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Playing Outside the Joints: Where the Religious Freedom Restoration Act Meets Title VII

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COMMENTS

PLAYING OUTSIDE THE JOINTS: WHERE THE RELIGIOUS FREEDOM RESTORATION ACT MEETS TITLE VII

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As the nation is grappling with rancorous identity wars, some are looking to the Religious Freedom Restoration Act (RFRA) as both a shield and sword. What was once a permissible federal religious accommodation has become an impermissible religious endorsement. This Comment argues that the Supreme Court's recent expansion of RFRA, as applied to Title VII of the 1964 Civil Rights Act, violates the Establishment Clause. RFRA not only provides employers immunity from Title VII, it allows employers to utilize the judiciary to coerce lesbian, gay, bisexual, transgender (LGBT) employees to conform to the employers' religious beliefs. In providing employers religious exemptions from Title VII, the judiciary coerces religious conformance and endorses religion. However blurred the boundaries of the Establishment Clause are, it clearly prohibits such government action.

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INTRODUCTION

You just returned from your honeymoon with your new wife. You are excited to get back to work, but when you arrive, you notice your name is no longer outside of your office and your key does not fit in the lock. You go to the Vice President to demand answers. He tells you that both his faith in God and the Christian Bible have taught him that marriage is between a man and a woman. He cannot, in accordance with his faith, let you, the closeted lesbian who has helped build this company, continue to be a part of his team. You are fired.

After a few days of shock, you file a charge with the Equal Employment Opportunity Commission (EEOC). You claim that the company unlawfully discriminated against you, and therefore violated Title VII of the 1964 Civil Rights Act. The EEOC investigates your case and finds reasonable cause to believe the company unlawfully discriminated against you. After months of investigating, the EEOC files a suit against the company. At trial, the company argues that requiring it to retain a homosexual employee violates its sincerely held religious beliefs. Under the Religious Freedom Restoration Act (RFRA),[1] the company should be exempt from Title VII's prohibition on employment discrimination. At the end of the trial, the court holds that requiring the company to maintain you as an employee violates the company's sincerely held religious beliefs. Further, because the EEOC failed to show that requiring the company maintain you as an employee is the least burdensome recourse, the company is exempt from Title VII. You lost.

While the scenario above is hypothetical, it is far from conjectural. RFRA prevents the government from substantially burdening a person's religious exercise[2] unless the government can pass strict scrutiny by demonstrating: (i) it has a compelling interest in applying the law to the person, and (ii) it is using the least restrictive means of achieving that interest.[3] Therefore, if a federal statute or regulation substantially burdens an individual's religious exercise, even if unintentionally, the government must satisfy strict scrutiny or it must exempt the individual from the burdensome statute or regulation.[4]

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1. 42 U.S.C. § 2000bb–2000bb-4 (2012).

2. *See* § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . .").

3. § 2000bb-1(b)(1)–(2).

4. § 2000bb-1(c); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (stating that "[i]f the Government substantially burdens a person's exercise of

In *Burwell v. Hobby Lobby Stores, Inc.*,[5] the Supreme Court held that the judiciary is not capable of measuring the substantiality of the burden a government action has on religious exercise.[6] Rather, courts can only inquire into whether the religious objector *honestly believes* that the government is substantially burdening his religious exercise.[7] Further, the Court held that closely held, for-profit corporations are "person[s]" under RFRA, whose religious exercise RFRA therefore protects.[8]

The *Hobby Lobby* decision represents an extreme expansion of religious liberty. First, by deeming itself incompetent to decide whether the government substantially burdened religious exercise, the Court eliminated the threshold question used to determine whether strict scrutiny should be applied.[9] So long as a person honestly believes the government is burdening his religious exercise, strict scrutiny must apply.[10] Additionally, by expanding RFRA protections to corporations, the Court effectively provided exemptions from laws specifically designed to circumscribe corporate power and protect individuals from harmful corporate conduct.[11]

This directly implicates Title VII of the 1964 Civil Rights Act,[12] which prohibits employers from taking adverse employment actions against employees because of their race, color, religion, sex, or national origin;[13]

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religion, under the [RFRA] that person is entitled to an exemption from the rule" (citing City of Boerne v. Flores, 521 U.S. 507 (1997))).

5. 134 S. Ct. 2751 (2014).

6. *See id.* at 2779 (announcing that the "narrow function" of the Court in analyzing RFRA issues is to determine whether the line drawn between the religious belief and objectionable act reflects an "honest conviction" (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981))).

7. *Id.*

8. *See id.* at 2768–75 (rejecting both the argument that closely held for-profit corporations are not "people," and the argument that corporations do not have the ability to exercise religion).

9. The word "substantially" was added to clarify that the compelling interest test should only be applied to government actions that substantially burden religious exercise. *See* 139 CONG. REC. 26180 (statement of Sen. Hatch) ("It does not require the Government to justify every action that has some effect on religious exercise."). Thus, whether RFRA applies depends on whether the government substantially burdened religious exercise. For further discussion, see *infra* note 107 and accompanying text.

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

11. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1458 (2015) (arguing that the Court's decision in *Hobby Lobby* has ushered in an era of Free Exercise Lochnerism, in which religious liberty is used as a conduit for corporate deregulation).

12. 42 U.S.C. §§ 2000e–2000e-17 (2012).

13. § 2000e-2(a)(1).

and, is particularly relevant to claims of employment discrimination on the basis of sexual orientation and gender identity.[14] Unlike race, lesbian, gay, bisexual, transgender (LGBT) status is seen as a choice by some judges,[15] and even if it is not, the outward projection of this status is partially within control of the employee. Therefore, rather than requiring the employer to maintain a flamboyant LGBT employee, a less restrictive alternative is to require the employee to present in a more hetero-normative or cis-normative manner while at work.[16]

This Comment argues that applying RFRA, as construed by the Supreme Court, to Title VII violates the Establishment Clause.[17] Part I reviews the evolution of religious accommodation under the Free Exercise Clause,[18] the recent expansion of religious accommodation under RFRA, and the simultaneous expansion of LGBT protections.[19] Additionally, Part I explores the inevitable clash between LGBT and religious rights as exemplified in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*[20] Finally, Part I explores how the Court has traversed the fine line between permissible religious accommodation under the Free Exercise Clause and impermissible religious endorsement under the Establishment Clause.[21]

Part II argues that applying RFRA, as construed by the Supreme Court, to Title VII's prohibition on sex discrimination constitutes a government action that compels LGBT employees to conform to the religious ideology of their employer, and therefore violates the

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14. The EEOC has interpreted Title VII's prohibition on sex discrimination to also prohibit discrimination on the basis of gender identity and sexual orientation. *See infra* Section I.C.

15. According to one judge, "[s]ome gay individuals adopt what various commentators have referred to as the gay 'social identity' but experience a variety of sexual desires." Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring) (citing E.J. Graff, *What's Wrong with Choosing to Be Gay*?, THE NATION (Feb. 3, 2014); Brandon Ambrosino, *I Wasn't Born This Way. I Choose to Be Gay*, THE NEW REPUBLIC (Jan. 28, 2014)).

16. *See infra* Section II.A.2 (showing how *Hobby Lobby* ignored pre-*Smith* cases to better protect employers over employees).

17. U.S. CONST. amend. I (prohibiting the federal government from establishing a state religion).

18. *Id.* (reserving the right of citizens to accept any religious belief and engage in any religious ritual); *see infra* Section I.A.

19. *See infra* Section I.C.

20. 201 F. Supp. 3d 837 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018); *see also infra* Section I.D.

21. *See infra* Part I.

Establishment Clause.[22] Additionally, Part II argues that RFRA accommodations from Title VII violate the fundamental principle of neutrality[23] and are therefore an impermissible endorsement.[24] To support these assertions, Part II analyzes the application of RFRA to Title VII by examining the *Harris Funeral Homes* decision.[25] This Comment concludes that the Establishment Clause provides a natural limit to the Court's broad expansion of religious freedom under RFRA, and applying RFRA to Title VII exceeds this limitation.[26]

I. BACKGROUND

A. The Free Exercise Clause and Religious Accommodation

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[27] Though the First Amendment specifically refers to Congress, it restricts all three branches, including the judiciary, from infringing on these rights.[28] Thus, if any branch acts beyond its authority by burdening an individual's religious exercise, that individual may seek exemption from the unjustified imposition.[29]

The Free Exercise Clause protects only beliefs and practices that are religious, and that protection is not infallible. This Section explains what protections are afforded under the Free Exercise Clause. Section I.A.1 explores the Court's rules for determining whether a

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22. *See infra* Section II.A.

23. *See infra* notes 215–221 (explaining accommodations must be neutral, neither favoring one religious over another, nor favoring religion generally).

24. *See infra* Section II.A.

25. *See infra* Section II.A.2.

26. *See infra* Conclusion.

27. U.S. CONST. amend. I.

28. As Justice Black eloquently explained:

> [t]he amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly.

N.Y. Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring); *see also* 1 ANNALS OF CONG. 437 (Joseph Gales ed., 1834) (statement of Rep. Madison) (explaining that the purpose of favoring particular rights within the Constitution is to "limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode").

29. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 409–10 (1963) (providing religious exemption from a state's employment benefit law).

belief or practice is religious. Section I.A.2 explains what restrictions on religious exercise are permissible under the Free Exercise Clause. This Section begins by delineating the Court's incongruent Free Exercise Clause jurisprudence leading up to its seminal decision in *Employment Division v. Smith*,[30] where it held that the Free Exercise Clause does not require the government to provide religious accommodation from neutral, generally applicable laws.[31] The Section concludes by clarifying what restrictions are permissible post-*Smith*.

1. Defining religious exercise

The Free Exercise Clause protects two rights: "the right to believe and profess whatever religious doctrine one desires" and the right to perform, or abstain from performing, physical acts engaged in for religious reasons.[32] The right to believe is absolute, but the right to act is not.[33] Thus, the government may not compel an individual to subscribe to a particular religious tenet; however, in some circumstances

30. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

31. *Emp't Div.*, 494 U.S. at 878.

32. *Id.* at 877.

33. At the time of ratification, both James Madison and Thomas Jefferson recognized that the right to free exercise was not absolute. *See* 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1834) (statement of Rep. Madison) (explaining that none of the proposed amendments, including what is now the First Amendment, should be construed as limitations on other protected rights); Letter from Thomas Jefferson to the Danbury Baptist Association, 1 January 1802, FOUNDERS ONLINE, https://founders.archives.gov/?q=danbury%20baptists&s=1111311111&r=5 (last visited Dec. 3, 2018) (expressing his understanding that under the recently ratified First Amendment, "the legitimate powers of government reach actions only, [and] not opinions" and, therefore, no citizen has any right superior to his social duties). Early cases recognized the power of government to regulate conduct in order to protect society. *See* Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (noting that states may enact nondiscriminatory laws to "safeguard the peace, good order and comfort of the community"); Reynolds v. United States, 98 U.S. 145, 166 (1878) (illustrating that if the government were unable to regulate religious conduct, it would have no authority to protect against individuals who believe their religion to require human sacrifice or suicide). Though religious belief is protected under the Free Exercise Clause, the early cases suggest that this protection derived from the Establishment Clause. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (noting that in of all the cases brought before the Court in the previous ten years, the Court consistently held that the Establishment Clause withdrew all legislative power respective of religious belief); *Cantwell*, 310 U.S. at 303–04 (explaining that between the two objectives of the First Amendment—preventing the government from compelling individuals to accept and practice any religion, and protecting the freedom to practice a chosen religion—the freedom to practice may be regulated by the government "for the protection of society").

the government may prohibit him from acting in accordance with the particular religious tenets to which he does subscribe.[34]

Whether belief or conduct, the Free Exercise Clause protects only those that are religious.[35] Because the right to religious belief is absolute, the Supreme Court has proceeded cautiously in rejecting an individual's claim that his beliefs are religious,[36] giving great deference to the individual.[37]

While there is no clear definition of religion, the Supreme Court has established some standards that guide the determination of whether a particular belief or action is religious.[38] First, the Free Exercise Clause protects beliefs not associated with a god or any established religion so long as they occupy the same place in the life of the religious objector as would an orthodox belief in god.[39] Further, if a person's beliefs are

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34. *See Emp't Div.*, 494 U.S. at 877, 879 (noting that the First Amendment excludes government regulation of religious beliefs, but rejecting the contention that a person's religious conduct must be excluded from such regulation).

35. Thomas v. Review Bd. of Indep. Emp't Sec. Div., 450 U.S. 707, 713 (1981).

36. *See e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972) (emphasizing that the "determination of what is a 'religious' belief or practice entitled to constitutional protection . . . present[s] a most delicate question").

37. *See* Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139, 160 (1982) (asserting that defining "religion" is a classification problem whereby "any definition inevitably will exclude some activities from protected status" and, therefore, risk violating the Establishment Clause); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPP. L. REV. 313, 345–46 (1980) (arguing that giving the government power to define what constitutes a "church" would violate the Establishment Clause by empowering the government to create a definition that discriminates against disfavored religions and religious minorities); *see also* Sandy Levinson, *Justice Ginsburg's Inexplicable First Two Pages*, BALKINIZATION (June 30, 2014), https://balkin.blogspot.com/2014/06/justice-ginsburgs-inexpecable-first-two.html ("'Because this is the way I feel seems to be a conclusive argument in the religions realm . . . .").

38. Some of these guidelines stem from the Court's attempt to construct a permissible statutory definition of religion, while others reflect the Court's understanding that it is incompetent to appraise the religiosity of a claimed belief. *See infra* notes 39–51 and accompanying text.

39. In *Unites States v. Seeger*, the Court was called upon to construe § 6 (j) of the Military Training and Service Act (MTSA), which exempts from combat training "persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form." 380 U.S. 163, 164–65 (1965). MTSA defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 165 (alteration in original). The Court held that, under MTSA, the test to determine whether a belief is "in relation to a Supreme Being," and

associated with an established religion, the person's religious beliefs do not have to align with the dominant views of his religion.[40] To hold otherwise would require courts to determine whose perception of the religious commands are correct, a task entirely outside of the judicial function and competency.[41] Second, courts may not question the truth or verity of religious doctrines or beliefs; rather, courts may only question whether the belief is sincerely held.[42]

Finally, courts may not question whether religious beliefs are reasonable.[43] In *Thomas v. Review Board of Indiana Employment Security Division*,[44] Thomas, a Jehovah's Witness, challenged the denial of his unemployment benefits under the Free Exercise Clause.[45] Thomas was assigned to work in the production of turrets for military tanks.[46] When he realized the turrets would be used in war, Thomas ultimately quit, claiming that contributing to the production of weapons violated his religion.[47] At an administrative hearing, Thomas testified that he believed that he could work in the production of raw material that might ultimately be used for the production of tanks without violating

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is therefore religious, is whether such belief is "sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 165–66. In his concurrence, Justice Douglas explained that the Court's' interpretation brings MTSA in line with the Free Exercise Clause, intimating that the First Amendment protects sincere beliefs not associated with a God or any established religion, so long as they occupy the same place in the life of the objector as would an orthodox belief in God. *See id.* at 188, 192–93 (Douglas, J., concurring).

40. *See Thomas*, 450 U.S. at 715–16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."); *see also* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) (accepting an individual's objection to working on Sundays as religious, even though others of his and similar religions did not have such a proscription).

41. *Thomas*, 450 U.S. at 716 (holding that the function of the court is to find if the terminated worker had an honest religious conviction, not to act as arbiters of scriptural interpretation).

42. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that the First Amendment prohibits a jury from determining the truth or veracity of religious beliefs or doctrines, but allowing the jury to determine whether respondent well knew their proffered religious beliefs were false).

43. *See Thomas*, 450 U.S. at 714 ("[T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

44. 450 U.S. 707 (1981).

45. *Id.* at 710.

46. *Id.*

47. *Id.*

his religious precepts because he would not be contributing directly to the war.[48] The Indiana Supreme Court found Thomas's religious beliefs to be inconsistent and, therefore, found his objection to be a philosophical rather than a religious choice.[49] The United States Supreme Court reversed, finding that Thomas had drawn a line between acceptable and unacceptable work based on his religious beliefs. The Court concluded that it was not the judiciary's role to question whether the line drawn was reasonable.[50] Instead, "[t]he narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."[51] Thus, if a person claims his conduct is connected to a religious belief, the reviewing court will most likely assent without further inquiry.[52]

2. Permissible restriction on religious exercise

Prior to the 1990s, the Supreme Court struggled to elucidate any clear boundaries of permissible government restrictions on religious conduct.[53] In earlier cases, the Court declined to strike down laws that were generally applicable and neutral towards religion, notwithstanding any burden on religious exercise.[54] In later cases, the Court determined whether a law substantially burdened religious exercise;[55] if it did, the Court applied some form of interest balancing test.[56]

In early cases, the Court did not subject a challenged law to any form of scrutiny if it found that the law was generally applicable and religiously neutral.[57] The Court was not concerned with the burden

48. *Id.* at 710–11.
49. *Id.* at 714–15.
50. *Id.* at 715.
51. *Id.* at 716.
52. *See* Levinson, *supra* note 37.
53. *See* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 549–57 (1983) (discussing the Court's inconsistent decisions in *Wisconsin v. Yoder*, *United States v. Lee*, *Sherbert v. Verner*, and *Braunfeld v. Brown*).
54. *See infra* text accompanying notes 57–58.
55. *See infra* notes 62–68 and accompanying text.
56. *See infra* notes 69–79 and accompanying text.
57. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–68 (1944) (denying religious exemptions for portions of state's child labor laws); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (striking down a statute targeting religious solicitation but recognizing that if the statute simply targeted solicitation in general, there would be no constitutional claim); Reynolds v. United States, 98 U.S. 145, 161–67 (1878)

on individual religious exercise. Instead, it focused on the detriment that mandatory religious accommodations would impose on the government and society.[58]

Over time, the Court shifted its concern from the broad detriment to society to the individual burden on religious exercise.[59] If the Court found that a law substantially burdened religious exercise, it used strict scrutiny to balance the government's interest against the individual's interests.[60] A law burdened religious exercise if it criminalized or penalized specific religious conduct.[61] A law only indirectly or incidentally burdened religious exercise if it merely made religious observance more difficult or did not require the religious objector to engage in the violative conduct himself.[62]

Thus, the government substantially burdened religious exercise when it denied unemployment benefits to an individual who quit his

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(denying religious accommodation from neutral, generally applicable statutes criminalizing polygamy).

58. *Reynolds*, 98 U.S. at 167 ("To permit this [exemption] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

59. *Compare id.* at 166–67 (denying religious accommodations because the accommodations could prevent the government from maintaining order), *with* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (granting religious accommodation after finding that mandatory school attendance would "substantially interfer[e]" with Amish students' religious development).

60. *See infra* notes 63–78 and accompanying text.

61. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

62. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447, 449 (1988) (recognizing the government's actions would have severe adverse effects on respondents' religious practice but denying a religious exemption because the government neither coerced respondents into violating their religious beliefs through criminal sanctions nor "penalize[d] religious activity by denying . . . an equal share of the rights, benefits, and privileges enjoyed by other citizens"); Bowen v. Roy, 476 U.S. 693, 701 (1986) (holding that the government's use of a social security number did not impair the claimant's ability to believe, express, or exercise his religion); Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.").

job because the job required that he violate his religious beliefs.[63] The state penalized the individual for adhering to his religious beliefs, thereby placing upon him a substantial pressure to modify his behavior.[64] However, a law that required owners to close their businesses on Sundays only indirectly burdened the religious exercise of an owner whose religious beliefs required that he also close his business on Saturdays.[65] The law did not require the business owner to engage in any behavior that his religion forbid; it simply made religious observance more expensive.[66] Additionally, conditioning the receipt of food stamps upon permitting the government to create a social security number only incidentally violated a Native American's religious belief that a social security number would "rob" his daughter's spirit.[67] The government had not required that the Native American create the spirit robbing number himself; rather, it merely required that he allow the government to create the number.[68]

When the Court found that the government substantially burdened religious exercise, it reviewed the government action under strict scrutiny. The Court first applied strict scrutiny to laws burdening religious exercise in *Sherbert v. Verner*.[69] There, the Court reviewed whether South Carolina violated the Free Exercise Clause by denying unemployment benefits because an applicant refused to accept work

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63. *See Thomas*, 450 U.S. at 717 (finding that the "employee was put to a choice between fidelity to religious belief or cessation of work").

64. *Id.* at 717–18.

65. *See Braunfeld*, 366 U.S. at 606 (noting that the Sunday closing law "may well result in some financial sacrifice in order to observe their religious beliefs," but finding that this "is wholly different than when the legislation attempts to make a religious practice itself unlawful").

66. *Id.* at 605.

67. *See Roy*, 476 U.S. at 696, 706 (holding that the government's use of a social security number did not impair the claimant's ability to believe, express, or exercise his religion).

68. *See id.* ("[A] government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."). In this case, the Court also focused on the fact that the Free Exercise Clause cannot be used to compel the government to conduct its own internal affairs in accordance with the claimant's religious beliefs. *See id.* at 709 ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . .").

69. 374 U.S. 398 (1963).

that required her to work on her Sabbath.[70] The Court rejected the state's argument that it had a compelling interest in preventing fraudulent claims of religious burden because the state had not raised this interest before the South Carolina Supreme Court; however, the Court noted that even if it were to accept this as a compelling state interest, the state would have to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[71] The Court's decision in *Sherbert* announced the typical balancing test under strict scrutiny, which requires that the government demonstrate that it has a compelling interest and that it used the least restrictive means of achieving that interest.

In some cases, the Court applied a narrow compelling interest analysis, under which it required the government to show that applying the law to the individual religious objector served the government's compelling interest. In *Wisconsin v. Yoder*,[72] three parents, members of the Old Order Amish and the Conservative Amish Mennonite Church, challenged a Wisconsin law that mandated that children under the age of sixteen attend school.[73] The parents believed that sending their children to high school was "contrary to the Amish way of life," and doing so would "endanger their own salvation and that of their children."[74] The state argued that education was necessary to "preserve freedom and independence" by ensuring citizens become "effective and intelligent" participants in the political process and "self-reliant and self-sufficient participants in society."[75] The Court refused to accept this general interest as sufficient justification for burdening the parents' religious exercise.[76] Instead, the Court examined the "impediment to those objectives that would flow from recognizing" an exception for the Amish.[77] Because the government failed to demonstrate how an exception for the Amish would prevent it from pursuing its interest, the Court granted the parents a religious exemption.[78]

In other cases, the Court used a broader compelling interest analysis, under which it permitted the government to justify a law by broadly

70. *Id.* at 400–01.
71. *Id.* at 407.
72. 406 U.S. 205 (1972).
73. *Id.* at 207.
74. *Id.* at 208.
75. *Id.* at 221.
76. *Id.* at 236.
77. *Id.* at 221.
78. *Id.* at 236.

defining its compelling interests such that it required uniform application.[79] For example, in *United States v. Lee*,[80] the Court found that the government's broad public interest in providing Social Security insurance required uniform application of the Social Security Tax.[81] There, a member of the Older Order Amish challenged compulsory participation in the social security tax system.[82] He claimed that giving or receiving public benefits through the social security system would violate his Amish beliefs.[83] The Court did not question whether granting a religious exception in this case would impede the government's interest.[84] Instead, the Court focused on the effect of religious exemptions in the aggregate, and found that permitting a "myriad [of] exceptions flowing from a wide variety of religious beliefs" would inhibit the government's ability to achieve its compelling interest.[85]

In 1990, the Court simplified its analysis, creating a predictable and uniform approach based on early Free Exercise Clause precedent. In *Employment Division v. Smith*, the Court held that the Free Exercise Clause does not require the government to provide religious accommodation from neutral, generally applicable laws.[86] The majority expressed concern that subjecting neutral laws of general applicability to strict scrutiny would foster anarchy by creating

79. *See, e.g.*, United States v. Lee, 455 U.S. 252, 258–60 (1982) (focusing on the broad public interest in providing Social Security insurance and the need for uniform application as compelling); Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (rejecting appellants' argument that an exemption for individuals whose religious convictions require a different day of rest would still permit the state to achieve its compelling interest in affording a uniform day of rest without burdening appellants' religious exercise—"to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity.").

80. 455 U.S. 252 (1982).

81. *Id.* at 258–60.

82. *Id.* at 254–55.

83. *Id.* at 259.

84. The Court inquired into whether permitting exemptions for the "Amish belief" would interfere with the government's ability to achieve its interest. *Id.* at 259. Yet, the Court's analysis focused on the harms that numerous religious exemptions would pose to the tax system in general. *See id.* at 260 (denying a religious exemption for the social security tax and reasoning that, because income taxes cannot be separated into discrete obligations, allowing partial exemptions would frustrate the general tax system as a whole).

85. *Id.* at 260.

86. 494 U.S. 872, 890 (1990) (denying religious exemption from Oregon's controlled substance law for the ceremonial ingestion of peyote).

"constitutionally required religious exemptions from civic obligations of every conceivable kind."[87] This concern was premised on the understanding that strict scrutiny must have the same meaning and application as in other areas of constitutional law, and under this uniform approach, many laws would fail.[88] The majority distinguished *Smith* from prior cases in which the Court applied the compelling interest test to laws burdening a person's religious exercise.[89] Those cases fell into two categories: (1) hybrid cases involving religious exercise and another constitutionally protected right;[90] and (2) unemployment compensation cases in which the relevant statutes created individual exemptions for individuals who quit or refused available work for "good cause."[91]

Thus, under the Free Exercise Clause, a law burdening religious exercise will be subject to strict scrutiny only if it is not a neutral law of general applicability.[92] A law is not neutral if "the object . . . is to infringe upon or restrict practices because of their religious motivation."[93] A law is not generally applicable if it only prohibits conduct when it is motivated by religious beliefs.[94] Thus, most Free Exercise claims will fail under *Smith* unless the government has specifically targeted religion.[95]

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87. *Id.* at 888–89.

88. *See id.* at 885–86, 888 (noting that, while applying strict scrutiny in the context of laws based on race or laws regulating speech results in "equal[] treatment and the unrestricted flow of speech," applying strict scrutiny to all laws in the context of religious exercise "would produce . . . a private right to ignore generally applicable laws").

89. *See id.* at 881–84.

90. *See id.* at 881–82.

91. *Id.* at 883–84 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (Burger, C.J.)).

92. *See* Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 527–28, 542, 545–46 (1993) (applying strict scrutiny to a city ordinance that prohibited the ritual sacrifice of animals because it was neither a neutral law nor a law of general applicability).

93. *Id.* at 533.

94. The Court declined to precisely define a standard for determining whether a law is one of general applicability; however, its decision shed light on what might qualify. *See id.* at 542–43 ("The Free Exercise Clause 'protects religious observers against unequal treatment,' . . . and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." (citations omitted)). Further, this synthesis comports with the interpretations of lower courts. *See, e.g.*, Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18 (1st Cir. 2004) (accepting the district court's construction of general applicability as prohibiting the government from selectively burdening religious conduct).

95. *See* Trinity Lutheran Church of Columbia Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (recognizing that under the Free Exercise Clause, laws that "target the religious for 'special disabilities' based on their 'religious status'" are subject to strict scrutiny

B. The RFRA Reaction

This Section discusses Congress's response to the Court's decision in *Smith* and the expansion of statutory protections for religious exercise. Section I.B.1 discusses RFRA, enacted to restore protection of religious freedom to pre-*Smith* standards. Section I.B.2 discusses how the Supreme Court has construed and applied RFRA.

1. Accommodating religion beyond the Free Exercise Clause

In 1993, Congress enacted RFRA to overturn the Court's decision in *Smith*.[96] RFRA states:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[97]

A person may use RFRA to file a claim against the government, or he may use RFRA to defend his otherwise unlawful actions.[98]

Through enacting RFRA, Congress set out to restore the pre-*Smith* Free Exercise compelling interest test[99] developed in *Sherbert*[100] and *Yoder*.[101] Congress found that pre-*Smith* cases provided "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[102] To determine whether the government met the compelling interest requirement, Congress expected courts to look to the pre-*Smith* Free Exercise precedent in applying this test.[103] Further, Congress cautioned courts against construing RFRA as applying

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(quoting *Lukumi Babalu*, 508 U.S. at 533)); Ronald J. Krotoszynski, Jr., *If Judges were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1194 (2008) (intimating that the inconsistent application of strict scrutiny is preferable to lowering the standard of review to rational basis because, unlike strict scrutiny, applying rational basis "virtually ensures that most free exercise claims will fail").

96. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (2012)).

97. 42 U.S.C. §§ 2000bb-1(b)(1)–(2).

98. *See* § 2000bb-1(c) (providing avenues for judicial relief).

99. § 2000bb(b)(1).

100. 374 U.S. 398 (1963); *see also supra* notes 69–71 and accompanying text for a brief explanation of *Sherbert v. Verner*.

101. 406 U.S. 205 (1972); *see also supra* note 79 and accompanying text for a brief explanation of *Wisconsin v. Yoder*.

102. 42 U.S.C. § 2000bb(a)(5); S. REP. NO. 103-111, at 3 (1993).

103. S. REP. NO. 103-111, at 8–9; H.R. REP. NO. 103-88, at 7 (1993).

a compelling interest test that is more or less stringent than it was prior to *Smith*.[104] Thus, Congress did not intend for courts to rely solely on *Sherbert* and *Yoder*; rather, it intended for courts to utilize the compelling interest test as it evolved up to the time of the *Smith* decision.[105]

Under RFRA, this compelling interest test only applies where the federal government has substantially burdened a person's religious exercise. RFRA does not require the government to meet strict scrutiny for every government action that has some incidental burden on religious exercise.[106] Therefore, the threshold question in any case is: Did the government substantially burden the claimant's religious exercise? If not, then RFRA cannot be used to provide a religious accommodation. Again, Congress expected courts to look to pre-*Smith* precedent to determine whether a law or government action substantially burdens a person's religious exercise.[107]

2. The Supreme Court's current construction

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,[108] the Court held that under RFRA, the government must demonstrate that applying "the challenged law [to] . . . the particular claimant" serves the government's compelling interest.[109] Courts must "look[] beyond

104. S. REP. NO. 103-111, at 9 (describing the bill not as a codification of any decisions reached before *Smith*, but rather restoring the legal standard applied in those cases); H.R. REP. NO. 103-88, at 7 (instructing courts not to apply a test that is any more or less stringent than was used prior to *Smith*).

105. In the text of RFRA, Congress declared its intent to restore the compelling interest test used in *Sherbert* and *Yoder*. 42 U.S.C. § 2000bb(b)(1). In committee reports, Congress cited subsequent cases to support the finding that the compelling interest test is workable and strikes a sensible balance between religious liberty and competing governmental interests. *See* S. REP. NO. 103-111, at 5 n.5 (citing Hernandez v. Comm'r, 490 U.S. 680 (1989); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982)). These cases demonstrate Congress's approval of both the broad and narrow compelling interest tests discussed in Section I.A.2. *See Hernandez*, 490 U.S. at 684 (upholding the government's action in denying members of the Church of Scientology a tax deduction for payments they made to branch churches for "auditing" and "training" services); *Bob Jones Univ.*, 461 U.S. at 605 (upholding the government's denial of a tax exemption to a religious college that claimed its religious beliefs mandated racially discriminatory practices); *Lee*, 455 U.S. at 261 (upholding the government's action in requiring an Amish employer to pay a portion of Social Security taxes).

106. S. REP. NO. 103-111, at 9 & n.18 (using fire codes, which apply equally to secular and religious buildings, as an example of neutral and compelling laws and regulations).

107. *Id.* at 8; H.R. REP. NO. 103-88, at 6.

108. 546 U.S. 418 (2006).

109. *Id.* at 430–31.

broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[110] In other words, the government must demonstrate that it has a compelling interest beyond the mere interest in a uniform application of the law, and that providing a religious exemption to the particular claimant would undermine the achievement of that compelling interest.[111]

In *Hobby Lobby*, the Court held that closely held, for-profit corporations can exercise religion and that, under RFRA, their religious exercise is protected.[112] In that case, several closely held, for-profit corporations challenged a government regulation promulgated under the Patient Protection and Affordable Care Act[113] that required certain employers to provide their employees with insurance plans covering multiple forms of birth control.[114] The corporations' majority shareholders believed that several of these forms of birth control were abortifacients,[115] and argued that the regulation burdened their religious exercise by forcing them to "facilitate access to contraceptive drugs or devices that operate after" conception.[116] Applying RFRA, the Court found that the contraceptive mandate substantially burdened the corporations' religious exercise.[117] The government argued that the contraceptive mandate did not substantially burden the petitioners' religious exercise because providing the coverage would not itself result in the "sinful" destruction of an embryo.[118] An embryo

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110. *Id.* at 431.

111. *See id.* at 435–36 (distinguishing the present case from others in which the government demonstrated that permitting exemptions would "seriously compromise its ability to administer the program").

112. *See* 134 S. Ct. 2751, 2772 (2014) ("When first enacted, RFRA defined the 'exercise of religion' to mean 'the exercise of religion under the First Amendment'—not the exercise of religion as recognized only by then-existing Supreme Court precedents.").

113. Pub L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

114. *See Hobby Lobby*, 134 S. Ct. at 2775.

115. An abortifacient is "an agent (such as a drug) that induces abortion." *Abortifacient*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abortifacient (last visited Dec. 3, 2018).

116. *See Hobby Lobby*, 137 S. Ct. at 2762–66.

117. *See id.* at 2779 (concluding that the economic penalties imposed by the regulation of employers who fail to comply with the contraceptive mandate because of their religious beliefs created a substantial burden on the corporations).

118. *See id.* at 2777 (summarizing the government's argument that the connection between the contraceptive mandate and petitioners' moral objection to the destruction of an embryo was "simply too attenuated" to violate the Free Exercise Clause).

would be destroyed "only if an employee chose to take advantage of the coverage" and then made an additional choice to use one of the four methods at issue.[119] According to the majority, this reasoning confused the permissible question of whether religious exercise is substantially burdened with the impermissible question of whether the religious belief is reasonable.[120] Instead, it held that the narrow function of the Court in determining whether religious exercise is substantially burdened is to determine whether the line drawn between the belief and objectionable act is "an honest conviction."[121] Further, because the government already provided accommodations to churches and religious nonprofits, the government demonstrated that it had a readily available least restrictive alternative.[122] Thus, the closely held, for-profit corporations were exempt from the contraceptive mandate because the government was unable to satisfy the requirements of RFRA.[123]

In an attempt to quell the dissent's fears that its decision will permit every corporation to become a law unto itself, the majority rejected the possibility "that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction."[124] It reasoned that the government has a compelling interest in providing equal opportunity in the workforce, and Title VII's prohibition on racial discrimination is the least restrictive means to achieve that goal.[125]

Justice Ginsburg dissented on multiple grounds. First, she rejected the majority's holding that corporations can exercise religion.[126] When an individual incorporates a business, he separates himself from the entity to escape personal liability and, therefore, should not be able to attach his religious beliefs to the corporation's conduct.[127] Second,

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119. *Id.* The four methods of birth control at issue were FDA-approved contraceptive options that may operate after the fertilization of an egg. *See id.* at 2762–63.

120. *Id.* at 2778; *see also supra* note 43 and accompanying text.

121. *Hobby Lobby*, 134 S. Ct. at 2779 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1982)).

122. *Id.* at 2782.

123. *See id.* at 2785.

124. *Id.* at 2783.

125. *Id.*

126. *See id.* at 2793–94 (Ginsburg, J., dissenting) (noting that RFRA "applies to government actions that 'substantially burden a person's *exercise of religion*,'" and asserting that there is "no support for the notion that free exercise rights pertain to for-profit corporations").

127. *See id.* at 2797 (questioning "why the separation should hold only when it serves the interest of those who control the corporation").

Justice Ginsburg found that the majority misconstrued the substantial burden analysis.[128] The majority's honest conviction test substituted a factual finding that the petitioners' beliefs are sincere and religious for a legal conclusion that the religious belief is substantially burdened.[129] Further, under the proper construction, the government had not substantially burdened the petitioners' religious exercise.[130] Justice Ginsburg found that any burden the claimants felt was "too attenuated" because the government had not required them to "purchase or provide" the objectionable contraceptives, but only to disperse "money into undifferentiated funds that finance a wide variety of benefits."[131] Therefore, in Justice Ginsburg's view, the majority opinion was a bold departure from pre-*Smith* jurisprudence because it eliminated RFRA's substantial burden prong and expanded the scope of entities protected.[132]

C. The Inclusive Interpretation of Title VII

As the Supreme Court was expanding protection for religious exercise under RFRA, it was simultaneously expanding constitutional protections for LGBT citizens.[133] In just twelve short years, LGBT

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128. *See id.* at 2799.

129. *See id.* at 2798. (acknowledging that the petitioners' beliefs were sincerely held but finding them insufficient for a RFRA claim).

130. *See id.* at 2799.

131. *Id.*

132. *Id.* at 2791–92.

133. The Supreme Court's decisions focus on lesbian, gay, and bisexual citizens. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604–08 (2015) (recognizing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect the right to marry for same sex partners); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down a state law that criminalized homosexual sodomy but not heterosexual sodomy under the Due Process Clause of the Fourteenth Amendment). However, several lower court decisions have held that the Equal Protect Clause requires courts to apply intermediate scrutiny to government actions that discriminate against transgender citizens. *See, e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048, 1051 (7th Cir. 2017) (finding that discrimination on the basis of gender nonconformity is gender discrimination under the Equal Protection Clause); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination on the basis of gender nonconformity is sex-based discrimination under the Equal Protection Clause); Smith v. City of Salem, 378 F.3d 566, 568, 576–77 (6th Cir. 2004) (concluding that the appellant alleged sufficient facts to demonstrate discrimination on the basis of gender nonconformity to bring a claim of sex discrimination under the Equal Protection Clause). *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221, 1227–28 (10th Cir. 2007) (holding that transgender is not a suspect class under Title VII and, therefore, the appellant failed to allege a sufficient claim under the Equal Protection Clause).

citizens went from lacking the fundamental right to engage in intimate same-sex relationships to the right to marry same-sex partners.[134] During this brisk shift in the legal and sociopolitical climate, the EEOC and several circuit courts adopted an inclusive interpretation of Title VII's proscription of sex discrimination.[135]

Title VII makes it unlawful for an employer to discharge or otherwise discriminate against an employee "because of such individual's race, color, religion, sex, or national origin."[136] In *Price Waterhouse v. Hopkins*,[137] the Court held that Title VII's prohibition on sex discrimination prohibits an employer from taking gender into account, and therefore precludes discrimination against an employee for failure to conform to sex-stereotypes.[138] In other words, Title VII prohibits an employer from making adverse employment decisions based on the fact that a female employee fails to act or appear in a stereotypically feminine way.[139] Similarly, it prohibits firing a male employee for failing to present or act in a stereotypically masculine way.[140] Thus, in *Price Waterhouse*, an employer violated Title VII when it denied partnership to a female employee because she failed to behave as some of the partners believed a woman should.[141]

In 2012, the EEOC held that discrimination on the basis of nonconforming gender expression is actionable as sex discrimination

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134. *See Obergefell*, 135 S. Ct. at 2604–05 (protecting same-sex marriage); *Lawrence*, 539 U.S. at 578–79 (protecting same-sex intimate relations).

135. *See infra* notes 137–144 and accompanying text.

136. 42 U.S.C. § 2000e-2(a)(1) (2012).

137. 490 U.S. 228 (1989) (plurality opinion), *superseded by statute*, 42 U.S.C. § 2000e-2(a), *as recognized in* Burrage v. United States, 571 U.S. 204, 213 n.4 (2014).

138. *See id.* at 239, 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .").

139. *See id.* at 250 (noting that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender").

140. Though *Price Waterhouse* concerned a female employee, *id.* at 231–32, the only logical inference is that Title VII must also prohibit discrimination against males on the same basis. Some lower courts have expressly stated this. *See* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (citing Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 214 (1st Cir. 2000)).

141. *See Price Waterhouse*, 490 U.S. at 234–35 (discussing partner reviews recommending the company deny partnership because the female employee was too masculine, and the given advice that the employee walk, talk, and dress more femininely to improve her chances in the future).

under Title VII.[142] The EEOC acknowledged that discrimination against a transgender employee might be based on sex stereotypes—the employer's belief "that biological men should consistently present as men and wear male clothing"—but it recognized that this is just one way to prove sex discrimination.[143] The EEOC took guidance from the Supreme Court's finding in *Price Waterhouse* that Congress intended to forbid employers from taking gender into account at all:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." . . . This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation . . . .[144]

Thus, while the EEOC recognizes that discrimination against gender-nonconforming employees falls under "sex-stereotyping," its decision is much broader than that of the Supreme Court's in *Price Waterhouse*. The EEOC is not alone; the Sixth Circuit recently abandoned the requirement that a transgender employee demonstrate sex-stereotyping to prevail on a Title VII claim.[145] Instead, the court relied on Justice Brennan's finding that Title VII requires "gender [to] be irrelevant to employment decisions," and an employer does not treat gender as irrelevant if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.[146]

Additionally, the EEOC has broadened the sex-stereotyping framework in holding that discrimination on the basis of sexual

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142. *See* Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *7 (E.E.O.C. Apr. 20, 2012).

143. *Id.* at *10 (considering an employer's willingness to hire an individual it believed to be a man but unwillingness to hire the individual after learning she was now a woman to be sex discrimination as well).

144. *Id.* at *7 (citing *Price Waterhouse*, 490 U.S. at 228, 244).

145. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018) ("Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex . . . ."), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

146. *Id.* at 576 (alteration in original) (quoting *Price Waterhouse*, 490 U.S. at 240).

orientation is discrimination based on sex.[147] In *Baldwin v. Foxx*,[148] the EEOC found that sexual orientation cannot be defined without reference to sex—it is "inseparable from and inescapably linked to sex."[149] When an employer discriminates based on sexual orientation, he necessarily treats the employee less favorably because of his sex.[150] For example, if "an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk," the employer took an adverse action against the lesbian employee that he would not have taken had the employee been male.[151] Thus, as construed, Title VII protects against discrimination related to a person's gender expression and sexual orientation.[152]

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147. *See* Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015) ("[W]e conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.").

148. Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

149. *Id.* at *5.

150. *Id.*

151. *Id.*

152. Several circuit courts have also held that Title VII prohibits discrimination because of a person's gender expression and sexual orientation. *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc) (concluding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination"), *petition for cert. docketed*, No. 17-1623 (U.S. June 1, 2018); Hively v. Ivy Tech Cmty Coll., 853 F.3d 339, 345 (7th Cir. 2017) (en banc) (asserting that discrimination on the basis of sexual orientation is "paradigmatic" sex discrimination); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 883 (11th Cir. 2016) (per curiam) (citing Glen v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011)) (reiterating that discrimination on the basis of gender nonconformity is gender discrimination under Title VII); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (finding that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms" (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). However, not all circuit courts interpret discrimination on the basis of sexual orientation as part of sex discrimination. *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1254–55 (11th Cir. 2017) (holding discrimination on the basis of gender nonconformity, but not sexual orientation itself, is actionable under Title VII), *cert. denied*, 138 S. Ct. 577 (2017) (mem.); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (stating that discrimination based on sexual orientation is not prohibited by Title VII), *cert. denied*, 534 U.S. 1155 (2002) (mem.); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (holding sex discrimination does not include discrimination because of sexual orientation). Further, the issue is currently pending before the Eighth Circuit. *See*

D. The Inevitable Clash Between Opposing Rights

It was only a matter of time before religious rights and civil rights clashed.[153] In *Harris Funeral Homes*, the United States District Court for the Eastern District of Michigan held that, under RFRA, a closely held, for-profit corporation was exempt from Title VII's prohibition on sex discrimination.[154] Thomas Rost, the owner and majority shareholder of R.G. & G.R. Harris Funeral Homes, Inc., fired the funeral home director, Aimee Stephens, shortly after she informed him that she would begin transitioning from male to female.[155] The funeral home had no affiliation to any religious organization.[156] However, Rost had been a Christian for over sixty-five years, and he believed that the "Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex."[157] Further, Rost believed that he would violate "God's commands" by permitting a male funeral director to wear a skirt suit because he "would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift."[158] Rost did not deny firing Stephens because of her transition.[159] Instead, he claimed that retaining Stephens as an employee would violate his, and by proxy the funeral home's, sincerely held religious beliefs. Thus, under RFRA, Rost argued that the government should exempt him from Title VII.[160]

Brief of Plaintiff-Appellant Mark Horton, Horton v. Midwest Geriatric Mgmt., LLC, No. 18-1104 (8th Cir. Aug. 30, 2018), 2018 WL 1350998.

153. Chief Justice Roberts predicted this clash in *Obergefell v. Hodges*:

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage . . . . There is little doubt that these and similar questions will soon be before this Court.

135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting) (citation omitted).

154. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 842 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

155. *Id.* at 843–45.

156. *Id.* at 843.

157. *Id.* at 847–48 (citation omitted).

158. *Id.* at 848 (citation omitted).

159. *Id.* at 846–47.

160. *Id.* at 848, 851.

The district court agreed with Rost.[161] First, it found that the EEOC substantially burdened Rost's religious exercise.[162] The court rejected the EEOC's argument that it would only substantially burden the funeral home's religious exercise if it required the home to provide female clothes to Stephens.[163] Adhering to the Supreme Court's decision in *Hobby Lobby*, the court acknowledged that its function was not to decide whether the funeral home's "religious beliefs are mistaken or insubstantial."[164] Rather, the court could only determine whether the belief was "an honest conviction."[165] Thus, because the court found Rost (and by proxy the funeral home) honestly believed he would violate his religious beliefs by permitting another person to express their gender identity, RFRA required the court to apply the compelling interest test.[166]

The court assumed that the EEOC had a compelling interest in applying Title VII's prohibition on sex discrimination to the funeral home.[167] The court did not read the *Hobby Lobby* dicta on Title VII—declaring that Title VII serves a compelling interest and is narrowly tailored—as exempting Title VII from the focused analysis RFRA demands.[168] Though the court expressed doubts that the EEOC had met this burden, the Supreme Court's *Hobby Lobby* decision did not offer

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161. *See id.* at 863.

162. *See id.* at 856–57 (concluding that it was a substantial burden to require Rost to employ a biological male who wore clothing that complied with the Funeral Home's female dress code).

163. *See id.* at 855.

164. *Id.* at 856 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014)).

165. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2279)).

166. As an ad hoc justification of its substantial burden analysis, the court noted that the funeral home would be forced to pay back and front pay to Stephens for firing her. *Id.* (noting the economic and mental pressure that would befall Rost were the court to apply Title VII after already finding his religious exercise to be substantially burdened). Further, the court noted that Rost testified that if he were required to maintain Stephens as an employee, he would feel pressure to sell his business. *Id.* Yet, the court based its substantial burden analysis on the mere fact that "requiring the Funeral Home to provide a skirt to and/or allow an employee born a biological male to wear a skirt at work would impose a substantial burden on the ability of Rost to conduct his business in accordance with his sincerely-held religious beliefs." *Id.*

167. *See id.* at 859 (referencing the EEOC's motion for summary judgment, which broadly described the compelling interest as "protecting employees from gender stereotyping in the workplace").

168. *See id.* at 856–58 (discussing the more focused inquiry set forth in *O Centro* and reaffirmed in *Hobby Lobby*).

guidance on how to apply the compelling interest analysis to Title VII.[169] Therefore, the court assumed that the EEOC had a compelling interest.[170]

Next, the court found that the EEOC failed to utilize the least restrictive method of ensuring that Rost complied with Title VII's proscription of sex discrimination.[171] The court rejected the EEOC's argument that Title VII's prohibition on sex discrimination was precisely tailored to ensure employees would not lose their jobs due to an employer's gender stereotyping.[172] Instead, the court required that the EEOC show that the burden on the funeral home's religious exercise was the least restrictive means of eliminating clothing gender stereotypes at the funeral home.[173] The court found that requiring Rost to implement a gender-neutral dress code would have burdened his religious exercise less than requiring him to permit Stephens to wear a skirt.[174] Therefore, RFRA required the court to grant Rost a religious exemption from Title VII.[175]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed.[176] First, the Sixth Circuit held that requiring Rost to comply with Title VII did not substantially burden his religious exercise.[177] The court recognized that it was Rost's sincerely held belief that the

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169. *Id.* at 859.

170. *Id.*

171. *See id.* at 862–63.

172. *See id.* at 860 (noting that this "conclusory" argument is too broad and does not focus on the specific burdens on the funeral home).

173. *Id.* at 859–60.

174. *Id.* at 862. While there are valid arguments for abstaining from determining whether the line between the religious belief and objectionable act are reasonable, this case demonstrates how in some circumstances this leads the court to accept absurd and arbitrary lines. Rost claimed that permitting Stephens to wear a skirt violated his sincerely held religious beliefs, and that he would be opposed to allowing a biological female employee to wear clothing complying with the funeral home's male dress code; however, the court noted that Rost already permitted biological female employees to wear pantsuits without a neck tie. *Id.* at 863 n.19. While gender norms may certainly be seen in the Christian Bible, gender expression is a social construct that developed separate from religion. Thus, it will change as society's view of acceptable gender expression changes. Wearing pants is now acceptable for women, yet one hundred years ago, only men were permitted to wear pants. Granting a religious exemption based on objection to gender expression authorizes an employer to draw lines less related to religious beliefs and more properly understood as related to sociopolitical views.

175. *Id.* at 863.

176. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 590 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

177. *See id.* at 586 (concluding that Rost could not use potential customer biases to assert a substantial burden).

operation of the funeral home was a religious exercise, and that Rost honestly believed complying with Title VII would substantially burden his religious exercise.[178] However, the court rejected the notion that it was powerless to determine whether Title VII substantially burdened that religious exercise.[179] The court reasoned that ending the substantial burden inquiry after finding an honest conviction would only substitute the religious objector's religious belief for legal analysis.[180]

Second, the Sixth Circuit held that even if requiring Rost to comply with Title VII substantially burdened his religious exercise, the government met its burden under strict scrutiny.[181] The court found that the EEOC has a compelling interest in eradicating sex discrimination, and exempting Rost would undermine that interest by permitting sex discrimination.[182] Further, unlike the district court, the Sixth Circuit understood the Title VII dicta in *Hobby Lobby* to mean that Title VII is always narrowly tailored.[183] Thus, the court held that Rost was not exempt from Title VII.[184]

E. Traversing the Free Exercise and Establishment Clauses

The Free Exercise Clause does not stand-alone; it is intrinsically bound to the Establishment Clause.[185] Both clauses operate to secure religious freedom, but, much like the definition of religion, the boundaries of the Establishment Clause are elusive.[186] At its most

178. *See id.* at 589.

179. *Id.* ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law." (quoting Eternal Word Television Network, Inc., v. Sec'y of the U.S. Dep't of Health and Human Servs., 818 F.3d 1122, 1145 (11th Cir. 2016))).

180. *See id.*

181. *Id.* at 590.

182. *See id.* at 590, 592–93.

183. *Id.* at 595.

184. *See id.* at 600 (granting summary judgment for the EEOC).

185. The text of the First Amendment mentions religion only once, yet both the Free Exercise and Establishment Clause refer to it. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *see also* Lee v. Weisman, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.").

186. *See* Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006) (commenting that the Supreme Court appears unable to provide sufficient guidance for understanding and applying the Establishment Clause).

restrictive posture, the Establishment Clause prevents the government from advancing or benefiting religion in anyway.[187] At its most permissive posture, the Establishment Clause permits the government to aid or even favor religion, so long as the government does not officially establish a national church.[188]

The Supreme Court's incoherent jurisprudence stems from fundamental differences, in the minds of the Justices, of the degree of separation the Constitution imputes onto the church-state relationship.[189] The varying degrees of constitutionally-required separation between the government and religion are best represented by three theories: (1) strict separation, (2) accommodation, and (3) flexible accommodation.[190] The theory of strict separation—best represented by Thomas Jefferson's metaphor of a "wall of separation between church and state"—is premised on the understanding that the Establishment Clause requires the government to remain completely impartial to religion, providing neither accommodations nor burdens.[191] The accommodation theory on the other hand, is premised on the understanding that religion does not exist in complete isolation from the government; the government must provide some aid to religion just as it must provide aid to other establishments (e.g., providing building permits, police, fire engines, etc.).[192] Under this theory, the government may accommodate religion without necessarily establishing one.[193] The flexible accommodation theory contends that the Establishment Clause simply prohibits the federal government from establishing a national church, nothing more.[194]

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187. *See infra* notes 189–194 and accompanying text.

188. *See infra* notes 189–194 and accompanying text.

189. *See* Gey, *supra* note 186, at 12–36 (discussing the shift in Establishment Clause jurisprudence from strict separation to integration).

190. *See* Shahin Rezai, Note, County of Allegheny v. ACLU*: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 507–25 (1990) (discussing differences between the theories of strict separation, accommodation, and flexible accommodation).

191. *Id.* at 507–09; *see also* Lee v. Weisman, 505 U.S. 577, 609–10 (1992) (Souter, J., concurring) (noting that the Establishment Clause forbids laws that aid religion in general).

192. *See* Walz v. Tax Comm'n, 397 U.S. 664, 675–76 (1970) (explaining that the Establishment Clause cannot mean the "absence of all contact" between church and state because "the complexities of modern life inevitably produce some conduct and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions").

193. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (confirming that the First Amendment cannot require complete separation but rather requires accommodation for, and forbids hostility towards, any religion).

194. Rezai, *supra* note 190, at 521.

As the Justices have adopted varying views on separation and integration, the Court has become increasingly divided in determining whether a given government action violates the Establishment Clause.[195] The Court's fractured precedent incorporates several common analyses, each premised on—to varying degrees—the three theories outlined above. For purposes of this Comment, only three of these analyses are relevant.[196]

First, under the *Lemon* test, developed in *Lemon v. Kurtzman*,[197] a statute "must have a secular legislative purpose"; it must not have a "principal or primary effect" of advancing or inhibiting religion; and it "must not foster 'an excessive government entanglement with religion.'"[198]

Second, under the endorsement test, the government must not have the primary purpose or effect of endorsing religion over non-religion.[199] The endorsement test is a mutation of the *Lemon* test that shifts the focus from whether the government's primary purpose or effect is to advance or inhibit religion to whether the government's action has the appearance of symbolically endorsing religion over non-religion.[200] According to Justice O'Connor, courts should look through the eyes of a hypothetical "reasonable observer," who is familiar with the "history, language, and administration of a particular statute" to determine whether the government acted with the primary purpose of endorsing a religion.[201] A statute has the effect of endorsing

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195. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (six Justices filing separate opinions).

196. This Comment briefly discusses the *Lemon* test and the endorsement test to provide the reader with some general context but focuses mostly on the coercion test because it serves as the minimum threshold for determining whether government action violates the Establishment Clause. *See infra* notes 203–216.

197. 403 U.S. 602 (1971).

198. *Id.* at 612–13.

199. *See* Lynch v. Donnelly, 465 U.S. 668, 687–88 (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community . . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.").

200. *See* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989) ("Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion . . . . [W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion . . . ."), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

201. Wallace v. Jaffree, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring); *see also* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) ("[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.").

religion if it, intentionally or unintentionally, communicates a message of endorsement or disapproval of religion.[202]

Finally, under the coercion test, the "government may not coerce anyone to support or participate in religion or its exercise."[203] This test is best understood as establishing the minimum level of protection that the Establishment Clause provides; if the government coerces a person to conform to the beliefs of another, this will satisfy the primary effects prong of both the *Lemon* and endorsement test.[204] In *Lee v. Weisman*,[205] the Supreme Court held that a public school could not incorporate clergy-delivered prayer at a graduation ceremony because the prayer indirectly coerced attendees to participate in a religious exercise.[206] The majority decided this case without referring to the *Lemon* test because, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[207]

First, the Court found that the religious exercise "bore the imprint of the state" because the school's principal decided to include the prayer, chose a rabbi to deliver the prayer, and advised the rabbi to provide a nonsectarian prayer.[208] Second, the state's involvement placed public pressure on the attendees to at least appear to

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202. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (asserting that government practices that offer such an endorsement or disapproval make religion relevant to community status).

203. Lee v. Weisman, 505 U.S. 577, 587 (1992) (striking down school-sponsored prayer without relying on the *Lemon* test).

204. *See id.* at 604 (Blackmun, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."); *see also id.* at 618–21 (Souter, J., concurring) (rejecting the argument that the Establishment Clause only prohibits the government from coercing citizens to engage in religious activities because the Free Exercise Clause prohibits the government from coercing citizens to support or engage in religious activities and, therefore, reading the Establishment Clause as only prohibiting coercion essentially renders the Clause superfluous); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 483 (1994) (referring to the coercion standards as a "constitutional safety net").

205. 505 U.S. 577 (1992).

206. *See id.* at 580, 599.

207. *Id.* at 587.

208. *Id.* at 588, 590.

participate in the prayer, while the graduation setting placed peer pressure on attendees.[209] This peer pressure was enough to indirectly coerce teenagers to stand for the prayer, thereby appearing to conform to the religious exercise.[210] Further, the fact that the ceremony was legally voluntary was not sufficient to overcome the coercive nature of the prayer.[211] Graduation ceremonies provide intangible benefits to high school students, and "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[212] Thus, the state could not require students to choose between either appearing to participate in the religious exercise or forfeiting the intangible benefits associated with graduation.[213]

Justice Scalia dissented, arguing that coercion violates the Establishment Clause only if it is supported "*by force of law and threat of penalty*."[214] Incorporating clergy-delivered prayer at a graduation ceremony could not violate the Establishment Clause because attendance was not legally required and failure to stand for the prayer was not backed by threat of penalty.[215] If taken to its logical conclusion, this understanding of coercion would permit virtually all forms of symbolic endorsement.[216]

At any given time, the Court may utilize any of these tests to scrutinize an alleged Establishment Clause violation.[217] The rest of this Section explores the relationship between the Establishment Clause and the Free Exercise Clause. Section I.E.1 explores cases in which the Court found a religious accommodation permissible under the Establishment Clause.[218]

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209. *Id.* at 593.

210. *See id.* (noting that "standing or remaining silent can signify adherence to a view").

211. *See id.* at 594–95 (finding no real choice existed for the teenage petitioner who wished to attend her own graduation).

212. *Id.* at 596.

213. *Id.* at 595.

214. *Id.* at 640 (Scalia, J., dissenting) ("The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced 'peer-pressure' coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

215. *See id.* at 640–42.

216. *See* Gey, *supra* note 204, at 506–07 (rejecting Justice Scalia's suggestion that the prayer was constitutional because it was nonsectarian).

217. *See id.* at 467 ("The case law is littered with tests and guidelines that were intended to clarify the line separating church and state but which succeeded only in creating new disputes.").

218. *See infra* Section I.E.1.

Section I.E.2 explores cases in which the Court found a religious accommodation impermissible under the Establishment Clause.[219]

1. Playing between the joints

Though the religion clauses of the Constitution share the "common purpose of securing religious liberty,"[220] they are fixed in diametrical opposition—"both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[221] If the government may not advance religion in any way, it must not provide accommodation from laws that burden religious exercise, thereby forcing the government to violate the Free Exercise Clause. On the other hand, if the government is unable to interfere with religious exercise in any way, it must provide religious accommodations even where they have the effect of advancing religion, thereby violating the Establishment Clause. To avoid these logical extremes, the Supreme Court has made clear that there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[222]

The Court has repeatedly confirmed the fundamental principle of neutrality: to remain within the "joints productive of benevolent neutrality," the government may not favor religion over non-religion or favor one religion over others.[223] Neutrality ensures all members of society, not just those subscribing to the majoritarian orthodoxy, are afforded religious liberty. The purpose of neutrality, as Justice Brennan noted:

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219. *See infra* Section I.E.2.

220. *Weisman*, 505 U.S. at 605 (Blackmun, J., concurring).

221. Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

222. *Id.* at 669.

223. *Id.* In 1992, Justice Souter recognized that in the preceding forty-five years, the Court had not strayed from the fundamental principle of neutrality. *See Weisman*, 505 U.S. at 610 (Souter, J., concurring). Since then, the Court has disregarded the neutrality principle in only one decision, *Town of Greece v. Galloway*, which upheld legislative prayer. *See* 134 S. Ct. 1811, 1823 (2014) (rejecting the argument that legislative prayer must be nonsectarian under historical perspective analysis). There, the Court rested its decision on the understanding that the practice of opening legislative sessions with prayer was firmly settled history, beginning with the First Congress. *See id.* at 1818–19. Thus, this analysis is not likely to be utilized in the context of employment discrimination, lest the Court apostatize the Fourteenth Amendment.

> is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.[224]

Therefore, while the government must remain neutral between religion and non-religion, and neutral between religious sects, the First Amendment does not require the government to completely separate itself from religion. Rather, so long as it acts neutrally, the government may accommodate religious exercise.[225] Thus, while the Court has moved beyond strict separation by recognizing that some religious accommodations are permissible, neutrality serves to temper these accommodations.[226]

The government remains neutral when it provides relief from a government created burden on religious exercise, so long as the availability of that relief is independent of the claimant's religious denomination. For example, in *Cutter v. Wilkinson*,[227] the Court rejected a facial challenge to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[228] which provides prisoners an exemption from prison policies that substantially burden their religious exercise.[229] The Court held that RLUIPA has the permissible primary purpose of alleviating government created burdens on religious exercise.[230] Further, RLUIPA did not differentiate between religious

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224. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989) (illustrating how the purpose and effects prong of the *Lemon* test ensure government neutrality).

225. *See Weisman*, 505 U.S. at 627 (Souter, J., concurring) ("That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may 'accommodate' the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings.").

226. *See Walz*, 397 U.S. at 669–70 ("Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.").

227. 544 U.S. 709 (2005).

228. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc–2000cc-5 (2012)).

229. *Cutter*, 544 U.S. at 719–20.

230. *Id.* at 720; *see also* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987) ("Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.").

sects; exemptions are provided regardless of the objector's religious denomination.[231] Therefore, at least facially, RLUIPA falls within the "joints productive of a benevolent neutrality."[232] However, the Court made clear that inmates should bring an as-applied challenge if RLUIPA exemptions favor religious interests over others by either imposing unjustified burdens on other inmates or jeopardizing the functioning of the prison.[233] Thus, a statute must be facially neutral, and it must remain neutral in its application.

2. Playing outside the joints

The government's attempt to accommodate religion oversteps the bounds of neutrality, and thereby violates the Establishment Clause, if its action has the effect of compelling one citizen to conform to the religious practices of another.[234] It is a fundamental principle that the 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."[235] When the government enacts a statute that has the effect of forcing non-adherents to conform to the religious beliefs of another, it places religious interests above all others, and it has the primary effect of advancing or endorsing religion.[236]

In *Estate of Thornton v. Caldor, Inc.*,[237] the Supreme Court held a statute that prohibited employers from requiring employees to work on their Sabbath violated the Establishment Clause.[238] Under the *Lemon* test, this statute had the effect of advancing religion by imposing an absolute duty on employers and employees to conform to the

231. *See Cutter*, 544 U.S. at 724 (noting that RLUIPA "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment").

232. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1990); *see id.* at 720 ("[W]e hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

233. *Id.* at 726.

234. The fear that the government might force citizens to adopt or participate in a particular religion is at the heart of the Establishment Clause. *See* 1 ANNALS OF CONG. 757–58 (Joseph Gales ed., 1834) (statement of Rep. Madison) (believing that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform").

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

236. *See id.* at 711 (O'Connor, J., concurring) (agreeing with the majority that Connecticut's Sabbath law violated the Establishment Clause).

237. 472 U.S. 703 (1985).

238. *Id.* at 710–11 (majority opinion).

religious practices of its religious employees.[239] The statute took no account of the employer's interests or the interests of employees who did not observe the same Sabbath.[240] Specifically, it did not provide an exception for circumstances under which compliance would impose a substantial economic burden on the employer or significant burdens on employees required to work in the place of the Sabbath observer.[241] Therefore, the statute placed religious interests over all others.[242] Further, even under the endorsement test, the statute violated the Establishment Clause.[243] Although the statute did not have the primary purpose of endorsing religion, it had the primary effect of endorsing religion over non-religion and the religion of one employee over the religions of others who have a different Sabbath.[244]

The Court has permitted a religious accommodation that had the effect of compelling a third party to conform to religious beliefs, but only where necessary to prevent the government from interfering with a church's ability to define its religious mission. In *Corporation of Presiding Bishop of The Church of Jesus Crist of Latter-day Saints v. Amos*,[245] the Court upheld § 702 of Title VII, which exempts churches from Title VII's prohibition on employment discrimination on the basis of religion.[246] The majority noted that an exemption is "not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."[247] In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[248] the Court held that the Free Exercise Clause and the Establishment Clause require a ministerial exception to Title VII.[249] The Free Exercise Clause protects a church's right to shape its own faith and mission through appointing ministers who

239. *See id.* at 708–09 (emphasizing that, through the law, the state "command[ed] that Sabbath religious concerns automatically control over all secular interests at the workplace").

240. *Id.* at 709.

241. *See id.* at 709–10.

242. *Id.* at 710.

243. *See id.* at 711–12 (O'Connor, J., concurring) (applying the endorsement test).

244. *See id.* at 711 ("The statute singles out Sabbath observers for special and . . . absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees . . . . The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.").

245. 483 U.S. 327 (1987).

246. *See id.* at 329–30 (upholding the validity of 42 U.S.C. § 2000e-1(a) (2012)).

247. *See id.* at 337 (concluding that a law is invalid if "the *government itself* has advanced religion through its own activities and influence").

248. 565 U.S. 171 (2012).

249. *See id.* at 188–89.

"personify its beliefs," while the Establishment Clause prevents the government from entangling itself "in such ecclesiastical decisions."[250] Thus, these cases represent a very narrow exception to the rule that religious accommodation cannot compel third party conformity.

In addition to forbidding the government from compelling third party conformance, the Court has repeatedly relied on *Estate of Thornton* for the proposition that the application of religious accommodation statutes such as RFRA must not impose unjustified burdens on third parties[251] and for the proposition that religious accommodations must not override other significant interests.[252] In such cases, the Court easily found that the requested religious accommodations did not burden any third parties and, therefore, had no opportunity to set a standard for determining whether such a burden is unjustified.[253] As argued below, the principle of neutrality prohibits courts from balancing the religious interests of a private citizen against the religious or secular interests of another. Therefore, the Court's reliance on *Estate of Thornton* for asserting otherwise is misplaced.[254]

II. ANALYZING THE APPLICATION OF RFRA TO TITLE VII UNDER THE ESTABLISHMENT CLAUSE

On its face, RFRA is a constitutional accommodation of religious exercise because Congress acted with the permissible purpose of alleviating a burden on religious exercise.[255] However, as applied to

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250. *Id.*

251. *See* Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring) (agreeing that RLUIPA required an exemption from prison grooming policy on the understanding that this exemption would not "detrimentally affect others who do not share petitioner's belief"); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014) (accepting that courts must, in applying RFRA, "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and that this will inform the compelling interest and least restrictive means analysis of RFRA (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005))); *Cutter*, 544 U.S. at 726 (noting that if a facially permissible religious exemption imposed unjustified burdens on third parties, an as-applied challenge would be appropriate).

252. *See Cutter*, 544 U.S. at 722 (construing *Estate of Thornton v. Caldor, Inc.* as invalidating a law because it "'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests'").

253. *See, e.g.*, *id.* at 720 (devoting one sentence to declaring that nothing on the face of RLUIPA "founder[s] on [the] shoals our prior decisions have identified" and referencing *Estate of Thornton v. Caldor, Inc.*).

254. *See infra* Section II.B.1.

255. *See* 42 U.S.C § 2000bb (2012) (explaining the purpose of the act is to relieve substantial burdens imposed by neutral laws of general applicability); *Cutter*, 544 U.S.

Title VII, RFRA constitutes an impermissible endorsement of religion. This Section argues that applying RFRA as construed by the Supreme Court violates the Establishment Clause in two ways. First, applying RFRA to Title VII constitutes a government action that coerces LGBT employees to conform to their employers' religious beliefs. Second, RFRA accommodations from Title VII violate the principle of neutrality and are therefore impermissible endorsements.

A. The Supreme Court's Construction of RFRA Represents an Extreme Expansion of Religious Liberty that Coerces Religious Conformance

This Section argues that the Supreme Court's construction of RFRA expands the scope of religious accommodations beyond what Congress intended. Further, applying this construction to Title VII constitutes a government action that coerces religious conformance. Using *Harris Funeral Homes*, this Section argues that the United States District Court for the Eastern District of Michigan accurately applied RFRA as construed by the Supreme Court, and this application constitutes a government action that coerced Stephens to conform to Rost's religious beliefs.

1. O Centro *requires stricter scrutiny than pre-*Smith *cases*

In *O Centro*, the Court held that the government must demonstrate that it has a compelling interest beyond the mere interest in a uniform application of the law. Further, it held that the government must demonstrate that providing a religious exemption to the particular claimant would undermine the achievement of that compelling interest.[256] At first glance, this interpretation might not provoke concern, but upon further inspection, it is apparent that it marks the

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at 720 (holding RLUIPA constitutional on its face because Congress acted with the permissible purpose of alleviating a burden on religious exercise). *But see* City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring) ("In my opinion, the Religious Freedom Restoration Act of 1993 . . . is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution. If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure . . . . [T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." (citing Wallace v. Jaffree, 472 U.S. 38, 52–55, (1985))).

256. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 435–37 (2006) (distinguishing the case at bar from others in which the government demonstrated that permitting exemptions would "seriously compromise [the government's] ability to administer the program").

beginning of a broad expansion of RFRA protection. This compelling interest analysis seems to align with the text of RFRA, which permits the government to substantially burden a person's religious exercise only if it demonstrates that the "application of the burden to the person" is in furtherance of a compelling interest.[257] Additionally, it appears in harmony with the purpose of RFRA, as the Court rests its decision on the reasoning it employed in *Yoder*, a case specifically mentioned in the text of RFRA.[258] However, leading up to *Smith*, the Court was inconsistent in how it applied the compelling interest test to particular cases.[259] For example, in *Sherbert*, which is also cited in the text of RFRA, the Court did not require the government to demonstrate that application of the challenged government action to the person served its compelling interest.[260] Thus, the cases mentioned in the text of RFRA do not delineate a clear requirement that courts apply this construction of the compelling interest test. Further, this construction conflicts with Congress's expectation that the courts would rely on pre-*Smith* precedent as a whole and apply a compelling interest test that is no more or less stringent than that precedent sets forth.[261] Thus, the Court began its initial expansion of RFRA by construing it to require this stringent compelling interest analysis as opposed to the broader analysis also used in pre-*Smith* cases.

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257. 42 U.S.C. § 2000bb-1(b).

258. *See O Centro*, 546 U.S. at 430–31; *see also* § 2000bb(b)(1) (explaining that one purpose of RFRA is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)").

259. *See* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1288–93 (2009) (discussing two different compelling interest tests used by the Court prior to *Smith*); *see also supra* notes 69–79 and accompanying text.

260. In *Sherbert v. Verner*, South Carolina denied Sherbert unemployment benefits because she refused to accept employment that would require her to work on her Sabbath. *See* 374 U.S. 398, 399–401 (1963). The state argued that it had a compelling interest in preventing fraudulent claims that burden employers and might reduce the amount of available unemployment funds. *Id.* at 407. In considering whether the state had a compelling interest, the Court never questioned whether the state's interest was served by denying the benefits to Sherbert, as the Court in *O Centro* implies. *Compare id.* at 408–09 (noting that there was no evidence to suggest that providing religious exemptions *in general* would make the benefits scheme unworkable), *with O Centro*, 546 U.S. at 431 (asserting that in both *Yoder* and *Sherbert*, the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants").

261. *See supra* notes 102–105 and accompanying text.

2. Hobby Lobby *eliminates the substantial burden analysis and pits the rights of corporations against the rights of employees*

In *Hobby Lobby*, the Court expanded RFRA in two ways. First, the Court held that closely held, for-profit corporations can exercise religion and that their religious exercise is protected under RFRA.[262] In doing so, the Court candidly broke from its practice of deferring to pre-*Smith* precedent.[263] The Court doubted that Congress meant to restrict RFRA's statutory development to an "ossified" version of First Amendment case law.[264] Thus, the Court intentionally established a new RFRA jurisprudence, untethered to the Constitution.

Second, the Court abdicated its authority to measure the substantiality of the government's burden on religious exercise, and thereby eliminated the threshold question to determine whether RFRA applies.[265] The Court held that its narrow function in determining whether religious exercise is substantially burdened is to determine whether the line drawn between the religious belief and objectionable act is "an honest conviction."[266] In doing so, the Court repurposed the honest conviction test set forth in *Thomas*—used to determine whether a belief is religious—for the substantial burden test that Congress set forth in RFRA—used to determine if RFRA applies.[267]

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262. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769–75 (2014) (rejecting multiple arguments for why for-profit corporations cannot exercise religion).

263. *See id.* at 2772–74 ("HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents . . . . This argument has many flaws.").

264. *See id.* at 2773 ("[T]he results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*.").

265. As Justice Ginsburg points out in her dissent, RFRA distinguishes between factual allegations that a party's beliefs are religious—which the court must accept as true—and the legal conclusion that a party's religious exercise is substantially burdened—which the court must decide. *Id.* at 2798 (Ginsburg, J., dissenting). Thus, the Court relinquished its authority to draw the necessary legal conclusion to determine whether RFRA's protection has attached to a given religious exercise. The hypocrisy in this analysis should not be lost: while the Court lacks the capacity to determine the substantiality of the burden on religious exercise, it has the capacity to determine whether a different government action would be less burdensome.

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

267. *See supra* notes 43–51 and accompanying text. There are, indeed, similarities between the government's argument in *Hobby Lobby* that the contraceptive mandate does not impose a substantial burden and the reasoning employed by the Indiana Supreme Court in *Thomas* to determine that Thomas had not quit his job for religious reasons. *Compare Hobby Lobby*, 134 S. Ct. at 2777, *with Thomas*, 450 U.S. at 712–13

This analysis ignores pre-*Smith* cases in which the Court found that the government's burden on religious exercise was incidental or indirect when it did not require the claimant to participate in the direct act that violated his religious beliefs.[268] By ignoring these cases, the Court ignored Congress's expectation that it would use pre-*Smith* case law to determine the substantiality of the burden.[269] Thus, notwithstanding Congress's intent, the Court's construction of RFRA requires courts to apply strict scrutiny to every religious claim—so long as the person honestly believes their religious exercise is substantially burdened.[270]

By expanding RFRA protections to corporations, the Court effectively provided exemptions from laws specifically designed to circumscribe corporate power and protect individuals from harmful corporate conduct.[271] In doing so, the Court has pitted the rights of corporations against the rights of its employees. And, because it also eliminated the substantial burden requirement, RFRA will always require courts to apply strict scrutiny so long as the corporation says that it honestly believes the government has substantially burdened its religious exercise.[272]

(discussing the Indiana Supreme Court's holding that denying Thomas unemployment benefits was only an indirect burden on his religious exercise). However, these cases presented the Court with two different questions. In *Thomas*, the Court was called upon to determine whether Thomas was exercising religion when he quit his job, to which the Court held he was, even if the connection between the objectionable act and his religion seemed unreasonable. *See* 450 U.S. at 714 ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of that particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). In *Hobby Lobby*, the Court was called upon to determine whether the religious belief was substantially burdened, to which the Court abdicated its authority to determine by relying on *Thomas*. *See* 134 S. Ct. at 2778–79.

268. *See supra* notes 62–68 and accompanying text. Though Justice Ginsburg referred to this precedent to suggest that the Court has the authority to measure the substantiality of the burden, she failed to distinguish the issue in *Hobby Lobby* from that in *Thomas*. *See Hobby Lobby*, 134 S. Ct. at 2798–99 (Ginsburg, J., dissenting) (focusing on *Bowen* as pre-*Smith* jurisprudence).

269. *See supra* notes 100–105 and accompanying text (discussing Congress's expectations).

270. The word "substantially" was added to clarify which government actions courts should apply the compelling interest test to. *See* 139 CONG. REC. 26180 (statement of Sen. Hatch) ("[RFRA] does not require the Government to justify every action that has some effect on religious exercise."). Thus, whether RFRA applies depends on whether the religious exercise was substantially burdened.

271. *See* Sepper, *supra* note 11.

272. Though the government could question whether the belief is sincerely held, it rarely does so. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 110

Moreover, the majority's dictum on Title VII, suggesting that Title VII would pass RFRA scrutiny, fails to solidify protection from all forms of employment discrimination.[273] First, this dicta ignores the *O Centro* framework, which repudiates broad categorical government interests and requires the government to show that applying the law to the person serves its compelling interest.[274] Further, unlike race, which is clearly an immutable characteristic, some judges believe that LGBT status is a choice.[275] Even if courts do not view LGBT status as a choice, the outward projection of this status is partially within control of the employee.[276] Therefore, rather than requiring the employer to maintain a flamboyant LGBT employee, a less restrictive alternative is to require the employee to present in a more hetero-normative or cis-normative manner. Thus, the government will not satisfy RFRA unless it requires the LGBT employee to conform to the religious beliefs of his employer by adopting a religiously-approved lifestyle or appearance.

The district court's decision in *Harris Funeral Homes* affirms this outcome. Section II.A.3 argues that the district court's decision is consistent with Supreme Court precedent and the district court, therefore, properly provided Rost a religious accommodation from Title VII. Section II.A.4 argues that, as evidenced by *Harris Funeral Homes*, granting the religious accommodation constitutes a government action that compels LGBT employees to conform to their employer's religious tenets.[277]

3. RFRA mandates religious accommodations from Title VII's ban on sex discrimination

The district court's decision in *Harris Funeral Homes,* continues the trend of diverging away from Congress's intent to establish a pre-*Smith* interpretation of RFRA, and is consistent with *Hobby Lobby*. First, the district court properly found that the EEOC substantially burdened the funeral home's religious exercise because it found that Rost honestly

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(2017) (explaining that the government lost in the only two cases in which it questioned the sincerity of religious belief).

273. *See Hobby Lobby*, 134 S. Ct. at 2783 (majority opinion) (making a broad declaration that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal").

274. *See supra* notes 108–111 and accompanying text.

275. *See supra* note 15 and accompanying text.

276. *Id.*

277. *See infra* Section II.A.4.

believed the EEOC did so.[278] That is precisely what the Supreme Court's ruling in *Hobby Lobby* requires.[279] After assuming the EEOC had a compelling interest, the district court properly applied the narrower least restrictive alternative analysis as set forth in *O Centro* and applied in *Hobby Lobby*.[280] Unlike the Sixth Circuit, the district court did not find itself beholden to the *Hobby Lobby* dicta.[281] Rather, it required the EEOC to demonstrate that it sought the least restrictive means of enforcing Title VII "to the person," which the EEOC failed to do.[282] Thus, the district court correctly provided Rost a religious accommodation from Title VII.

The Sixth Circuit's reversal diverged from Supreme Court precedent.[283] Though the Sixth Circuit avoided an Establishment Clause confrontation, for better or worse, its analysis does not apply RFRA as construed by the Supreme Court.[284] First, the court disregarded the ruling in *Hobby Lobby* that the narrow function of the court in determining whether religious exercise is substantially burdened is to determine whether the line drawn between the belief and objectionable act is an honest conviction.[285] Instead, the Sixth Circuit found that the district court substituted a religious belief for a legal conclusion when it ended its inquiry after finding the claimant honestly believed the government substantially burdened his religious

278. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 855 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018) (noting that Rost sincerely believes that permitting a biological male employee to wear a skirt-suit violates "God's commands" because it supports the notion "that sex is a changeable social construct," and therefore holding that requiring Rost to permit Stephens to wear a skirt-suit would substantially burden his religious exercise).

279. *See supra* notes 116–122 and accompanying text.

280. *Harris Funeral Homes*, 201 F. Supp. 3d at 860 (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780 (2014)) (noting that RFRA "requires the government to 'sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]'").

281. *Id.* at 857 ("This Court does not read that paragraph as indicating that a RFRA defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority. If that were the case, the majority would presumably have said so. It did not.").

282. *Id.* at 860.

283. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 585–90, 595 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

284. By denying the RFRA defense, the court did not require Stephens to conform to the religious beliefs of Rost, and therefore did not transgress the Establishment Clause. Further, the court declined to consider the Establishment Clause arguments raised in several amici because the parties did not raise these arguments below. *Id.* at 585 n.8.

285. *See supra* notes 118–121 and accompanying text.

exercise.[286] This finding mirrors Justice Ginsburg's rigorous dissent in *Hobby Lobby*, and is irreconcilable with the majority's ruling.[287] Further, the Sixth Circuit relied on the nonbinding *Hobby Lobby* dicta to assume that Title VII was narrowly tailored.[288] Therefore, even if the EEOC substantially burdened Rost's religious exercise, RFRA still did not provide Rost a religious accommodation from Title VII.[289]

The Sixth Circuit's decision does not reflect the current construction of RFRA because the circuit court misapplied the substantial burden analysis as directed by the *Hobby Lobby* decision and it assumed Title VII was the least restrictive means of furthering the EEOC's compelling interest. Because the Sixth Circuit disregarded Supreme Court precedent and misapplied RFRA, the rest of this section uses the district court's decision to demonstrate that, in the context of employment discrimination, applying the Supreme Court's current construction of RFRA constitutes a government action that compels LGBT employees to conform to the religious ideology of their employer, and thereby violates the Establishment Clause.

4. Applying RFRA as construed by the Supreme Court constitutes a government action that coerces LGBT employees to conform

Under the coercion test set forth in *Weisman*,[290] the district court's application of RFRA to Title VII in *Harris Funeral Homes* is a government action that coerced Stephens to engage in Rost's religious exercise. According to the court, Stephens could have her job back but only if she wore gender-neutral attire.[291] Thus, the court required that Stephens either conform to Rost's religious beliefs or forfeit her right to the intangible and tangible benefits of employment. Further, though Stephens is an adult and may not be so vulnerable as to succumb to peer pressure to conform,[292] RFRA allowed the court to apply

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286. *Harris Funeral Homes*, 884 F.3d at 585.

287. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787, 2792 (2014) (Ginsburg, J., dissenting) (noting that RFRA distinguishes between factual allegations that a claimant's beliefs are sincere and of a religious nature and legal conclusions that the government substantially burdened religious exercise).

288. *See Harris Funeral Homes*, 884 F.3d at 595.

289. *Id.*

290. *See supra* notes 205–215.

291. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 863 n.20 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

292. *See* Lee v. Weisman, 505 U.S. 577, 596 (1992) (relying on the vulnerability of teenagers to hold that the state could not indirectly coerce teenagers to stand for religious prayers).

much more than just peer pressure. Permitting Rost to utilize both RFRA and the federal courts was to permit him to "employ the machinery of the [federal government] to enforce religious orthodoxy."[293]

Additionally, the court's application of RFRA to Stephens's Title VII claim bears the "imprint" of the federal government.[294] RFRA does not say that individuals should conform to the religious ideology of others. It was the district court's application of RFRA, as construed by the Supreme Court, that led to this outcome. In applying the least restrictive alternative test, the district court determined what degree of conformance RFRA legally required before Title VII would protect Stephens.[295] Once the district court determined what degree of conformance was required, it presented Stephens with a choice of conforming to Rost's religious views of gender expression or losing her job and all of the tangible and intangible benefits that go along with it.[296] Thus, whether Congress intended to coerce religious conformance or not, implementing the statute as construed by the Supreme Court has this effect.[297]

Further, even under Justice Scalia's theory of coercion in *Weisman*, the district court's application of RFRA to Stephens's Title VII claim legally coerced Stephens to conform to Rost's religious beliefs.[298] The court's judgment created both a force of law and a penalty. First, by determining the least restrictive means to achieve the EEOC's interest, the court's decision acts as a force of law, demarcating the bounds of conformance to which Rost may legally subject Stephens. Further, the court's decision forces Stephens to conform to Rost's religious beliefs under threat of losing her job—should Stephens refuse to adhere to Rost's religious beliefs by wearing female clothing, Rost may legally terminate her employment.[299]

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293. *Id.* at 592.

294. *Id.* at 590 (holding that a public school's forcing students to stand for prayer violated the First Amendment's prohibition against the favoring of one religion over others).

295. *Harris Funeral Homes*, 201 F. Supp. 3d at 861–62 (noting that if the EEOC truly had a compelling interest in ensuring Stephens was not subject to gender stereotypes, then requiring Stephens to adhere to a gender-neutral dress code is a less restrictive alternative that serves the EEOC's interest better than requiring Rost to permit Stephens to wear a skirt).

296. *Id.* at 863 n.20.

297. *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").

298. *See supra* notes 214–216 and accompanying text.

299. *Harris Funeral Homes*, 201 F. Supp. 3d at 863.

Thus, even under the most conservative theory of coercion, applying RFRA to Title VII contravenes the Establishment Clause.

B. Religious Accommodation from Title VII Falls Outside the Joints Productive of Benevolent Neutrality

The religious accommodations that RFRA carves out of Title VII violate the principle of neutrality. First, this Section argues that, notwithstanding the Supreme Court's indication otherwise, the principle of neutrality prevents courts from balancing one citizen's religious interests against another citizen's secular or religious interests. Therefore, the correct interpretation of *Estate of Thornton* admonishes religious accommodations that permit one citizen to compel or coerce another citizen to conform to his religious tenets. Using *Harris Funeral Homes,* this Section argues that a RFRA accommodation from Title VII violates the principle of neutrality because it permits an employer to compel a LGBT employee to conform to the employer's religious orthodoxy.

1. The principle of neutrality precludes balancing the interests of third parties

The Supreme Court's reliance on its decision in *Estate of Thornton* as admonishing unjustified burdens on third party interests is misplaced.[300] This interpretation implies that courts have the authority to balance the religious interests of one citizen against the religious or secular interests of another. This section argues that any attempt to balance religious and secular burdens between citizens violates the principle of neutrality. Instead, the Court should rely on *Estate of Thornton* as prohibiting the government from providing religious accommodations that permit one citizen to coerce or compel another citizen to conform to his religious beliefs.[301]

The Court has not had an opportunity to clarify how it will balance the religious interest of one citizen against the religious or secular interests of another, but its *Hobby Lobby* opinion contains enlightening dicta.[302] Both

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300. There, the Court struck down a statute that compelled secular employers and employees to conform to the religious beliefs of religious employees. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985).

301. *Id.* at 710.

302. The *Hobby Lobby* case nearly presented the Court with the opportunity to clarify how it will balance these interests when the least restrictive alternative, which RFRA requires, burdens third parties. By not providing coverage for the contested forms of birth control, the corporations in *Hobby Lobby* would have burdened their female employees' reproductive choices if this coverage was not otherwise available without

the majority and Justice Kennedy proffer balancing frameworks that fly in the face of neutrality and the Establishment Clause.[303]

The majority in *Hobby Lobby* conceded that in applying RFRA, courts must "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[304] Under its view, however, simply framing a statute as conferring a benefit on third parties does not preclude an employer from receiving a religious accommodation.[305] Otherwise, the government could render RFRA inoperable by framing all regulations as benefiting third parties.[306] For example, this would permit the government to require that all restaurants remain open on Saturdays to give employees an opportunity to earn tips, and thereby exclude any person whose Sabbath is on Saturday from owning a restaurant.[307] Instead, third party burdens only guide the compelling interest and least restrictive means analysis of RFRA.[308]

Yet, the majority provided no standard for determining which third party burdens are sufficient to outweigh a claimant's interest in religious exercise or which religious interests are sufficient to justify burdening third parties.[309] Simply using third party burdens to guide the compelling interest and least restrictive means analyses requires courts to judge the third party's interests in relation to the objector's religious interests. Thus, if the reviewing court ultimately grants a religious exemption, it favors religious interests over others, thereby violating the principle of neutrality.[310] Additionally, the majority's holding that it lacked the capacity to measure the burden on religious

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additional cost; but, because the Court ultimately found that the government had a readily available, less restrictive alternative that did not impact any third party, we are left with only dicta. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014).

303. *See supra* note 302; *Hobby Lobby*, 134 S. Ct. at 2785–87 (Kennedy, J., concurring).

304. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

305. *Id.*

306. *Id.*

307. *See id.*

308. *Id.*

309. *See id.* (noting a less restrictive alternative, which did not burden third parties, was readily available and being used for other religious entities).

310. *See supra* notes 223–225 and accompanying text (explaining that the principle of neutrality prevents the government from providing religious accommodations that favor one religion over another, or favor religion over non-religion).

exercise casts doubt on whether it has the capacity to objectively balance these interests.[311]

Though the majority rejected the argument that statutes designed to confer a benefit on third parties should always preclude religious accommodation, it did not offer any alternative.[312] The majority leaves open the question of how courts should distinguish between a law that provides the benefit of working on Saturday from a law that provides the benefit of equal employment opportunities; or conversely, how courts should distinguish between religious accommodations that burden employees by not providing the opportunity to work on Saturdays, from religious accommodations that burden employees by subjecting them to discrimination in the work place.[313]

Justice Kennedy suggests an equally paradoxical framework: a religious exemption should not be granted where a person's religious exercise "unduly restrict[s] other persons . . . in protecting their own interests, interests the law deems compelling."[314] Under this view, so long as the third party can defend his own compelling interests, the judiciary can grant a religious accommodation.[315] Thus, this approach still requires courts to judge a third party's interests in relation to the objector's religious interests, and therefore creates the risk that a court will violate the principle of neutrality.[316] Further, it is unclear how a court would determine whether an individual has a compelling interest.[317]

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311. *See supra* notes 265–270 and accompanying text.

312. *See Hobby Lobby*, 134 S. Ct. at 2781 n.37 (suggesting that prohibiting exemptions from laws that benefit third parties could render RFRA inoperable, but failing to clarify how it will balance competing interests because the government had a readily available, less restrictive alternative).

313. *See id.* (reasoning that if simply framing a law as benefiting third parties prevented religious accommodations, the government could require all restaurants to remain open on Saturdays to give employees the opportunity to earn tips, preventing persons whose Sabbath is Saturday from operating a restaurant).

314. *Id.* at 2787 (Kennedy, J., concurring).

315. *See id.* at 2786–87 (mentioning the Courts' duty to balance the two interests).

316. *See supra* notes 223–225 and accompanying text (explaining that the principle of neutrality serves to restrain the government from taking a secular stance in terms of religious affiliation).

317. It is possible that the court would look to whether it has found similar government interests compelling, but this would ensure certain populations never have a compelling interest. For example, the Supreme Court has never required the government to show that it has a compelling interest to justify discriminating against LGBT citizens or citizens with disabilities. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down an amendment to the Colorado state Constitution under rational basis, which permits the government to discriminate if it has a mere conceivable legitimate

The Court should not rely on its decision in *Estate of Thornton* as admonishing unjustified third party harms, which allows the judiciary to place its power behind religious interests. Rather, it should rely on that decision as admonishing religious accommodations that permit one citizen to compel or coerce another to conform to his religious ideology. This would shift the Court's focus in determining whether a religious accommodation is permissible back to the fundamental principle upon which *Estate of Thornton* was predicated: "The 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."[318] Additionally, this would keep Establishment Clause restrictions on religious accommodation abreast with Establishment Clause restrictions on other government actions[319] and would prevent the Judiciary from exceeding its jurisdiction.[320]

Further, this interpretation would provide a workable solution to determine how courts should distinguish between a law that provides the benefit of working on Saturday from a law that provides the benefit of equal employment opportunities. An employer who closes his business on Saturday, does not, in pursuance of exercising his religion, require employees to conform to his religion; these employees are free to work elsewhere on Saturdays and still keep their job. In the context of employment discrimination, the employer, in pursuance of exercising his religion, denies equal treatment unless an employee conforms to his religious beliefs.[321] Thus, while both laws could be framed as benefiting third parties, courts would only deny religious accommodations under one law.

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interest in discriminating); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (using rational basis to scrutinize government action that discriminated against citizens with disabilities). Though it might seem strange for an individual to claim his religion compels him to discriminate against people with disabilities, the court can neither question the veracity of that claim nor measure the burden on religious exercise. *See* United States v. Ballard, 322 U.S. 78, 86 (1944); *Hobby Lobby*, 134 S. Ct. at 2779 (majority opinion).

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

319. This accords with the coercion test as set forth in *Lee v. Weisman*. *See* 505 U.S. 577, 587 (1992); *see also supra* notes 203–216 and accompanying text.

320. If the Court violates the principle of neutrality, it violates the Establishment Clause, and the court is without jurisdiction to issue any decision violative of the First Amendment. *See supra* note 28 and accompanying text (explaining the First Amendment removes the authority to violate the religion clauses from all three branches).

321. *See infra* Section II.B.2.

2. RFRA accommodations permit employers to compel religious conformance from employees

In *Harris Funeral Homes,* the district court's application of Title VII violated the principle of neutrality because it permitted Rost to compel Stephens to conform to his religious beliefs. The district court's application of RFRA mirrors the statute struck down in *Estate of Thornton* because it imposed on Stephens an absolute duty to conform to Rost's religious, cis-normative view of gender.[322] Unlike the statute struck down in *Estate of Thornton*, RFRA does permit the court to conduct a balancing test; however, this test is only designed to balance a citizen's interest in exercising his religion against the government's interests in regulating conduct.[323] Further, even if RFRA did permit the court to balance Stephens's interests, the principle of neutrality prevents this.[324] Indeed, the court did not feign an attempt to account for the burdens on Stephens.[325] Instead, it developed a least restrictive alternative by looking solely at the EEOC's compelling interest and Rost's religious objection. Rost objected to permitting a male employee to dress in female clothing, and the EEOC had a compelling

322. *See Estate of Thornton*, 472 U.S. at 709 ("In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates.").

323. RFRA was designed to protect citizens' religious exercise from harmful government action. *See* S. REP. NO. 103-111, at 8 (1993) ("To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test."); H. REP. NO. 103-88, at 2 (1993) (noting that the Constitution has not prevented the government from burdening religious exercise). Therefore, it sets forth the standard for balancing the government's interests in regulating particular conduct against a citizen's interest in religious exercise—strict scrutiny. *See* 42 U.S.C. § 2000bb-1(b)(1)(2) (2012) (requiring that the government have a compelling interest in substantially burdening the religious objector's religious exercise, and that it use the least burdensome method of achieving that interest). It fails, however, to elucidate any standard for balancing the religious interests of one citizen against the secular or religious interests of another. *See id.* (lacking any reference to balancing third party interests).

324. By balancing the religious interests of one citizen against the secular interests of another, the Court would violate the fundamental principle of neutrality. *See supra* notes 223–225 and accompanying text. Thus, even if a court finds that the EEOC has a compelling interest, it cannot balance third party interests in determining whether compliance with Title VII is the least restrictive means of achieving that interest without violating the Establishment Clause.

325. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 861–63 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. docketed*, No. 18-107 (U.S. July 24, 2018).

interest in eliminating gender stereotypes.[326] Thus, the court's solution that Rost reinstate Stephens so long as Stephens adheres to a gender-neutral dress-code was tailored without any consideration of the effect this would have on Stephens.[327] This solution compels Stephens to conform to the religious, cis-normative views of gender expression that were unilaterally designated by Rost and merely circumscribed by the EEOC's compelling interest (not Stephens's). By providing a religious accommodation that gives Rost the power to compel Stephens to conform to his religious beliefs, this application of RFRA exceeds the bounds of benevolent neutrality and therefore violates the Establishment Clause.[328]

CONCLUSION

The Supreme Court's construction of RFRA mandates sweeping protections of religious exercise at the expense of religious liberty. This broad interpretation knows no bounds and would require exemptions for even the most benign burdens on religious exercise. In particular, the Court's construction of RFRA presents a serious threat to the autonomy and liberty of LGBT employees by permitting employers to blatantly discriminate against them.

Applying RFRA, as construed by the Court, to Title VII's prohibition on sex discrimination constitutes a government action that compels LGBT employees to conform to the religious orthodoxy of their employers. Providing RFRA accommodations in this context forces an LGBT employee to choose between conforming to his employer's religious hetero, cis-normative views of sexual orientation and gender expression or forfeiting his job and all the tangible and intangible benefits it provides. Further, the compulsion to conform is attributable to the judiciary, not just the employer, because the reviewing court determines the degree to which the employee must conform to keep his job.

Further, RFRA accommodations from Title VII violate the fundamental principle of neutrality. In granting a RFRA accommodation from Title VII, courts place religious interests above all others by permitting an employer to, in pursuit of his religious exercise, compel his employees to conform his religious beliefs.

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326. *Id.* at 847–48, 859.
327. *Id.* at 861–63.
328. *See supra* notes 300–320 and accompanying text.

Religious exercise is not absolute.[329] At all times, the government must walk the fine line traversing the Free Exercise and Establishment Clauses. By coercing LGBT employees to conform to the religious orthodoxy of their employer, RFRA moves beyond the zone of permissible accommodation into the realm of impermissible religious endorsement.

329. *See supra* notes 33–34 and accompanying text.