678 (1977) (finding that states need to have compelling governmental interests that are narrowly tailored to regulate contraceptives).

37. See *id.* at 696 (holding the New York statute was unconstitutional for lack of a compelling governmental interest).

contraceptives to include selling and distributing contraceptives.<sup>38</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court further explained that placing a substantial obstacle in the path of individuals seeking an abortion at any point before viability constitutes a substantial burden.<sup>39</sup> The definition of substantial burden was applied again in *Whole Woman's Health v. Hellerstedt*, where the Court held that a state statute was unconstitutional because it required any abortion provider to have admitting privileges at a hospital within thirty miles of the abortion clinic.<sup>40</sup> The Court believed the statute substantially burdened individuals because the enforcement of the statute disqualified half of the abortion clinics in Texas, which limited an individual's access to abortion services.<sup>41</sup> The Court asserted that the significant number of abortion clinics forced to close could not meet the legitimate governmental interest of promoting individuals' health and safety.<sup>42</sup> In *Planned Parenthood v. Danforth*, the Court held that a statute allowing a husband to refuse his wife's abortion without his consent was unconstitutional because the wife is the primary decision maker of her own body.<sup>43</sup>

Although the Supreme Court upheld an abortion conscience clause in *Doe v. Bolton*, the Court has also stated that the government has a less legitimate interest in contraceptives because the government does not have a compelling interest in the protection of potential life from contraceptives.<sup>44</sup>

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38. See *id.* (asserting the government needs a compelling interest to regulate the sale and distribution of contraceptives).

39. See *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (stating a statute that placed a substantial obstacle in the path of an individual's choice when exercising their fundamental rights was unconstitutional).

40. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (holding that the statute was unconstitutional because the state did not prove a compelling interest to substantially burden an individual's access to abortion).

41. See *id.* at 2313 (asserting a substantial burden is restricting or limiting an individual's access to reproductive services that women are entitled under the Due Process Clause).

42. See *id.* at 2311 (stating the statute did not significantly help health-related problems or have a legitimate interest in protecting women's health).

43. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (holding that the state lacked authority to give the husband the veto power to refuse abortion).

44. See *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (finding that under a Georgia statute, health institutions and providers can refuse to provide abortion services for moral or religious reasons); see also *Carey v. Population Serv. Int'l*, 431 U.S. 678, 695 (1977) (asserting that the state's interests in protecting potential life are clearly more implicated in the decision of abortion than in the decision of contraceptives).



Through these decisions, the Court has decided that individuals have a right to abortion prior to viability under the Due Process Clause of the Fourteenth Amendment, but the government may restrict abortion post-viability.<sup>45</sup> The right to use contraceptives has considerably higher protection under the Fourteenth Amendment than the right to abortion, since contraceptives are used to prevent the fertilization or implantation of an egg in a womb rather than to end a potential life.<sup>46</sup>

*C. The History of Religious Exemption Laws, the Establishment Clause, and the Lemon Test*

In 1973, the Supreme Court held that the right to an abortion is a fundamental right protected by the Constitution in *Roe v. Wade*.<sup>47</sup> Only weeks after the ruling, Congress enacted the Church Amendment, which permits health providers receiving federal loans to refuse to provide abortion services if they have religious or moral objections.<sup>48</sup> States started to follow Congress by creating similar conscience laws.<sup>49</sup> In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), prohibiting the government from substantially burdening an individual's exercise of religion without a compelling interest.<sup>50</sup> The Act still applies to states and the federal government, even though the Supreme Court has held it is unconstitutional because RFRA is not confined to any specific agency and contradicts the principle of separation of powers.<sup>51</sup> RFRA crossed the line between Congress and the Judiciary because Congress used RFRA to determine what constitutes a Constitutional violation, when only courts have the power to do

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45. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (overturning the trimester framework in *Roe* and drawing the line for governmental interference between pre-viability and post-viability).

46. See *Miller*, *supra* note 22, at 253-54 (distinguishing the right to contraceptives from the right to abortion under the Due Process Clause).

47. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that the right to privacy extends to cover the right to abortion).

48. See 42 U.S.C. § 300a-7(b)(1) (2018) (establishing health providers' right to refuse to provide or perform abortions based on conscience objections).

49. See *Stephens*, *supra* note 30, at 99 (elaborating on how the Church Amendment opened the door for conscience clauses).

50. See 42 U.S.C. § 2000bb-1(a) (2018) (defending an individual's religious freedom against substantial government burdens).

51. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 685 (2014) (finding the state substantially burdened the plaintiff's religious exercise under RFRA); see also *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (holding RFRA exceeds the scope of Congress' enforcement power).

so.<sup>52</sup>

Congress expanded the scope of conscience protections by passing the Coats-Snowe Amendment in 1996, which prohibits governmental discrimination against any hospital that refuses to provide abortion training.<sup>53</sup> Many medical professionals lost the opportunity to learn essential medical knowledge and to train for abortion procedures under this Act.<sup>54</sup> In 2005, the Weldon Amendment extended these legal protections to health entities and included refusing to provide or reference abortion within the definition of “discrimination”.<sup>55</sup> Finally, the Affordable Care Act of 2010 has a narrow exception for conscience objections, which allows church organization employers to opt out of contraceptive coverage for female employees based on their religious beliefs.<sup>56</sup> The exception now has been promulgated by the Department of Health and the Supreme Court to any employer with religious or moral objections.<sup>57</sup>

Freedom of religion has long been known as a fundamental right protected by the Constitution.<sup>58</sup> The Free Exercise Clause prohibits the government from interfering with religious beliefs and practices.<sup>59</sup> However, religious freedom is not absolute.<sup>60</sup> The government may regulate the exercise of religion if doing so does not substantially infringe on an individual’s religious freedom.<sup>61</sup> The Establishment Clause further prohibits the

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52. See *Flores*, 521 U.S. at 519 (stating Congress was only given the power to enforce, not the power to determine a constitution violation).

53. See 42 U.S.C. § 238n (2018) (protecting religious institutions against governmental discrimination).

54. See REWIRE NEWS, *supra* note 7 (emphasizing negative effects of the Coats-Snowe Amendment).

55. See Consolidated Appropriations Act of 2005, Pub. L. No. 447, tit. V, § 508, 118 Stat. 2809 (2004) (expanding the scope of protection for religious institutions).

56. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (permitting a narrow exception only for church employers).

57. See Pub. L. No. 111-152, 124 Stat. 1029 (expanding the religious exception to non-profit organizations); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 683 (2014) (extending the conscience exception to for-profits employers); see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) (allowing the Department to expand the exception to any employer).

58. See U.S. CONST. amend. I (establishing people’s freedom of religion).

59. See *id.* (stating Congress shall make no law to prohibit the free exercise of religion).

60. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (recognizing the First Amendment does not give an absolute right to freedom to act).

61. See *id.* at 304 (affirming that this conduct was subjected to regulations).

government from promoting one religion over another religion or non-religion.<sup>62</sup> The government may interfere with religious practices if the regulation in question has a secular purpose and is considered neutral under the Establishment Clause.<sup>63</sup> For example, in *Lynch v. Donnelly*, the city's regulation that allowed a Santa Claus house and a Christmas tree to be displayed in the center of the shopping district was constitutional because the regulation was motivated by a secular purpose for holiday decorations.<sup>64</sup>

In 1971, the Supreme Court established the *Lemon* test to examine the neutrality of government regulations.<sup>65</sup> Under the *Lemon* test, a statute must (1) have a secular legislative purpose; (2) have a principle or primary effect that will not promote or inhibit religion; and (3) not foster an excessive entanglement between government and religion.<sup>66</sup> If any of these three prongs are not met, a statute is unconstitutional.<sup>67</sup> The Court in *Lemon* further explained that the legitimate purpose examined by the test must be the actual purpose that motivated the law and must not be a sham.<sup>68</sup> The Court determines the primary effect of the law by examining whether there is a crucial symbolic link between the government's purpose and religion, and whether the statute impermissibly advances or prohibits a particular religious practice.<sup>69</sup> Finally, the Court interpreted excessive entanglement

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62. See U.S. CONST. amend. I (prohibiting Congress from establishing religion).

63. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (asserting the First Amendment emphasizes governmental neutrality).

64. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (finding the city's action had a secular purpose because it was not motivated by wholly religious considerations, even though it had some religious factors).

65. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating if the regulation violates any of the three prongs, the regulation is unconstitutional under the Establishment Clause).

66. See *id.* (detailing the three prongs in the test to explain factors courts need to examine).

67. See *id.* at 615 (emphasizing the Court must examine all three prongs to ensure the regulation passes the *Lemon* test).

68. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (concluding that the statute that authorized teachers to have one minute of silence during every school day for meditation or voluntary prayer had no secular purpose, because the state intended to return voluntary prayer to public schools).

69. See *Grumet v. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 81 N.Y.2d 518, 528 (N.Y. 1993) (holding that statute allowing only Hasidic children to attend the public school created the symbolic union between the government and the religion, which indicated an endorsement by the government of that religion); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (finding that the statute that required non-religious employees and employers to absolutely accommodate Sabbath observers at any

by looking at “the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the resulting religious authority.”<sup>70</sup> The Court has found only a comprehensive, discriminating, and continuing state surveillance to ensure that such regulation has a secular purpose, rather than normal administrative procedures, constitutes an excessive government entanglement with religion.<sup>71</sup>

Even though the Supreme Court has used the *Lemon* test to decide major cases involving religion, the Court has never applied the test to any case involving conscience clauses that regulate reproductive health care.<sup>72</sup>

#### *D. Current State and Federal Conscience Clauses for Contraceptive Services*

Currently, forty-six states have conscience clauses for abortion, and twelve states allow doctors to refuse to provide health care related to contraceptives.<sup>73</sup> The conscience clauses for contraceptives can be divided into three categories.<sup>74</sup> In the first category, states allow any health provider with a conscience objection to refuse to provide contraceptive services.<sup>75</sup> For

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expense violated the Establishment Clause for its advancing religious effect).

70. See *Lemon*, 403 U.S. at 615 (detailing the elements to examine for the third prong of the *Lemon* test).

71. Compare *id.* at 619 (stating the government entanglement with religion is fostering when the government continues surveillance of regulation to keep its secular purpose), with *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762 (1976) (asserting the statute did not foster the government entanglement with religion because the state only provided aid for secular activities and for essential secular educational functions), and *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (stating the tax exemption did not foster a government entanglement with religion because it restricted the fiscal relationship between the state and the church).

72. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 683 (2014) (deciding the case through RFRA); see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) (analyzing the contraceptives mandate that allows employers to opt out of contraceptive coverage due to religious or moral objections under administrative procedures).

73. See *Refusing to Provide Health Services*, GUTTMACHER INST. (Feb. 1, 2021), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> (listing the states that have conscience clauses with different standards for abortion and contraceptive services).

74. See *id.* (comparing conscience clauses to show differences between standards and requirements between states).

75. See IDAHO CODE ANN. § 18-611 (West 2011) (stating health professionals can refuse to provide care if the requested care violates their conscience).

example, in Illinois, physicians can refuse to perform, assist, suggest, refer to, or participate with any form of medical care based on their conscience objections.<sup>76</sup> In the second category, states narrow the scope by only allowing private institutions or physicians with conscience objections to turn patients away.<sup>77</sup> For example, in Tennessee, the statute allows private institutions, physicians, and their employees to refuse to provide contraceptive services, procedures, and information because of their conscience objections.<sup>78</sup> In the last category, even though states allow doctors to refuse to provide care, they also require institutions to establish protocols to help patients find alternative available service providers in a timely manner.<sup>79</sup> For example, in New York, regulations require private healthcare providers who refuse to provide care to transfer patients promptly to other providers willing to offer the requested services.<sup>80</sup>

In 2019, the Trump Administration re-enacted a Conscience Rule that was rescinded by the Obama Administration.<sup>81</sup> The rule permits health providers to opt out of providing care or services that violate their conscience.<sup>82</sup> The rule is clearly not narrowly tailored and expands the conscience exemption to an unlimited and unprecedented scope.<sup>83</sup> Currently, the rule has been vacated by the Southern District Court of New York on the grounds that the Department of Health lacks the authority to implement the rule.<sup>84</sup> Although

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76. See 745 ILL. COMP. STAT. ANN. 70/2 (2017) (allowing doctors to reject patients without any limit).

77. See COLO. REV. STAT. ANN. § 25-6-102 (West 2010) (allowing private health providers with conscience objections to refuse to provide contraceptive services).

78. See TENN. CODE ANN. § 68-34-104 (West 2019) (stating that private health institutions and providers can use their conscience objections to refuse to provide contraceptive services to patients without any liability).

79. See CAL. BUS. & PROF. CODE § 733 (West 2014) (requiring employers to ensure patients have timely access to prescriptions if their requests for prescriptions are rejected for doctors' conscience).

80. See N.Y. PUB. HEALTH LAW § 2994-n (McKinney 2010) (stating private hospitals and health care providers with conscience objections need to promptly transfer responsibility for the patient to another individual health care provider who is willing to offer the rejected service).

81. See Gostin, *supra* note 9 (demonstrating the Obama administration found the rule problematic and not ready to be enacted).

82. See Protecting Statutory Conscious Rights in Health Care; Delegations of Authority, 84 Fed. Reg. at FR23170-71 (expanding this conscience clause nationally).

83. See Gostin, *supra* note 9 (explaining the broad scope of the rule that includes performing, consulting and referring health services to women).

84. See *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp.

this rule strongly protects health workers' freedom of religion, it also seriously jeopardizes an individual's right to seek and to obtain reproductive services.<sup>85</sup>

### III. ANALYSIS

#### *A. Current State and Federal Conscience Clauses Violate an Individual's Fundamental Right to Contraceptives Because the Clauses are Overbroad and Obstruct an Individual's Access to Contraceptives.*

Current State and Federal conscience clauses are unconstitutional because they violate the Due Process Clause.<sup>86</sup> Conscience clauses cannot pass strict scrutiny because the government does not have a compelling interest to interfere in an individual's access to contraceptives and the clauses are not narrowly tailored to only express the interest.<sup>87</sup> A conscience clause must have a compelling governmental interest because it affects an individual's personal decision regarding their own body.<sup>88</sup> In *Carey v. Population Services International*, the Court held a statute that prohibited dispensing contraceptives to minors for health concerns lacked a compelling government interest because a simple health concern was not enough to interfere with an individual's constitutional right to use contraceptives.<sup>89</sup> The purpose of state and federal conscience clauses is to protect health providers' right to freedom of religion and to prohibit all forms of discrimination, coercion, and liability upon such persons or entities who hold

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3d 475, 497, 519 (S.D.N.Y. 2019) (vacating the final conscience rule in its entirety because the Department of Health and Human Services lacks the (rulemaking) authority to enact such rule).

85. See Ju, *supra* note 5, at 1296, 1312-1313 (asserting conscience clauses may cause individuals to spend more time and money on traveling to find alternative available services and expose them to more health risks due to the delayed care).

86. See U.S. CONST. amend. XIV (prohibiting the government from depriving any person of life, liberty and property without the due process of law).

87. See also *Carey v. Population Serv. Int'l*, 431 U.S. 678, 693-94 (1977) (holding that the statute prohibiting the sale or distribution of contraceptives to minors was unconstitutional because it was not narrowly tailored and justified by a compelling government interest).

88. See *Carey*, 431 U.S. at 684 (noting that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to . . . contraception").

89. See *id.* at 689-90 (stating the statute prohibiting the sale and distribution of contraceptives to minors did not substantially relate to the goal of promoting minors' health).

different moral or religious beliefs.<sup>90</sup> Even though current conscience clauses do not include any term directly regulating an individual's health, the effects of these clauses inevitably interfere with an individual's choice regarding their own body.<sup>91</sup> The government needs to show that its compelling interest outweighs the negative effects of conscience clauses' interference with an individual's access to contraceptives.<sup>92</sup>

The Supreme Court held that the government can only regulate contraceptive services by compelling interests when regulating such reproductive services promotes individuals' health or protects potential life.<sup>93</sup> In *Carey v. Population Services International*, the Court found the state could not justify a compelling interest for the statute that prohibited the distribution of contraceptives to minors, since the state's interest in protecting the mental and physical health of pregnant minors and potential life was less clear with contraceptives than with abortion because contraceptives do not end the pregnancy.<sup>94</sup> A simple concern related to contraceptive services, or a rational relationship between the regulation and the state's purpose, is not enough to show a compelling interest.<sup>95</sup>

States and the federal government have not justified any compelling interest for conscience clauses because current conscience clauses solely focus on promoting doctors' moral beliefs in reproductive services and fail to offer any protection for individuals whose rights are jeopardized by these regulations.<sup>96</sup> Even if the government provides possible solutions to help

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90. See 745 ILL. COMP. STAT. ANN. 70/2 (asserting that people and organizations hold different beliefs about whether certain health care services are morally acceptable); see also 45 C.F.R. § 88.1 (stating that the purpose of this Conscience Rule is to protect conscience rights in healthcare and to enforce anti-discrimination laws).

91. See *Washington v. Azar*, 426 F. Supp. 3d 704, 721 (E.D. Wash. 2019) (noting that the Conscience Rule severely and disproportionately harms vulnerable groups such as women and LGBTQ individuals).

92. See *Carey*, 431 U.S. at 690 (ruling that the statute unconstitutionally restricted women's access to contraceptives because it did not show a compelling interest in protecting potential life or health in the regulation of nonhazardous contraceptives).

93. See *id.* at 686 (stating regulations imposing a burden on an individual's decision on whether to bear or beget a child can only be justified by compelling interests).

94. See *id.* at 690, 694 (asserting the state's interests in protecting minors' health and potential life were not implicated in nonhazardous contraceptives).

95. See *id.* at 692 (holding that the government could not establish a compelling interest through a proper concern).

96. See *Azar*, 426 F. Supp. 3d at 721 (finding that the Conscience Rule is arbitrary and capricious because the government failed to conduct a reasonable analysis of the regulation's impact).

individuals who were refused contraceptive services to find alternate reproductive health care, the conscience clauses are unconstitutional because the clauses violate an individual's right to use contraceptives in the first place.<sup>97</sup>

Even though the Supreme Court held that doctors with conscience objections have the right to refrain from providing abortion services,<sup>98</sup> the ruling does not extend to contraceptives because the government does not have a compelling interest in protecting potential life when restricting contraceptive services.<sup>99</sup> In *Carey*, the Court found nonhazardous contraceptives bear no relation to the state because the state did not have an interest in protecting minors' health or potential life when restricting access to nonhazardous contraceptives.<sup>100</sup> Contraceptives have more constitutional protections than abortion, and the bar for proving a compelling governmental interest in contraceptives is higher than the one for abortion because contraceptives only prevent pregnancy and do not end the potential life of a human being.<sup>101</sup> Current conscience clauses do not present legitimate evidence or findings that prove any compelling interest in allowing doctors to refuse to provide contraceptive services.<sup>102</sup> Although current conscience clauses intend to protect doctors' religious freedom, which is also a fundamental right protected by the Constitution, a disagreement in religious beliefs is not a constitutional reason to prevent individuals from receiving

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97. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976) (holding that the statute was unconstitutional because the first part of it allowed a physician to preserve a fetus's life before viability).

98. See *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (finding that the provision allowing health providers to refrain from participating in abortion procedures was constitutional because it provided appropriate protection to employees).

99. See *Carey*, 431 U.S. at 690 (holding that the regulation of nonhazardous contraceptives was unconstitutional because the state did not have interests in protecting potential life regarding contraceptives).

100. See *id.* (showing the state did not have a compelling interest in regulating contraceptives because the state established no relation between contraceptives and health concerns related to abortion).

101. See *id.* (asserting that the state's interests in protecting potential life are clearly more implicated in the decision of abortion than the decision of contraceptives because contraceptive services do not end a potential life); see also *Miller*, *supra* note 22, at 250-51 (stating contraceptives only intend to prevent pregnancy and the definition has been confirmed by the medical field and legal field).

102. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (indicating that the state did not present any legitimate finding to prove it had a compelling interest in burdening women's access to abortion).



the contraceptive services they need because the right to religious freedom cannot simply override other constitutional rights.<sup>103</sup>

The government has a compelling interest when enacting a conscience clause if the conscience clause is the only way to achieve its purpose of protecting doctors' religious beliefs and protecting doctors from discrimination in the workplaces.<sup>104</sup> In *Eisenstadt v. Baird*, the Court found a statute that prohibited dispensing contraceptives to unmarried individuals could not be justified for the governmental interest in regulating potentially harmful contraceptives, since other state and federal drug regulations already effectively regulated such contraceptives.<sup>105</sup>

Similarly, Title VII already protects doctors' religious beliefs and requires employers to make reasonable accommodations for religious employees.<sup>106</sup> Current conscience clauses reinforce the government's interest in protecting doctors from discrimination in the workplace.<sup>107</sup> Because conscience clauses are not the only way to achieve the purpose of protecting doctors' religious beliefs in the workplace, the interest cannot be justified.<sup>108</sup>

Current conscience clauses must be narrowly tailored to achieve their purpose to be constitutional.<sup>109</sup> A regulation is narrowly tailored if there is not a less restrictive way to achieve the government's purpose.<sup>110</sup> In

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103. See U.S. CONST. amend. I (recognizing freedom of religion as a fundamental right by forbidding Congress to make laws prohibit the free exercise of religion); see also *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 972 (Alaska 1997) (rejecting the "compelling" interest that the hospital established because it just claimed one constitutional right over another).

104. See *Carey*, 431 U.S. at 686 (holding that the regulation burdening women's abortion choices could not be justified by any interest other than a compelling one).

105. See *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (asserting that the statute that intended to regulate harmful drugs was not required since other state and federal laws already regulated this problem).

106. See 42 U.S.C. § 2000e-2 (2018) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

107. See 45 C.F.R. § 88.1 (2019) (allowing health providers to refuse to provide care based on any moral objection without offering any remedy to patients).

108. See *Carey*, 431 U.S. at 686 (holding that a compelling interest could be justified if such interest was the only way to achieve the government's purpose).

109. See *id.* at 698-99 (finding that the regulation was not narrowly tailored to achieve the state's purpose of restricting minor's access to contraceptives to deter juvenile sexual conduct).

110. See *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (emphasizing fundamental reproductive rights can only be constrained by a compelling interest).

*Griswold v. Connecticut*, Justice White found the state could achieve its purpose of prohibiting extramarital affairs through a more discriminately tailored statute, rather than intruding on the privacy of all married couples and unmarried individuals.<sup>111</sup> Although current state and federal conscience clauses all have one purpose, protecting doctors' religious rights, each protection has different standards for what group of doctors should be covered and different requirements for the subsequent actions doctors should take after refusing to provide contraceptive services.<sup>112</sup> Title VII already protects religious employees from discrimination and requires employers to make reasonable accommodations for religious employees.<sup>113</sup> Some states require doctors with conscience objections to notify employers in writing, and employers then have the opportunity to make accommodations for the doctors given their religious beliefs; some states even require hospitals to help patients who are rejected find alternative available contraceptive services if hospitals or doctors have conscience objections.<sup>114</sup> Simply allowing a doctor with any conscience objection to refuse to provide contraceptive services to patients, without requiring the doctor or the hospital to formally ask for or implement an accommodation, imperils patients' right to receive contraceptives in a timely manner.<sup>115</sup> The clauses are not narrowly tailored because less restrictive ways exist to achieve the government's purpose.<sup>116</sup>

Besides examining the terminology of the regulation, the effect of the

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111. See *Griswold v. Connecticut*, 381 U.S. 479, 489 (1965) (White, J., concurring) (asserting the statute unnecessarily broadly swept all people in Connecticut regardless of their marital statuses or their medication requirements).

112. Compare N.Y. Pub. Health Law § 2994-n (McKinney 2010) (stating health providers should help patients to find alternative services they cannot provide based on conscience objections), with 45 C.F.R. § 88.1 (2019) (allowing health providers to refuse to provide care based on any moral objection without offering any remedy to patients).

113. See 42 U.S.C. § 2000e-22 (2018) (prohibiting employment discrimination based on race, color, religion, sex, or national origin).

114. See Idaho Freedom of Conscience for Health Care Professionals, S.B. No. 1353, § 18-611, 2010 Idaho Sess. Laws 3, 273 (stating employers are required to make reasonable accommodations for doctors with conscience objections upon advanced written notifications by the employees); see also CAL. BUS. & PROF. CODE § 733 (West 2014) (requiring employers to ensure patients have timely access to prescriptions if their requests for prescriptions are rejected due to doctors' conscience).

115. See Ju, *supra* note 5, at 1312-13 (stating conscience clauses limit an individual's access to contraceptives and burden an individual financially).

116. See *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) (asserting other regulations existed to regulate extramarital affairs without intruding on marital privacy).

regulation must also be considered as a criterion to determine whether the regulation is narrowly tailored.<sup>117</sup> In *Griswold v. Connecticut*, Justice White in his concurring opinion stated that the regulation on contraceptives was not narrowly tailored because it was intended to prohibit extramarital affairs, but had the same effect as an anti-use contraceptive statute for married couples, which was found ineffective for its purpose.<sup>118</sup> Current conscience clauses intend to protect doctors' religious rights, but the clauses also turn individuals away from essential contraceptive services that were available to them before.<sup>119</sup> The clauses do not satisfy the narrowly tailoring element because they have a negative effect on patients by decreasing the number of available doctors willing to offer contraceptive services, when the government's primary purpose is to protect a doctor's conscience.<sup>120</sup>

Current state and federal conscience clauses also reduce access to available services for patients who use contraceptives for non-contraceptive purposes.<sup>121</sup> In *Burwell v. Hobby Lobby Stores Inc.*, Justice Ginsburg in her dissenting opinion argued that contraceptives can help individuals to avoid health problems associated with unintended pregnancies, especially for individuals who have certain medical conditions and are not ready to have a child.<sup>122</sup> Potentially prolonged medical care that results from current conscience clauses can create financial burdens and health risks for individuals.<sup>123</sup> As a result, conscience clauses are unnecessarily broad for

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117. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 714 (1977) (examining the narrowness of the statute by looking to the consistency of the purpose and the effect of the statute).

118. See *Griswold*, 381 U.S. at 507 (White, J., concurring) (stating prohibiting the use of contraceptives for persons engaging in extramarital affairs had the same effect as a broad anti-use contraceptive statute).

119. See *Washington v. Azar*, 426 F. Supp. 3d 704, 721 (E.D. Wash. 2019) (rejecting the government's assumption that access to contraceptives would increase after the Conscience Rule was enacted).

120. See *Griswold*, 381 U.S. at 507 (White, J., concurring) (showing the statute was overly broad if it served as another regulation that was unrelated to the state's purpose).

121. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 761 (2014) (Ginsburg, J., dissenting) (recognizing contraceptives can prevent certain cancers and menstrual disorders).

122. See *id.* (Ginsburg, J., dissenting) (indicating contraceptives provide other benefits to individuals besides preventing pregnancy).

123. See *Ju*, *supra* note 5, at 1312-13 (asserting that refusals of contraceptive services from doctors with conscience objections may cause individuals to spend more time and money on traveling to find alternative available services and expose them to more health risks due to the delayed care).

the purpose that the government wants to achieve.<sup>124</sup>

Current state and federal conscience clauses are unconstitutional because the clauses impose an undue burden on an individual's ability to access contraceptives.<sup>125</sup> The government cannot impose a burden on an individual's decision to bear or beget a child unless the regulation can be justified by compelling interests, and the regulation is narrowly tailored to achieve such interests.<sup>126</sup> Although current conscience clauses do not prohibit the use of contraceptives, substantially limiting access to contraceptives is considered a burden on individuals because the right to access contraceptives is so essential to an individual's decision of whether or not to bear a child.<sup>127</sup>

States and the federal government must prove that the interest in protecting religious freedom outweighs the interest in protecting an individual's right to contraceptives.<sup>128</sup> The interest in protecting religious freedom over the right to use contraceptives is hard to justify in current conscience clauses, since such clauses substantially interfere with an individual's access to contraceptives and put an individual's health at risk.<sup>129</sup> Unintended pregnancy could cause an individual to experience depression and anxiety, which can further affect the child's health.<sup>130</sup> Individuals whose medical conditions do not allow them to carry a child, or who use contraceptives to treat acne, fibroids, and endometriosis, also face health risks if they cannot

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124. See *Griswold*, 381 U.S. at 485 (holding that the statute was unnecessarily broad because it invaded the privacy of all married couples).

125. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687-88 (1977) (finding that the statute was unconstitutional because it imposed a substantial burden on the right of an individual to use contraceptives).

126. See *id.* at 686 (establishing the constitutionality test for a statute that prohibited the distribution of contraceptives to minors).

127. See *id.* at 688 (asserting that the constitutionality test applies not only to regulations prohibiting the use of contraceptives but also to those that substantially limit access to contraceptives because the right to use contraceptives is essential to decisions regarding childbearing).

128. See *id.* at 686 (emphasizing a burdensome regulation can only be justified by sufficiently compelling interests).

129. See *Ju*, *supra* note 5, at 1312-13 (demonstrating conscience clauses caused women to spend more time and money on traveling and may cause them to face health risks if they do not receive their prescriptions).

130. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 743 (2014) (Ginsburg, J., dissenting) (noting the dangers that unintended pregnancies pose for women if they cannot access available contraceptive services).

access contraceptives in a timely manner.<sup>131</sup> In contrast, when doctors invoke conscience clauses they do not suffer any potential physical harm, but they may feel pressured and coerced to provide the proper medical care that patients request.<sup>132</sup> Courts have rejected proposals of favoring health providers' conscience rights over an employer's hardship to make absolute accommodations for religious employees.<sup>133</sup> As a result, a doctor's religious beliefs can hardly outweigh an individual's bodily autonomy.<sup>134</sup>

Current state and federal conscience clauses also substantially burden disadvantaged groups who already face difficulties in accessing contraceptives.<sup>135</sup> In *Griswold*, Justice White mentioned in his concurring opinion that the Connecticut anti-contraceptives statute posed a substantial burden on disadvantaged citizens who did not have sufficient knowledge or resources to obtain private counseling for birth control.<sup>136</sup> Similarly, current conscience clauses substantially burden individuals in rural areas because those individuals have to travel longer distances to get prescriptions if local doctors refuse to provide contraceptive services based on conscience objections.<sup>137</sup> Increasing traveling time and expenses impose not only financial burdens, but also health risks on individuals who cannot receive

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131. See *id.* (Ginsburg, J., dissenting) (stating that women's health may be negatively affected by pregnancy); see also Lyall & Schneider, *supra* note 24, at 164 (stating contraceptives are widely prescribed by doctors for other medical uses besides just preventing pregnancies).

132. See Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2018) (to be codified at 45 C.F.R. pt. 88) (noting that medical students and professionals with moral beliefs feel pressured and discriminated against because of their conscience).

133. See *Noesen v. Med. Staffing Network, Inc.*, 232 Fed. App'x. 581, 584-85 (7th Cir. 2007) (holding Title VII does not require an employer to make accommodations for religious employees which would amount to an undue hardship for other employees when the employer already made reasonable accommodations).

134. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 103 (1976) (Stevens, J., concurring in part and dissenting in part) (asserting that giving birth will affect an individual's entire future so an individual should be able to freely choose what to do with their body without barriers).

135. See *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (White, J., concurring) (stating the anti-contraceptive statute denied disadvantaged citizens' access to knowledge, information, and contraceptives).

136. See *id.* (White, J., concurring) (asserting the government needs to justify this substantial burden on disadvantaged citizens).

137. See Ju, *supra* note 5, at 1312-13 (emphasizing women in rural areas are susceptible to the negative effects of conscience clauses because they may have to spend additional money and time finding other health providers).

medical care in a timely manner close to home.<sup>138</sup> The growing number of Catholic hospitals in rural areas increases the chance that patients will be rejected by doctors when seeking contraceptives, which makes conscience objections an even more serious issue for those living in rural areas.<sup>139</sup> States and the federal government have failed to justify these substantial burdens imposed on disadvantaged citizens when implementing conscience clauses.<sup>140</sup>

Further, the government does not have the authority to give a third party the right to interfere with an individual's decision to use contraceptives based on non-medical opinions.<sup>141</sup> In *Planned Parenthood of Central Missouri v. Danforth*, the Court recognized that denying a husband veto power on abortion may have potentially negative effects on marriage; however, it insisted that the state lacked the authority to give the husband veto power to reject the wife's choice to have an abortion because the state itself lacked such a right.<sup>142</sup> Current conscience clauses give doctors the right to refuse to provide contraceptives to patients based on non-medical reasons.<sup>143</sup> Although doctors do not have the veto power to reject all available contraceptive services for patients, doctors' refusals may function as a veto because patients face financial difficulties and geographic restrictions when seeking other alternative available contraceptive services, especially in rural areas.<sup>144</sup>

Additionally, unlike in *Danforth* where the husband had an interest in the future life of the fetus, doctors have no interest in patients' reproductive

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138. See *id.* at 1313 (indicating prolonged medical care could pose risks to women's health).

139. See *id.* at 1311 (stating that rural patients' requests for contraceptives services are more likely to be denied because one in four rural hospitals have religious affiliations).

140. See *Griswold*, 381 U.S. at 503 (White, J., concurring) (asserting the state bore the burden of justifying negative effects of the regulation to disadvantaged citizens).

141. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69-70 (1976) (holding that the state lacked the authority to give a spouse the unilateral veto power to refuse an abortion because the state itself lacked the authority to regulate abortion).

142. See *id.* at 70 (demonstrating the state's lack of authority outweighed any possibly deleterious effects of the mother's unilateral decision to terminate pregnancy).

143. See 45 C.F.R. § 88.1 (2019) (allowing health providers to refuse to provide care based on any moral objection).

144. See Ju, *supra* note 5, at 1311-13 (stating the increasing number of Catholic hospitals in rural areas increases the chance that individuals will be denied access to contraceptives so individuals may face difficulties finding available contraceptive services outside their areas).

health other than providing appropriate care based on their medical judgement.<sup>145</sup> Even though the Constitution protects an individual's religious freedom, the Supreme Court has held religious freedom is not absolute and an individual may not exercise religion at the expense of others.<sup>146</sup> States and the federal government do not have the authority to give doctors the right to refuse to provide contraceptives because the states themselves lack the authority to regulate the use of contraceptives.<sup>147</sup> As a result, doctors do not have the right to exercise their conscience objection at the expense of an individual's access to contraceptives.<sup>148</sup>

*B. Current Conscience Clauses Violate the Establishment Clause Because They Fail the Lemon Test for Lacking a Secular Purpose, Having a Primary Effect on Advancing Religion, and Fostering an Excessive Entanglement Between the Government and Religion.*

Current conscience clauses violate the Establishment Clause because the clauses violate all three prongs of the *Lemon* test.<sup>149</sup> Current conscience clauses violate the first prong because the clauses have a religious purpose rather than a secular one.<sup>150</sup> In *Lynch v. Donnelly*, the Court recognized that a religious purpose is a purpose that is motivated wholly by religious considerations.<sup>151</sup> Current conscience clauses fail the first prong of the

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145. See *Danforth*, 428 U.S. at 93 (White, J., concurring in part and dissenting in part) (recognizing the spouse's interest in his child should also outweigh the state's interest in protecting potential life just as the mother's interest does).

146. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (showing the First Amendment does not give the absolute right of freedom to act); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (holding that reasonable accommodations for religious employees under Title VII do not include requiring non-religious employees to take religious employees' weekend shifts at their own expenses).

147. See *Danforth*, 428 U.S. at 70 (finding the statute was unconstitutional because the state gave the husband unilateral veto power over the wife's decision on abortion).

<sup>148</sup> See *id.* (affirming that the husband as a third party did not have the right to make a decision on abortion, even though the state statute said so, because the state itself lacked such right to empower the husband).

149. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that a government regulation does not violate the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion).

150. See *id.* at 613 (holding the statute in question had a secular purpose because it intended to promote the quality of secular education in schools).

151. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasizing that a lack of secular purpose can be established when the regulation was motivated wholly by religious purposes).

*Lemon* test because the clauses are motivated wholly by religious considerations.<sup>152</sup> States and the federal government enacted conscience clauses to promote doctors' conscience rights by allowing them to refuse to provide contraceptive services solely based on conscience objections, without considering the medical concerns of patients.<sup>153</sup> The concern that doctors may be discriminated against in the workplace for their moral beliefs has been addressed by Title VII, and the Court has held employees may not exercise religion at another's expense under Title VII.<sup>154</sup> Conscience clauses that allow doctors' conscience objections to affect their professional judgement on contraceptive services violate the first prong of the *Lemon* test because the clauses are motivated by wholly religious considerations.<sup>155</sup>

Even though current conscience clauses only apply to doctors with conscience objections and do not force everyone to refuse to provide reproductive services, the clauses still violate the first prong because the clauses are motivated by a plainly religious purpose.<sup>156</sup> In *Wallace v. Jaffree*, the Court found that the statute had the sole purpose of encouraging prayer activities instead of protecting every student's right to engage in voluntary prayer because the term "voluntary prayer" did not lessen the religious purpose; rather, it indicated that the government "characterize[d] prayer as a favored practice."<sup>157</sup> Similarly, current conscience clauses only protect a doctor's conscience right and neglect an individual's right to use

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152. See 45 C.F.R. § 88.1 (2019) (noting the purpose of this Conscience Rule is to protect health providers' conscience rights in healthcare).

153. See Freedom of Conscience for Health Care Professionals, S.B. No. 1353, § 18-611, 2010 Idaho Sess. Laws 3, 273 (stating health professionals with conscience objections can refuse to provide care); see also 45 C.F.R. § 88.3(a)(vi) (showing an individual can refuse to provide care if the requested service violates the individual's religious or moral beliefs to do so).

154. See 42 U.S.C. § 2000e-2 (2018) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (holding that reasonable accommodations for religious employees under Title VII do not include requiring non-religious employees to take religious employees' weekend shifts at their own expenses).

155. See *Lynch*, 465 U.S. at 680 (finding that the statute violated the first prong of the *Lemon* test because it was motivated by wholly religious considerations and lacked a secular purpose).

156. See *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (holding that the statute in question violated the Establishment Clause because it had a plainly religious nature).

157. See *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985) (asserting that since the statute had the sole purpose of returning voluntary prayer to schools, the term was characterized as a favored practice instead of a description).



contraceptives in the process of seeking health care.<sup>158</sup> Conscience clauses have the sole purpose of endorsing the religious freedom of doctors in healthcare rather than trying to protect both doctors' and patients' rights when a moral conflict exists.<sup>159</sup> Therefore, current conscience clauses have a solely religious purpose and violate the first prong of the *Lemon* test.<sup>160</sup>

Current conscience clauses also violate the second prong of the *Lemon* test because the effect of the clauses is to advance religion.<sup>161</sup> In *Grumet v. Board of Education*, the Court of Appeals found that the statute had a primary effect of impermissibly advancing religion because the state's action created a symbolic link between the government and the religion, and thus, followers of the religion were more likely to believe such an action was an endorsement of their religion.<sup>162</sup> Similarly, current conscience clauses send a strong message to the public that the government favors a doctor's religious beliefs over an individual's right to use contraceptives because the clauses provide no protection for patients who request contraceptive services.<sup>163</sup> Such a unilateral benefit to doctors is likely to be perceived by the public as an endorsement of religion or religious beliefs from the government.<sup>164</sup> States and the federal government fail to establish any effective means of guaranteeing that conscience clauses will be deployed in a secular and neutral way.<sup>165</sup>

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158. See Ju, *supra* note 5, at 1313-14 (stating that conscience clauses protect doctors' religion but not the proper standard of medical care, which causes patients to receive lower standards of care than usual).

159. See *id.* at 1292 (noting the government needs to balance the relationship among people who share different beliefs in a community, the constitutional connection of religious freedom, and the deprivation of one's life and liberty).

160. See *Wallace*, 472 U.S. at 59-60 (holding the statute violated the Establishment Clause because it was motivated by a solely religious purpose).

161. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating a statute violates the Establishment Clause if the primary effect of the statute advances or inhibits religion).

162. See *Grumet v. Bd. of Educ.*, 618 N.E.2d 94, 100 (N.Y. 1993) (noting the statute, which only allowed Hasidic children to attend the public school in the new district, could be sufficiently perceived by Satmar Hasidim as an endorsement of the religion).

163. See 45 C.F.R. § 88.1 (2019) (stating the purpose of the federal Conscience Rule was to enforce federal Conscience laws and to protect both health providers and patients who have conscience objections to certain health care and services).

164. See *Grumet*, 618 N.E.2d at 100 (asserting that only allowing Hasidic people to attend the school and to be elected on the school board implied a governmental endorsement of Hasidic people's religious choices).

165. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982) (emphasizing

A symbolic link between the government and religion arises when the effect of the regulation is likely to be perceived by religious adherents as an endorsement, or by non-adherents as a disapproval of their religion.<sup>166</sup> The governmental protection of doctors' conscience rights is likely to be perceived by doctors as an endorsement of their religious beliefs that individuals should not use contraceptives to prevent conception, and that contraceptives are a threat to the potential life of a human being.<sup>167</sup> Such protection is also likely to be perceived by patients as governmental disapproval of their beliefs that individuals have bodily autonomy.<sup>168</sup> Current conscience clauses violate the second prong of the *Lemon* test because the clauses have a primary effect of advancing doctors' religious freedom, which threatens an individuals' bodily autonomy.<sup>169</sup>

Additionally, current conscience clauses have a primary effect of advancing religion because the clauses favor a doctor's religious interest at the expense of an individual's interest in using contraceptives.<sup>170</sup> In *Estate of Thornton v. Caldor, Inc.*, the Court found that the statute had a primary effect of impermissibly advancing a particular religion, since it substantially burdened other employees by requiring them to adjust their personal affairs to accommodate Sabbath observers, and the statute favored the interests of Sabbath observers over all other employees' interests.<sup>171</sup> Current conscience clauses force an individual to dedicate more time and expenses to traveling

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that a governmental guarantee of neutral employment of the regulation can help the regulation avoid the violation of the second prong of the *Lemon* test).

166. See *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-91 (1985) (stating that significant benefits provided by a symbolic union between the state and the religion can be perceived by reasonable minds as governmental support for religion).

167. See KAN. STAT. ANN. § 65-443 (West 2012) (noting doctors with conscience objections can refuse to provide health services if they believe such services will end a pregnancy).

168. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (holding that the government cannot impose a burden on an individual's decision to bear or to beget a child unless the regulation passes the strict scrutiny).

169. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that a statute violates the Establishment Clause if the primary effect of the statute advances or inhibits religion).

170. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (finding that a statute which required non-religious employees and employers to absolutely accommodate Sabbath observers at any expense violated the Establishment Clause because it advanced religion).

171. See *id.* at 709-10 (asserting that the First Amendment does not give religious employees the absolute right to exercise their religion at others' expenses).

and to looking for other available contraceptive services.<sup>172</sup> The clauses do not take into account the convenience and interests of patients who seek contraceptives, not only for preventing the pregnancy, but also for health purposes.<sup>173</sup> The unyielding favor of doctors' consciences over an individual's right to use contraceptives creates an imbalance between the parties' interests, which is likely to be perceived by doctors as the government advancing their religious beliefs by enacting regulations to protect their beliefs.<sup>174</sup>

Even though the First Amendment protects an individual's freedom of religion, the First Amendment does not give an individual the right to impose such personal interests at the expense of others' health.<sup>175</sup> Current conscience clauses allow a doctor to choose his or her religious beliefs over a patient's request for contraceptives, which are an essential part of reproductive health care.<sup>176</sup> A doctor's right to refuse to provide contraceptive services due to their conscience objections is not within the scope of the First Amendment.<sup>177</sup> The expansion of the right to exercise one's religion at the expense of others guaranteed by the First Amendment indicates that the clauses have a substantial effect of advancing a doctor's religious beliefs instead of a simply incidental or remote effect.<sup>178</sup>

Finally, current conscience clauses violate the third prong of the *Lemon* test because of the excessive entanglement between the government and

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172. See Ju, *supra* note 5, at 1312-13 (stating that patients often have to spend more money and time on finding available contraceptive services when doctors with conscience objections reject them).

173. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 761 (2014) (Ginsburg, J., dissenting) (noting contraceptives help avoid health problems related to unintended pregnancies and certain cancers and menstrual disorders).

174. See *Estate of Thornton*, 472 U.S. at 710 (asserting the unyielding favor to Sabbath observers over other employees indicated the statute had a primary effect of advancing religion).

175. See *id.* (stating the First Amendment does not give a religious individual the right to ask others to conform their conduct to the individual's religious needs) (citing *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

176. See Ju, *supra* note 5, at 1312-13 (emphasizing that individuals need to pay more money and time to find alternative available contraceptive services when doctors with conscience beliefs refuse to provide such services).

177. See *Estate of Thornton*, 472 U.S. at 710 (asserting the First Amendment did not give religious employees the absolute right to exercise their religion at others' expenses).

178. See *id.* (stating the statute that unyieldingly favored religious employees had the primary effect of advancing religion because it went beyond incidental and remote benefits).

religion.<sup>179</sup> In *Roemer v. Board of Public Works*, the Court recognized that the state provided aid to secular activities, and occasional audits from the state did not necessarily implicate excessive entanglement.<sup>180</sup> Conversely, only health providers with conscience objections benefit from current conscience clauses, and the clauses have a wholly religious purpose which creates a government entanglement with religion.<sup>181</sup> Current conscience clauses unyieldingly favor a doctor's religious beliefs at the expense of an individual's access to contraceptives and only provide aid to doctors with conscience objections, resulting in substantial harm to patients who seek contraceptives from doctors with conscience objections.<sup>182</sup>

The entanglement between government and religion is excessive when the regulation needs comprehensive, discriminating, and continuing state surveillance to ensure that the regulation will not violate the First Amendment.<sup>183</sup> In *Walz v. Tax Commission of New York*, the Court found that there was no excessive entanglement between the government and religion because the statute did not require official surveillance to ensure it continued to have a secular purpose.<sup>184</sup> The Court recognized that a minimum and remote involvement between the state and the religion was not excessive.<sup>185</sup> In 2018, the Trump administration created the Conscience and

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179. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (asserting a statute violates the Establishment Clause if it fosters an excessive entanglement between the government and religion).

180. See *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762 (1976) (stating occasional audits did not foster excessive entanglement because the possibility of occasional audits, which are normally involved in school accreditations, were not likely to be any more entangling than inspections).

181. See *Lemon*, 403 U.S. at 616 (noting that the substantially religious character of the church-related schools which benefited from the statute gave rise to an entangling state-religion relationship).

182. See *Aguilar v. Felton*, 473 U.S. 402, 409 (1985) (emphasizing that the state should not entangle itself with a given denomination of one religion and let non-adherents of such religion suffer).

183. See *Lemon*, 403 U.S. at 619 (showing that government entanglement with religion will foster if the government has to continue constant surveillance of the regulation in order to make sure the regulation is not fostering religion).

184. See *Walz v. Tax Comm'n, of N.Y.*, 397 U.S. 664, 675 (1970) (stating that the state would have more chances to involve itself in the church if no taxation exemption exists).

185. See *id.* at 676 (asserting that the tax exemption restricted the fiscal relationship between the state and church and reinforced the separation between the government and religion).

Freedom Division (“Division”) within the Department of Health with the intention of expanding protections for health providers with conscience objections.<sup>186</sup> The Division has a purpose of “vigorously and effectively” enforcing existing conscience clauses to protect health providers, and it has proposed a Conscience Rule to allow any worker in healthcare to refuse to provide any service based on religious or moral objections.<sup>187</sup> Such government endorsement of religion and surveillance to enforce existing conscience clauses from a Division that was specifically created to protect freedom of religion in healthcare exceeds simple administrative procedures and inspections.<sup>188</sup> The entanglement between the government and religion that is created under conscience clauses is excessive, and thus, the federal Conscience Rule violates the third prong of the *Lemon* test. State conscience clauses may also be affected by the Division if Congress decides to regulate state action through its broad spending power.<sup>189</sup>

#### IV. POLICY RECOMMENDATION

The right to use contraceptives is an individual’s fundamental right that is protected by the Constitution.<sup>190</sup> Individuals have the right to decide whether to bear or beget a child without the interference of a third party.<sup>191</sup> Many individuals report that they face obstacles when accessing contraceptives.<sup>192</sup>

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186. See Ju, *supra* note 5, at 1296 (stating that the Division wanted to expand the conscience protection for health providers who deny not only abortion services, but also services for LGBT patients).

187. See *id.* at 1296-97 (noting that the expanded Conscience Rule will allow even receptionists at clinics or hospitals to refuse to provide service).

188. See *Walz*, 397 U.S. at 675 (affirming that continuing government surveillance of regulations with religious values, rather than simple administrative procedures, would foster an excessive government entanglement with religion).

189. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (stating a statute violates the Establishment Clause if it fosters an excessive government entanglement with religion); see also *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987) (holding that Congress can use its spending power to condition the award of federal highway funds on the states’ adoption of a uniform minimum drinking age for a general welfare purpose).

190. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding the right to use contraceptives is a fundamental right under the Due Process Clause of the Fourteenth Amendment).

191. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 68-69 (1976) (holding that the state lacked authority to give a spouse unilateral veto power over a mother’s decision regarding whether to have an abortion because the state itself lacked the authority to regulate abortion).

192. See Committee on Gynecologic Practice, *Over-the-Counter Access to Hormonal*

These obstacles may include the cost of contraceptives, lack of insurance, doctors' conscience objections, and challenges to get an appointment.<sup>193</sup> Even though thirteen states have allowed pharmacists to prescribe contraceptives to reduce some of the difficulties individuals face when seeking to obtain contraceptives, pharmacists can still refuse to provide the prescription of contraceptives due to their conscience objections.<sup>194</sup>

The obstacle to contraceptive access imposed by health providers' conscience objections can be solved by reclassifying prescribed contraceptives as over-the-counter drugs.<sup>195</sup> Oral contraception has been legally recognized as an over-the-counter drug in over one hundred countries, allowing individuals to access such contraceptives without a prescription.<sup>196</sup> Medical experts have claimed that health risks related to oral contraceptives are extremely low when compared to Aspirin, NSAIDs, and Tylenol, which are approved as over-the-counter drugs.<sup>197</sup> A self-screening tool can effectively help individuals determine whether their medical history and profile allow them to use contraceptives.<sup>198</sup> Over-the-counter oral contraceptives would make contraceptives more accessible and remove the

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*Contraception*, ACOG (Oct.134 AM. C. OF OBSTETRICIANS & GYNECOLOGISTS 96, 97 (Oct. 2019), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2019/10/over-the-counter-access-to-hormonal-contraception.pdf> (stating 29% of individuals who participated in the survey reported they face some external difficulties when seeking contraceptives).

193. *See id.* (noting 14% of individuals who participated in the survey face cost barrier or lack of insurance when seeking contraceptives and 13% of individuals have difficulties obtaining an appointment for contraceptive services).

194. *See id.* (stating individuals face potential barriers related to pharmacists' conscience objections when accessing contraceptives); *see also* Julia Ries, *The Pill Is Nearly 60 and Still Requires a Prescription: Why Is That?*, HEALTHLINE (Oct. 8, 2019), <https://www.healthline.com/health-news/birth-control-has-been-around-for-60-years-why-is-it-hard-to-get> (showing that thirteen states have already tried to cut down on hurdles to getting contraceptives).

195. *See* Committee on Gynecologic Practice, *supra* note 192, at 97 (stating the over-the-counter access to hormonal contraception could provide a more comprehensive solution to current limitations on contraceptives).

196. *See* Ries, *supra* note 194 (asserting that medical and public health experts already proved the safety of over-the-counter contraceptives).

197. *See id.* (noting the birth control pill is safer than other common over-the-counter drugs).

198. *See* Committee on Gynecologic Practice, *supra* note 192, at 100-01 (stating individuals can figure out whether they can use contraceptives through a 15-question survey).

access barriers imposed by doctors' conscience objections.<sup>199</sup>

To make birth control available over the counter, the U.S. Food and Drug Administration must approve drug makers' applications to switch the category of birth control from a prescription drug to an over-the-counter drug.<sup>200</sup> Birth control would need to go through three stages: a consumer evaluation of labeling, a self-selection study to determine, and an actual-use study.<sup>201</sup> Because birth control users can determine their medical situations through a self-screening survey, and birth control pills pose extremely low health risks to users, institutions currently put effort in simulating the actual use of birth control in the real world.<sup>202</sup> Besides, insurance companies should also extend their coverage to over-the-counter birth control to reduce an individual's financial burden.<sup>203</sup> Making birth control available over-the-counter will solve the conflict between doctors with conscience objections and individuals who seek access to contraceptives and minimize the harm to both parties' constitutional rights.<sup>204</sup>

## V. CONCLUSION

Although doctors enjoy the freedom of religion, the First Amendment does not give doctors the absolute right to exercise their religious beliefs at the expense of individuals' right to use contraceptives.<sup>205</sup> Current conscience clauses substantially burden an individual's access to contraceptives and are not justified by a compelling government interest.<sup>206</sup> The clauses are not

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199. *See id.* at 97 (emphasizing over-the-counter access improves the availability of contraceptives and saves the costs of traveling and making appointments).

200. *See Ries, supra* note 194 (stating the FDA needs to evaluate the safety and potential danger of birth control in order to approve drug makers' requests).

201. *See* Committee on Gynecologic Practice, *supra* note 192, at 98 (noting the FDA evaluates birth control through these three stages to understand the potential toxicity of the medication and whether the medication can benefit consumers without endangering their safety).

202. *See id.* at 101 (showing the actual-use study determines whether individuals can select and use the method appropriately in an over-the-counter setting).

203. *See id.* (stating over-the-counter birth control may add financial burdens to individuals if their insurances do not provide coverage to such birth control).

204. *See id.* at 97 (asserting over-the-counter contraceptives remove the potential barrier individuals may face because of physicians' resistances).

205. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (asserting the First Amendment did not give religious employees an absolute right to exercise their religion at others' expenses).

206. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 690 (1977) (finding that the statute unconstitutionally restricted women's access to contraceptives because it did not

narrowly tailored because there is a less restrictive way to achieve governmental purpose through Title VII.<sup>207</sup> Current conscience clauses also violate the Establishment Clause because the clauses fail all three prongs of the *Lemon* test.<sup>208</sup> Conscience clauses are motivated by a wholly religious purpose because they only intend to protect doctors' religious beliefs.<sup>209</sup> The clauses have a primary purpose of advancing religion because doctors are likely to perceive the clauses as a government endorsement of their own religious beliefs.<sup>210</sup> The clauses also foster an excessive entanglement between the government and religion because the Trump administration established the Division to enforce existing conscience law and to expand religious exemptions in healthcare.<sup>211</sup> In conclusion, conscience clauses are unconstitutional because the clauses violate an individual's right to contraceptives and the Establishment Clause.<sup>212</sup>

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serve a compelling state interest in protecting potential life or health in the regulation of nonhazardous contraceptives).

207. *See Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63, 84-85 (1977) (holding that reasonable accommodations for religious employees under Title VII do not include requiring non-religious employees to take religious employees' weekend shifts at their own expense).

208. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (proposing three factors to analyze whether government regulations violate the Establishment Clause).

209. *See Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984) (asserting the city's display of the crèche has a secular purpose because it was not motivated by wholly religious considerations, even though it did have some religious factors).

210. *See Grumet v. Bd. of Educ.* 618 N.E.2d 94, 100-01 (N.Y. 1993) (showing a statute allowing only Hasidic children to attend a public school in a new district could be sufficiently perceived by Satmar Hasidim followers as an endorsement of their religion by the government).

211. *See Lemon*, 403 U.S. at 619 (stating government entanglement with religion will foster if that government has to continue to surveil the regulation to ensure it keeps its secular purpose).

212. *See U.S. CONST. amend. XIV § 1* (prohibiting the government from depriving any person of life, liberty and property without the due process of law); *see also U.S. CONST. amend. I* (prohibiting Congress from promoting certain religions).