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# Too Heavy a Burden: Testing Complicity-Based Claims Under the Religious Freedom Restoration Act

KALEB BROOKS\*

## INTRODUCTION

In “a decision of startling breadth,”<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.* announced a significant expansion of the Religious Freedom Restoration Act’s (RFRA) protections to encompass so-called “complicity-based compliance claims.”<sup>2</sup> Consider the plaintiffs’ basic claim in the now famous case: Hobby Lobby and the other corporate plaintiffs claimed that compliance with the Affordable Care Act’s (ACA) minimum coverage requirements would substantially burden their religious exercise because it would require them to provide contraceptive coverage. In their view, this coverage was objectionable because some employees might *independently* select certain pharmaceuticals that might cause some fertilized zygotes to fail to adhere to uterine walls.<sup>3</sup> On account of this uncertain causal chain, the *Hobby Lobby* plaintiffs claimed that compliance with the law would force them to “facilitate” abortion, a prospect they viewed as grave sin.<sup>4</sup> The Supreme Court, by a narrow majority, validated this view, proclaiming that the plaintiffs were entitled to “draw a line” regarding their willingness to participate in the sins of others because the Judiciary is ill-equipped to question the reasonableness of such complex moral and ethical questions.<sup>5</sup>

Accordingly, *Hobby Lobby* stands for the proposition that RFRA applies strict scrutiny not only to legislative enactments that directly impinge on adherents’ religious conduct but also to laws that direct otherwise nonreligious activity through which adherents fear complicity in the sins of others.<sup>6</sup> Some commentators have noted that this expansion of RFRA analysis to include complicity-based claims has the potential to stand as the case’s most influential holding,<sup>7</sup> but at present, the

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1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

2. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–19 (2015).

3. See *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); see also Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1899 (2015) (“The understanding of complicity underpinning this claim is vastly more expansive than that which standard legal doctrine or moral theory contemplates.”).

4. See *Hobby Lobby*, 134 S. Ct. at 2764–65.

5. *Id.* at 2778 (citing *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981)).

6. See Nejaime & Siegel, *supra* note 2, at 2519.

7. See Sepinwall, *supra* note 3, at 1905 (arguing that “*Hobby Lobby*’s deeper significance” and “the ‘parade of horrors’ it threatens” do not arise from the “corporate law implications of the decision” but rather with the Court’s expansive view of complicity wherein exemptions are warranted just “so long as the religious adherent believes himself to be implicated in the conduct that his religion opposes”); see also Nejaime & Siegel, *supra* note

precise breadth of potentially-viable complicity claims under *Hobby Lobby* remains uncertain.

Perhaps in an attempt to add clarity to this field, the Supreme Court, in November 2015, granted certiorari in another complicity-based RFRA challenge to the ACA; specifically, the Court granted review to determine whether “the availability of a regulatory method for nonprofit religious employers to comply with [Health and Human Services’] contraceptive mandate eliminate[s] either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*”<sup>8</sup> But, by the time the *Zubik* case ripened for decision, a key member of the *Burwell* conservative majority, Justice Scalia, had passed away.<sup>9</sup> With his vacancy unfilled, it appeared that the Court, bitterly divided in *Hobby Lobby*, was unable to reach a majority opinion with regard to whether plaintiffs’ complicity claims articulated a significant burden under RFRA.<sup>10</sup> Instead, following a round of supplemental briefing, the Court remanded the combined *Zubik* cases to their respective circuits with instructions directing a compromise solution.<sup>11</sup> Because the *Zubik* court failed to reach of the merits of the case before it, the core question regarding how lower courts ought to consider complicity-based RFRA claims remains unanswered.

This Note focuses upon this question in order to more broadly analyze the emerging frontier of complicity-based conscience claims. Specifically, this Note analyzes a sample of the federal circuit court decisions that considered complicity-based challenges to the ACA’s accommodation scheme during the period between *Hobby Lobby* and the Court’s granting certiorari in *Zubik*; this survey concludes that the various judicial approaches developed since *Hobby Lobby* may be categorized according to their adherence to three primary modes of argument. After finding that this array of judicially-created tests largely misunderstands the structure of complicity-based arguments, I contend that courts should determine the substantiality of complicity claims under the Act according to whether compliance with a law requires direct participation in apparently sinful conduct or mere religious unease with the actions of others.

In Part I, I locate complicity claims in the larger framework of RFRA litigation and posit a general argumentative scheme for understanding and critiquing the

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2, at 2542 (relating the expansion of complicity-based claims for exemptions to “long-running ‘culture-war’ conflicts about laws that break from traditional morality”).

8. Question Presented at ii, *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 15-105 (U.S. Nov. 6, 2015), *consolidated with* *Zubik v. Burwell*, No. 14-1418 (U.S. May 16, 2016) (per curiam).

9. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/Q9LA-L34L>].

10. See Editorial, *The Crippled Supreme Court*, N.Y. TIMES (May 16, 2016), <http://www.nytimes.com/2016/05/17/opinion/the-crippled-supreme-court.html?comments> [<https://perma.cc/FJP9-KHC8>] (commenting that the *Zubik* opinion “solves nothing” because “[e]ven if these plaintiffs can find their way to an agreement with the government that satisfies their religious objections, there are other employers with different religious beliefs who will not be satisfied, and more lawsuits are sure to follow”).

11. See *Zubik*, 136 S. Ct. 1557 (2016) (per curiam) (expressing no opinion on the merits).

structure of such claims. Broadly, I build upon existing models of complicity-based arguments that distill these claims into their basic components and advance a means of differentiating the degree of judicial deference each component merits.<sup>12</sup> In Part II, I provide a brief overview of the statutory and regulatory provisions that make up the ACA accommodation scheme for religious, non-profit employers who object to the provision of contraceptive services. Then, I categorize fourteen decisions from various federal circuit courts<sup>13</sup> that considered RFRA challenges to the ACA accommodation scheme according to their primary means of testing complicity-based claims. In this analysis, I depart from the body of work on complicity-based claims that focuses on structure or implications of such claims to consider the development of judicial analysis in the field since *Hobby Lobby*. In Part III, I critique these various approaches to the substantiality analysis and briefly sketch a judicial test that allows courts to scrutinize complicity-based claims without inquiring into the reasonableness of their religious underpinnings. Finally, in the conclusion, I turn to the proceedings in *Zubik*. I conclude that the order remanding the matter, when viewed in light of the parties' supplemental briefs, reveals a deeply divided court on the question of complicity under the RFRA. Each of the three approaches apparent in the circuit court decisions giving rise to *Zubik* remain potentially viable under the compromise approach the court assumed in its remand order.

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12. In effect, this Note attempts to distill the “field-invariant” structure of complicity-based arguments in order to uncover the basic argumentative “standards by reference to which we assess” the validity of such claims. See STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 15 (2003). The task of mapping a basic structure of argument is especially important for complicity claims because these claims span distinctly theological and legal “fields” of argument; distinguishing the field-invariant structure of such arguments from their religiously dependent content allows a critic to consider the senses in which their “acceptability or unacceptability” depends “upon their ‘formal’ merits and defects” without regard to the soundness of their religious reasoning. See *id.* at 88.

13. This Note analyzes fourteen circuit court decisions, concurrences, and dissents that addressed the substantiality of asserted burdens in cases seeking injunctions against the Department of Health and Human Services regarding the non-profit accommodation scheme between the *Hobby Lobby* decision and November 2015. The analysis includes opinions from the following cases: *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015), *vacated*, 136 S. Ct. 2006 (2016); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015), *vacated*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016); *Grace Schs. v. Burwell*, 801 F.3d 788 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016); *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016); and *Eternal Word Television Network, Inc. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014).

## I. THE STRUCTURE OF COMPLICITY BASED RELIGIOUS FREEDOM CLAIMS

In a general sense, Congress passed the RFRA to overturn *Employment Division v. Smith*<sup>14</sup> and maintain strict scrutiny as the standard of review for laws that place burdens on religious practice.<sup>15</sup> In relevant part, RFRA states: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless “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.”<sup>16</sup> Besides making clear an intent to overturn *Smith*’s holding that the Free Exercise Clause of the First Amendment “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability,”<sup>17</sup> the statutory language provides little guidance as to the proper standards for adjudication under its strict scrutiny regime.<sup>18</sup>

It is, however, clear that Congress only intended its strict scrutiny test to apply to “substantial” burdens on religious exercise.<sup>19</sup> In this sense, the RFRA creates a two-step, burden-shifting framework: a plaintiff bears the initial burden to show that a law substantially burdens her religious practice, and thereafter the government bears the burden to show that the challenged law represents the least restrictive means of attaining a compelling governmental interest.<sup>20</sup>

To meet the requirement of substantiality, a burden on religious practice must be restrictive in two senses: the plaintiff faces a conjunctive burden to show that the law compels some religiously forbidden activity and that noncompliance triggers some sufficiently serious repercussion.<sup>21</sup> If a plaintiff fails to demonstrate both elements of substantiality, the burden will be characterized as “de minimis” and the challenged law will be subject to rational basis review.<sup>22</sup> Parsed in this way, substantiality analysis relies in part on determining the amount of coercion the government uses to

14. 494 U.S. 872 (1990).

15. See *Priests for Life*, 772 F.3d at 236 (“Congress sought to reinstate as a statutory matter the pre-*Smith* free exercise standard.”).

16. 42 U.S.C. § 2000bb–1(a), (b) (2012).

17. 494 U.S. at 879 (internal quotation marks omitted).

18. See Matthew A. Melone, *Corporations and Religious Freedom: Hobby Lobby Stores—A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 483 (2015) (“RFRA provides neither context nor nuance. In effect, it was a vote for religious freedom in a vacuum.”).

19. See *Hobby Lobby Stores, Inc. v. Burwell*, 134 S. Ct. 2751, 2798 (Ginsburg, J., dissenting) (noting that the original draft of the RFRA in the Senate included the word “burden” unmodified and that the term “substantial” was added pursuant to a clarifying amendment).

20. See *Priests for Life*, 772 F.3d at 244, 2 F.3d at 244 (D.C. Cir. 2014) (“[I]f the law’s requirements do not amount to a substantial burden under RFRA, that is the end of the matter.”).

21. See Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN’S L.J. 35, 80 (2015) (arguing that “the test of substantial burden has two parts, not just one,” and that the conflict must involve “secular costs of compliance with faith” and “religious costs for those who comply with secular law.”).

22. See *Priests for Life*, 772 F.3d at 246.

compel an act that a religious adherent sincerely believes violates her religious principles.<sup>23</sup>

Complicity-based conscience claims are a means of establishing the “religious” burden of compliance with a law or regulation. For instance, in *Hobby Lobby*, the plaintiffs’ substantiality argument consisted of two basic claims: First, compliance with the ACA’s minimum coverage requirements would force them to “provid[e] insurance coverage for items that risk killing an embryo[, thereby] mak[ing] them complicit in abortion,”<sup>24</sup> and second, noncompliance would trigger large fines.<sup>25</sup> Only by making both claims could the plaintiffs show that the law was sufficiently coercive with regards to their religious practices to trigger strict scrutiny analysis.

In turn, a complicity-based conscience claim itself comprises three interrelated sub-claims: a moral claim, an empirical claim, and a relational claim.<sup>26</sup> Consider again the plaintiffs’ claims in the *Hobby Lobby* decision:

The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe<sup>27</sup> . . . that [will connect them] to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.<sup>28</sup>

The first proposition, a religious objection to abortion, amounts to a moral claim or “proposition[] about right and wrong.”<sup>29</sup> The second proposition, that the ACA coverage requirements include pharmaceuticals that may be categorized as abortifacients, is an empirical claim or assertion of testable fact.<sup>30</sup> The final proposition, that compliance would facilitate abortion in some way sufficient to amount to sinful complicity, is a relational claim that proves the connection between the conduct of a third party and the plaintiffs’ religious convictions.<sup>31</sup>

Argumentatively, each of these propositions is necessary to justify the claim that compliance would substantially burden religious practice. The first two propositions, moral and empirical, serve similar argumentative purposes; both are premises in that both are foundations for further reasoning rather than themselves being the product of the argument’s logic.<sup>32</sup> These data points, however, do not obviously amount to

23. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1209 (10th Cir. 2015) (Baldock, J., dissenting).

24. Brief for Respondents at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

25. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–76 (2014) (noting that the penalties facing plaintiffs for either failure to provide contraceptive care or failure to provide healthcare altogether would amount to “surely substantial” sums).

26. Sepinwall, *supra* note 3, at 1912.

27. 134 S. Ct. at 2759.

28. 134 S. Ct. at 2778.

29. Sepinwall, *supra* note 3, at 1912.

30. *Id.*

31. *Id.*

32. Using the terminology of argumentation scholar Stephen Toulmin, both can be categorized as “data” in support of the claim. See TOULMIN, *supra* note 12, at 90–91.

the claim; an additional logical “step” is necessary to connect these premises to the proposed conclusion.<sup>33</sup> The relational claim represents this additional “step” in reasoning that links the allegedly sinful conduct of third parties to a claim of personal moral culpability.<sup>34</sup> In this sense, the relational component of a complicity claim acts as a logical function; it authorizes an inference of complicity from a certain data set.<sup>35</sup>

Bearing in mind this simple argumentative structure, a complicity claim may be tested for validity on two registers. First, one may dispute the validity of the premises: this criticism is effectively pre-argumentative in the sense that a problem with the validity of a premise does not suggest any flaw with the reasoning process but rather the inputs.<sup>36</sup> In regards to moral propositions in the RFRA context, such challenges are broadly limited to testing the sincerity of the plaintiff’s religious convictions.<sup>37</sup> Because the Judiciary is barred from considering the reasonableness of religious belief, moral propositions in RFRA claims are subject only to very deferential review.<sup>38</sup> Empirical claims, on the other hand, should be afforded no such deference. *Hobby Lobby* largely bracketed any serious inquiry into the validity of the plaintiffs’ disputable claim that the contraceptive methods at issue could trigger abortions,<sup>39</sup> but it defies reason to suggest that Congress intended the heavy burden of strict scrutiny review to adhere on the basis of plainly unfounded factual assertions.<sup>40</sup>

Second, one may dispute an argument’s reasoning, which requires a more complex process of criticism.<sup>41</sup> By excerpting an argument’s inferential reasoning from its premises, the underlying logic of an argument can be stated generically: given sufficient data of a certain type, a particular conclusion is sound.<sup>42</sup> Parsed in

33. *See id.*

34. If the *Hobby Lobby* plaintiffs’ only claim was amounted to a personal objection to use of abortifacients, then they would effectively admit that the employer mandate imposed no substantial burdens on their beliefs; the controversy in *Hobby Lobby* followed from an additional religious assertion claiming culpability for the acts of others. *See* EUGENE VOLOKH, *SEBELIUS V. HOBBY LOBBY: CORPORATE RIGHTS AND RELIGIOUS LIBERTIES* 48 (2014).

35. In this sense, the relational claim operates within a complicity argument as what Toulmin termed a “warrant.” *See* TOULMIN, *supra* note 12, at 91.

36. *See id.* at 90 (“[W]e may not get the challenger even to agree about the correctness of these facts, and in that case we have to clear his objection out of the way by a preliminary argument: only when his prior issue or ‘lemma’, [sic] as geometers would call it, has been dealt with, are we in a position to return to the original argument.”)

37. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774, 2778 (2014).

38. *Sepinwall*, *supra* note 3, at 1927–29 (“[M]oral deference should be absolute, but it need not be enthusiastic . . .”).

39. *See* 134 S. Ct. at 2778 (declining to consider the plausibility of the religious claim).

40. *See* *Sepinwall*, *supra* note 3, at 1932 (“Accepting all factual assertions as true no matter their plausibility would commit us to a life of irrationality.”); *see also* 139 CONG. REC. 26,180 (1993) (statement of Sen. Hatch) (“[RFRA] does not require the Government to justify every action that has some effect on religious exercise.”).

41. *See* TOULMIN, *supra* note 12, at 90–91.

42. *See id.* at 91 (“[Warrants] may normally be written very briefly (in the form ‘If D, then C’); but, for candour’s sake, they can profitably be expanded, and made more explicit: ‘Data such as D entitle one to draw conclusions, or make claims, such as C,’ or alternatively ‘Given data D, one may take it that C.’”).

this way, the soundness of an argument's reasoning relies upon whatever assurances a speaker may provide to show that this function may generally authorize the underlying inferential step.<sup>43</sup> The sort of assurances that are necessary to substantiate an inference varies according to the venue.<sup>44</sup> For example, the evidence required to establish "causation" in epidemiology bears little resemblance to the same concept in a legal forum.<sup>45</sup>

In the RFRA context, the relational element of a complicity claim represents a form of faith-based reasoning, so the assurances which underpin its internal logic are themselves religious. Consider, for instance, the Catholic concept of scandal: therein one may be culpable for the sins of others where one provides "material support" for the objectionable acts.<sup>46</sup> A relational claim premised upon this moral precept would necessarily consist of two elements.<sup>47</sup> The first component of the claim would comprise a set of religious criteria: Catholic moral reasoning provides that "scandal" may consist of "command, counsel, agreement, flattery, protection, participation, silence, not objecting, [or] not revealing."<sup>48</sup> These criteria define a "line" that demarks the degree of participation in sin that a Catholic adherent must not cross.<sup>49</sup> The second element amounts to a satisfaction claim: the argument must effectively assert that the data presented satisfies these religious criteria for complicity. For instance, a Catholic objection to the contraceptive-coverage mandate must allege that compliance "crosses the line" into scandalous participation in the contraceptive choices of others.<sup>50</sup> Both of these components are, at root, dependent upon religious reasoning, so judicial inquiry may only scrutinize the relational element of a complicity claim to a limited degree.<sup>51</sup>

Part II surveys the present array of judicial approaches to complicity claims in light of this argumentative scheme. Thereafter, in Part III, I attempt to distinguish

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43. *Id.* at 95–96.

44. *Id.* at 96.

45. See generally Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 *FORDHAM L. REV.* 732 (1984) (discussing application of epidemiological concepts of proof in the context of legal causation).

46. Edward C. Lyons, *Causation and Complicity: The HHS Contraceptive Mandate and Asymmetrical Burdens on Free Exercise*, 55 *S. TEX. L. REV.* 229, 289 (2013) ("Catholic ethical theory takes this complexity of human interaction into account by means of a moral discussion it refers to under the rubric, 'Formal and material cooperation in others' wrongdoing.'").

47. See Sepinwall, *supra* note 3, at 1912 n.53.

48. See Lyons, *supra* note 46, at 290 (quoting 2 *ST. ALPHONSUS LIGOURI, THEOLOGIA MORALIS* 357, 557 (L. Gaude ed., 1910)) (internal quotations omitted).

49. The Supreme Court often conceptualizes complicity-based claims in terms of metaphorical line-drawing: the religious adherent is entitled to draw a proverbial "line in the sand" regarding his/her participation in the sinful conduct of others. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710 (1981); see also *infra*, note 88 and accompanying text.

50. See Lyons, *supra* note 46, at 294 (discussing the structure of Catholic claims that compliance with the HHS contraceptive mandate could implicate formal or material cooperation in sin from the perspective of Catholic moral thought).

51. See *Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not to be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").



judicial analyses that rely upon testing the soundness of religious reasoning and those that employ no such inquiry.

## II. TESTING COMPLICITY BASED RELIGIOUS FREEDOM CLAIMS IN THE CONTEXT OF ACA ACCOMMODATIONS

In large part, the various controversies surrounding the ACA accommodation scheme for religious, non-profit employers have turned upon disputes regarding how the regulations “actually work.”<sup>52</sup> Accordingly, some detailed exposition regarding the regulatory framework of the ACA is necessary in order to contextualize the various complicity tests that these controversies have spawned. Part II.A provides a brief history and explanation of the regulatory provisions that make up the accommodation scheme; thereafter, Part II.B surveys circuit court decisions that have considered the validity of these accommodations under the RFRA.

### A. The Structure of ACA Accommodations

The ACA generally requires employers who employ at least fifty full-time-equivalent employees to provide health insurance that meets “minimum essential coverage” requirements.<sup>53</sup> Failure to meet this requirement triggers various fines. If a covered employer supplies health insurance that does not meet the minimum essential coverage requirements, the employer may be required to pay one hundred dollars per day for each effected individual.<sup>54</sup> Alternatively, if an employer fails to provide health insurance altogether, it runs the risk of being fined two thousand dollars per year for each of its full-time employees.<sup>55</sup>

The essential minimum coverage standards include feminine health “preventative care and screenings” that may not be subject to “any cost sharing requirements.”<sup>56</sup> Congress did not define the precise services that must be included within insurance plans under this heading.<sup>57</sup> Rather, the statute provides that group health plans must provide coverage according to the evidence-based recommendations of the U.S. Preventative Services Task Force as codified in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).<sup>58</sup>

After passage of the ACA, the HRSA developed recommendations regarding contraceptive care in conjunction with the Institute of Medicine.<sup>59</sup> After an Institute of Medicine study revealed that women bear disproportionate burdens in attaining comprehensive health services and that excluding contraceptive care from the slate of preventative services available without cost sharing would lead to adverse health

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52. See, e.g., *Geneva Coll. v. Sec’y Dep’t of Health & Human Servs.*, 778 F.3d 422, 436 (3rd Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016).

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

54. 26 U.S.C. § 4980D(a)–(b) (2012).

55. 26 U.S.C. § 4980H(a), (c)(1) (2012).

56. 42 U.S.C. § 300gg-13(a)(4) (2012).

57. See *id.* § 300gg-13(a)(1)–(4).

58. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

59. *Id.* at 2788 (Ginsburg, J., dissenting).

consequences, the HRSA adopted guidelines recommending coverage of all FDA-approved contraceptive methods and related patient education and counseling for all women with reproductive capacity.<sup>60</sup> Following publication of this guideline, the regulatory agencies charged with enforcement of the ACA, including the Department of Health and Human Services (HHS), promulgated regulations requiring health plans to incorporate the HSRA recommendation.<sup>61</sup>

These regulations provide an exemption to the contraceptive coverage requirements for religious objectors.<sup>62</sup> This accommodation is available to non-profit organizations that “hold [themselves] out as [] religious organizations” and “oppose[] providing coverage for some or all of any contraceptive items or services required to be covered . . . on account of religious objections.”<sup>63</sup> In order to invoke the accommodation, an employer must self-certify that it meets these criteria.<sup>64</sup> This self-certification may proceed in one of two ways. First, the employer may complete EBSA Form 700, issued by the Department of Labor’s Employee Benefit Security Administration.<sup>65</sup> The form requires the name of the organization, the name and title of the person signing it, and contact information; by submitting the form, the signatory certifies that it meets the requirements and believes the form to be correct.<sup>66</sup> Alternatively, an employer can directly submit notice to HSS. The notice need not take any particular form, but it must include the name of the organization, a statement of religious opposition to the coverage mandate, and contact information for the plan insurer or third party administrator.<sup>67</sup>

The effect of an employer’s self-certification depends upon its means of providing insurance to employees. For employers who provide coverage through a group health plan insurer, self-certification notifies the insurer of an obligation to “[e]xpressly exclude contraceptive coverage from the group health insurance coverage” provided by the employer and to “segregate premium revenue collected from the [employer] from the monies used to provide payments for contraceptive services.”<sup>68</sup> Importantly, self-certification does not create the obligation to provide contraceptive care because the statutory language obliges insurance issuers to ensure that plan participants receive contraceptive coverage, so the insurer would be obligated to

60. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,725–26 (Feb. 15, 2012).

61. See 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2016); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2015); 45 C.F.R. § 147.130(a)(1)(iv) (2015).

62. 45 C.F.R. § 147.131(a) (2015).

63. *Id.* at § 147.131(b).

64. *Id.* at § 147.131(b)(3).

65. 29 C.F.R. § 2590.715-2713A(b)(1)(ii), (c)(1) (2015); 45 C.F.R. § 147.131(c)(1) (2015).

66. DEP’T OF LABOR, EBSA FORM 700 (2014), <http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc>.

67. See 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(B), (c)(1)(ii); 45 C.F.R. § 147.131(c)(1)(ii). This alternative self-certification process is the result of a Supreme Court injunction against the requirement that employers use an earlier version of EBSA Form 700. See *Wheaton Coll. v. Burwell.*, 134 S. Ct. 2806, 2807 (2014).

68. 29 C.F.R. § 2590.715–2713A(c)(2)(i)(A)–(B) (2015); 45 C.F.R. § 147.131(c)(2)(i)(A)–(B) (2015).

provide coverage regardless of whether the employer self-certifies.<sup>69</sup> Alternatively, if an employer self-insures,<sup>70</sup> self-certification authorizes HHS to designate the employer's third party administrator (TPA) as a claims administrator for contraceptive benefits.<sup>71</sup> After such designation, the TPA is eligible for reimbursement for contraceptive services it provides at a rate of 150%.<sup>72</sup> In either case, a self-certifying organization is not required to "contract, arrange, pay, or refer for contraceptive coverage,"<sup>73</sup> and insurers or TPAs must transmit all material and communication regarding the contraceptive care in a manner "separate from" material distributed on account of the employer's health plan.<sup>74</sup>

### B. Alternative Approaches to Substantial Burden Analysis

Despite these regulatory steps to insulate objecting employers from the provision of contraceptives, a number of non-profits have objected to this accommodation scheme on the theory that the self-certification process itself amounts to a substantial burden on religious exercise.<sup>75</sup> In injunction proceedings, these cases have produced an inconsistent set of decisions regarding the propriety of the accommodation scheme given the requirements of RFRA.<sup>76</sup>

With some minor variations, the plaintiffs' core contentions in these cases are generally threefold. To illustrate, consider two cases: *Eternal Word Television Network v. Secretary*,<sup>77</sup> in which the plaintiffs successfully attained an injunction,

69. See 42 U.S.C. §§ 300gg-13, 300gg-22 (2012); see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1165 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016).

70. A self-insured employer assumes the risk of providing health benefits for its employees directly; in most cases, a self-insured employer contracts with a third party administrator to manage contracts with healthcare providers, administer coverage policies, and arrange payments. See *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1162–63.

71. 26 C.F.R. § 54.9815-2713A(b)(1)(ii)(B) (2015); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B).

72. 26 C.F.R. § 54.9815-2713A(b)(3); 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d)(2)(ii)–(iii) (2015); see also *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 454 (5th Cir. 2015) ("Third-party administrators and insurers that pay for contraceptives in this circumstance are eligible for government reimbursement of 115% of their expenses."), *vacated*, 136 S. Ct. 1557 (2016).

73. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,462 (Feb. 6, 2013).

74. 26 C.F.R. § 54.9815–2713A(d); 29 C.F.R. § 2590.715–2713A(d); 45 C.F.R. § 147.131(d) (2015).

75. See *supra*, note 13 and accompanying text.

76. Compare, e.g., *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015) (finding plaintiff unlikely to prevail on its claim that self-certification substantially burdens its religious exercise), *vacated*, 136 S. Ct. 2007 (2016), with *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015) (issuing an injunction after finding the plaintiff's RFRA challenge substantially likely to succeed on the merits), *vacated*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

77. 756 F.3d 1339 (11th Cir. 2014).

and *Grace Schools v. Burwell*,<sup>78</sup> in which the government prevailed. First, plaintiffs typically argue that self-certification renders them complicit in the provision of contraceptives because their action causes insurers or TPAs to provide contraceptive coverage. Plaintiffs in *Grace Schools* contended that self-certification “renders them complicit in a grave moral wrong because the form has certain legal effects that facilitate the provision of the objectionable services.”<sup>79</sup> Likewise, plaintiffs in *Eternal Word Television* claimed that their submission of Form 700 would “trigger” their TPA’s obligation to provide contraceptive services.<sup>80</sup>

Second, plaintiffs typically argue that even after accommodation, they must participate to an objectionable degree in the insurer’s or TPA’s efforts to provide contraceptive care. In *Grace Schools*, the plaintiffs argued that compliance with the accommodation would require them to undertake various actions “in furtherance of” a scheme to provide objectionable services, including amending the documents governing their health program.<sup>81</sup> Plaintiffs in *Eternal Word Television* likewise complained of the administrative burden of identifying the eligible employees so that the TPA could provide services.<sup>82</sup> Finally, plaintiffs’ typically argue that the accommodation improperly utilizes their health plans as conduits to enable delivery of contraceptive services. The *Grace Schools* plaintiffs claimed that the accommodation required them to “contract with insurance companies or third-party administrators that are authorized to provide objectionable coverage.”<sup>83</sup> Similarly, the *Eternal Word Television* plaintiffs complained that they would be required to locate an administrator who is willing to provide the services.<sup>84</sup>

The plaintiffs’ inconsistent success raising these functionally identical claims reflects underlying disagreement as to the proper tests that courts ought to apply to gauge the substantiality of complicity-based religious burdens.<sup>85</sup> In all, the judicial approaches to this question since *Hobby Lobby* can be categorized into three broad camps.

First, a number of courts attempt to confine adjudication of a plaintiff’s claim of religious burden to a question of sincerity.<sup>86</sup> These cases broadly rely upon the

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78. 801 F.3d 788 (7th Cir. 2015), *vacated*, 136 S. Ct. 2011 (2016).

79. *Id.* at 802.

80. 756 F.3d 1339, 1342 (11th Cir. 2014) (Pryor, J., concurring).

81. 801 F.3d at 803.

82. 756 F.3d at 1342 (Pryor, J., concurring).

83. 801 F.3d at 803.

84. 756 F.3d at 1342–43 (Pryor, J., concurring).

85. *Compare, e.g., Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1208 (10th Cir. 2015) (Baldock, J., dissenting) (“Several learned judges have argued compellingly that . . . the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion’s requirements is the only consideration relevant to whether a burden is ‘substantial’ under RFRA.”), *vacated*, 136 S. Ct. 1557 (2016), *with Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014) (“Accepting the sincerity of Plaintiffs’ beliefs . . . does not relieve this Court of its responsibility to evaluate the substantiality of any burden on Plaintiffs’ religious exercise.”), *vacated*, 136 S. Ct. 1557 (2016).

86. *See, e.g., Dordt Coll. v. Burwell*, 801 F.3d 946, 949 (8th Cir. 2015), *vacated*, 136 S. Ct. 2006 (2016); *Sharpe Holdings, Inc. v. U.S. Dep’t of Health & Human Servs.*, 801 F.3d 927, 935 (8th Cir. 2015), *vacated*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016); *Grace*

Supreme Court's guidance in *Thomas* as excerpted in *Hobby Lobby*.<sup>87</sup> *Thomas* involved a religious pacifist working in a steel manufacturer; when he was reassigned to work on tank turret fabrication, he quit and applied for unemployment benefits.<sup>88</sup> The state unemployment authority denied his benefits because he quit by choice.<sup>89</sup> Despite factual disputes on the record concerning whether the plaintiff's religion traditionally considered manufacture of war goods sinful,<sup>90</sup> the Court held that a religious adherent is entitled to determine for himself whether a given degree of participation in the sins of others is acceptable, so a government benefit could not be conditioned upon the choice.<sup>91</sup>

Taking this line of reasoning to its logical conclusion, a mere sincere belief that compliance with a law would violate religious convictions coupled with a sufficient sanction against noncompliance will invariably amount to a substantial burden. For example, in *Eternal Word Television*, the court found that plaintiffs' naked assertion that compliance with the self-certification requirement would violate their religious belief, regardless of whether their understanding of "how the contraception mandate works" was reasonable, was sufficient to trigger strict scrutiny analysis.<sup>92</sup> Similarly, the court in *Sharpe Holdings, Inc. v. Department of Health and Human Services* phrased its approach entirely in terms of the plaintiffs' beliefs: "if one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear."<sup>93</sup>

Second, in stark contrast to the first approach, a majority of courts have adopted a test that concentrates intensely upon veracity of plaintiffs' assertions regarding the function of the challenged regulations.<sup>94</sup> These courts distinguish between plaintiffs' beliefs concerning their own religious obligations and plaintiffs' assertions regarding

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*Schools*, 801 F.3d at 808 (Manion, J., dissenting); *Eternal Word Television*, 756 F.3d at 1340–41 (Pryor, J., concurring).

87. See, e.g., *Sharpe Holdings*, 801 F.3d at 941 ("It is not our role to second-guess [plaintiffs'] honest assessment of a 'difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.'" (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014))).

88. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 710 (1981).

89. See *id.*

90. See *id.* at 713–14.

91. See *id.* at 715.

92. *Eternal Word Television Network, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014).

93. *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 941 (8th Cir. 2015), *vacated*, No. 15-775, 2016 WL 2842448 (U.S. May 16, 2016).

94. See, e.g., *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1177 (10th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Priests for Life v. Dept. of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016).

“how the law or policy being challenged actually operates and affects religious exercise.”<sup>95</sup> The former concern is a question of fact wherein the court is confined to consider only the sincerity of plaintiffs assertions, but the latter concerns are questions of law that are within the court’s purview.<sup>96</sup> By concentrating analysis on “what the law actually requires,”<sup>97</sup> these courts effectively determine substantiality questions according to traditional legal considerations of causation.<sup>98</sup>

The interplay between the majority and dissenting opinions in *Little Sisters of the Poor Home for the Aged*<sup>99</sup> demonstrates the causality-type arguments common to these decisions. The majority found that neither the group health plan plaintiffs nor the self-insured plaintiffs demonstrated a substantial burden on their religious practices.<sup>100</sup> Considering the group health plan plaintiffs, the court concluded that self-certification “does not enable coverage” because the “insurance issuer . . . has an independent and exclusive obligation to provide [contraceptive] coverage without cost sharing.”<sup>101</sup> On this account, federal law would require insurers to provide coverage regardless of whether an employer utilized the accommodation, so any complicity argument arising from providing access to coverage must fail.<sup>102</sup> Regarding self-insured plaintiffs, the majority similarly denied a complicity claim on the basis that self-certification “does not change or expand contraceptive coverage beyond what federal law already guaranteed.”<sup>103</sup> In the court’s reasoning, this conclusion follows because “federal law generally requires that all people must have health insurance . . . including contraceptive coverage,” so plan participants would be entitled to contraceptive coverage regardless of the employers’ utilizing the accommodation.<sup>104</sup> On this account, plaintiffs’ complicity claim failed despite their showing that self-certification “is a but-for cause of the TPAs’ authority to provide contraceptive coverage.”<sup>105</sup>

The dissent agreed with the court’s conclusion regarding the insured plaintiffs but reached the opposite conclusion regarding the self-insured plaintiffs.<sup>106</sup> Because the plaintiffs’ claims were premised on a causal consideration, the dissent found a “critical distinction” between self-insured and group-health plans because “in the *self-insured* context, a TPA would be ‘*authorized* and obligated to provide coverage

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95. *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1177.

96. *See E. Tex. Baptist Univ.*, 793 F.3d at 456.

97. *Catholic Health Care Sys.*, 796 F.3d at 218 (quoting *Priests for Life*, 772 F.3d at 249) (internal quotations omitted).

98. For example, the court in *East Texas Baptist University* distinguished its approach from *Hobby Lobby* as follows: “The difference is not just that there are more links in the causal chain here than in *Hobby Lobby*—a difference that would not change the outcome, given that we accept an adherent’s judgment as to how much separation is enough. It is also that the type of compelled act is quite different—the act at issue in this case is not one that authorizes or facilitates the use of contraceptives.” 793 F.3d at 462.

99. 794 F.3d 1151.

100. *See id.* at 1181, 1183–86.

101. *See id.* at 1181.

102. *See id.* at 1182–83.

103. *See id.* at 1186.

104. *Id.*

105. *See id.* at 1185.

106. *Id.* at 1209 (Baldock, J., dissenting).

... *only if* the religious non-profit . . . opts out.”<sup>107</sup> In the dissent’s view, “this makes their opting out a but-for cause of the receipt of the coverage.”<sup>108</sup> Accordingly, opting out makes plaintiffs complicit in the provision of contraception because their action triggers a regulatory process by which their employees’ gain access to coverage.<sup>109</sup> In this sense, the disjuncture between the majority and dissent turned upon the degree of dispositive weight the court ought to attribute to “but-for” causal analysis.<sup>110</sup>

Finally, a third test disposes of substantiality considerations by distinguishing between allegations according to whether a regulation directly impinges upon religious exercise or merely affects plaintiffs’ clarity of religious conscience.<sup>111</sup> These cases rely upon a distinction between burdens on religious conduct and burdens on religious conscience or sentiment developed in *Bowen v. Roy*<sup>112</sup> and *Lyng v. Northwest Indian Cemetery Protective Ass’n*.<sup>113</sup>

With this distinction in mind, a number of courts have determined that religious objectors do not suffer substantial burdens under RFRA where the only harm is sincere unease with their inability to prevent others from fulfilling regulatory objectives after they opt out.<sup>114</sup> Employers enjoy no RFRA right to be “free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors.”<sup>115</sup> Consider the plaintiff’s claims in *Geneva College v. Department of Health & Human Services*.<sup>116</sup> Therein, Geneva College admitted that, unlike directly paying for contraceptives, neither the provision of health insurance generally nor the administrative task of self-certifying, standing alone, would be objectionable; rather, the plaintiffs objected in light of the downstream activities of third parties reacting to its decision to opt out.<sup>117</sup> On this basis, the court determined that the plaintiff’s claims did not amount to an objection

107. *Id.* at 1210 (emphasis in original) (citations omitted).

108. *Id.* at 1211 (Baldock, J., dissenting).

109. *See id.* at 1213 (Baldock, J., dissenting) (“[F]ederal law, *only in conjunction with the self-insured plaintiffs’ opt out*, allows plan participants and beneficiaries to receive contraceptive coverage.” (emphasis in original)).

110. *See id.* at 1212 (Baldock, J., dissenting).

111. *See, e.g., Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 223 (2d Cir. 2015), *vacated*, 136 S. Ct. 2450 (2016); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 623 (7th Cir. 2015) (Hamilton, J., concurring), *vacated*, 136 S. Ct. 2007 (2016); *Geneva Coll. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 778 F.3d 422, 441 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016).

112. 476 U.S. 693, 699 (1986) (rejecting a free exercise challenge to the government’s use of a Native American child’s Social Security number for purposes of administering benefit programs because the government’s internal uses of that number “place[d] [no] restriction on what [the father] may believe or what he may do”).

113. 485 U.S. 439, 449 (1988) (distinguishing plaintiffs’ free exercise right to avoid being coerced into violating religious beliefs and the right to pursue “spiritual fulfillment according to their own religious beliefs”).

114. *See Catholic Health Care Sys.*, 796 F.3d at 223.

115. *Id.*

116. 778 F.3d 422.

117. *See id.* at 435.

regarding what the regulations required of it but rather an attempt to impose a “religious veto against plan providers' compliance with those regulations.”<sup>118</sup> Stated simply, *Geneva College* stands for the proposition that a complicity-based conscience claim can only amount to a significant burden within the framework of RFRA where a plaintiff alleges that the actual requirements of the law require some degree of religiously forbidden participation in sin.

Because these three tests produce inconsistent outcomes when applied to similar facts, they cannot easily coexist. Part III considers each of these tests in terms of the argumentative scheme established in Part I. In light of this analysis, only the third approach can consistently determine whether a regulation substantially burdens a person's exercise of religion without engaging in an evaluation of that person's religious beliefs.

### III. TOWARDS A NONRELIGIOUS TEST FOR SUBSTANTIALITY

An appropriate test for substantiality under the RFRA must enable courts to successfully navigate between two broad, potentially conflicting congressional mandates. First, the debates surrounding the term “substantial” in the initial RFRA drafts indicate that Congress did not intend strict scrutiny to apply to all government programs that place an articulable burden on religious practice.<sup>119</sup> Second, as subsequently amended, RFRA clearly forbids courts from engaging in substantiality analysis that directly considers the internal consistency of religious claims.<sup>120</sup> This congressional guidance reifies longstanding First Amendment jurisprudence that limits judicial inquiry into the reasonableness of religious belief.<sup>121</sup> In the foregoing survey of judicial approaches to the ACA accommodation scheme, only the third test (i.e., distinguishing burdens upon religious conduct from those upon moral sentiment) satisfies both of these criteria.

Confining religious burden analysis to a factual inquiry regarding sincerity, as the first approach in Part II does, belies the requirement that RFRA protection only apply to substantial burdens because deference to mistaken empirical claims invites nearly limitless expansion of strict scrutiny analysis. As the argumentative scheme in Part I details, a complicity claim relies upon both moral and empirical premises.<sup>122</sup> Under this approach, such distinctions are meaningless, and a plaintiff need only to show a sincere belief that compliance with a law entails certain religiously forbidden practices.<sup>123</sup> The problem with such a test is that deference to empirical claims invites

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118. *Id.* at 439.

119. *See supra* note 19 and accompanying text.

120. After amendments contained in the Religious Land Use and Institutionalized Persons Act of 2000, RFRA applies to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A) (2012).

121. The narrow function of judicial inquiry is to determine “whether the plaintiffs’ asserted religious belief reflects ‘an honest conviction.’” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2757 (2014) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981)).

122. *See supra* Part I.

123. *Eternal Word Television Network, Inc. v. Sec’y U.S. Dep’t of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014).



strict scrutiny analysis on the basis of patently absurd factual contentions.<sup>124</sup> Consider a slight alteration to the fact pattern in *Thomas*; suppose that the plaintiff was mistaken that the components on which he worked were destined for use in tank turrets.<sup>125</sup> If, instead, the components were to be used exclusively in, say, toy tanks, should strict scrutiny still apply?<sup>126</sup> It would seem that the basic policy rationale behind the *Thomas* test is inapposite in such a scenario because inquiry into the actual uses of components does not require the court to “undertake to dissect religious beliefs.”<sup>127</sup> Indeed, *Hobby Lobby* does not directly suggest that courts ought to treat empirical claims deferentially; rather, the Court refused to consider arguments regarding the improbability of abortions resulting from the challenged contraceptive methods.<sup>128</sup> These arguments can be distinguished from an outright argument that the challenged contraceptive methods cannot lead to the expulsion of fertilized zygotes. Arguments of the latter variety do not attempt to mitigate the plaintiffs’ empirical claims; rather, such a line of argument places the veracity of those claims in contention. In such situations, a court should not afford deference to plaintiffs’ empirical claims.

Conversely, the second approach described in Part II deploys broad judicial consideration of the nexus between religious belief and regulatory mechanics. In this more searching review, it improperly invites inquiry into the reasonableness of religious belief because it substitutes legal considerations, such as causality, for metaphysical ones. At first, it may seem as though the judicial task of determining how regulations “actually work”<sup>129</sup> amounts to a call to inspect the empirical elements of a complicity claim, but upon closer inspection, this analysis interrogates substantially broader questions. Whether compliance with the self-certification scheme actually triggers, facilitates, or enables contraceptive coverage cannot be tested empirically because these terms do not comprise empirical criteria.<sup>130</sup> Rather, they amount to moral criteria operating within the larger framework of a complicity claim.<sup>131</sup> In effect, the religious adherent has drawn a “line” stating that conduct which “triggers” sin amounts to complicity in sin; accordingly, the criteria for what amounts to a “trigger” are themselves religious considerations.<sup>132</sup>

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124. See *supra* note 40 and accompanying text.

125. See *Priests for Life v. Dept. of Health & Human Servs.*, 772 F.3d 229, 249 n.14 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016).

126. See *id.*

127. See *Thomas v. Review Bd. of Ind. Emp’t Security Div.*, 450 U.S. 707, 715 (1981).

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

129. See *supra* note 94 and accompanying text.

130. Seginwall, *supra* note 3, at 1974 (“[D]eference should be the default here, given that concerns about complicity can strike at the heart of the believer’s conscience and given that, unlike with empirical claims, we lack nonneutral considerations with which to dispute the metaphysics underpinning the more expansive notions of complicity in conscientious objectors’ claims.”).

131. See *supra* note 48 and accompanying text.

132. See *supra* note 49 and accompanying text.

The legal concept of causality, itself a metaphysical calculation, is a poor proxy for this religious reasoning.<sup>133</sup> As the dissent in *Grace Schools* aptly opines, “[a] thorough examination reveals that the accommodation’s tangled mess is hiding the fact that the extension cord gets its power from the nonprofits’ health plans and must be plugged in before it will work.”<sup>134</sup> Regardless of whether an employer utilizes self-insurance or a group health plan, neither a TPA nor an insurer would have any duty to provide contraceptive care to the employer’s workers if she chose not to provide insurance in the first place and accept the statutory fines.<sup>135</sup> Accordingly, courts cannot deny a “but-for” relationship between an employer’s engaging with the ACA system and the provision of objectionable contraceptive care; instead, courts employing this test must resort to reasoning akin to proximate causation and claim that culpability should really adhere to actors at some other place in the causal chain.<sup>136</sup> At base, this approach cannot be principally distinguished from the “attenuation” arguments that *Hobby Lobby* explicitly rejected as impermissibly premised on testing the reasonableness of religious belief.<sup>137</sup>

In light of the failings of the other two approaches, a test that distinguishes between burdens on religious conduct and those on moral sentiment (i.e., the third substantiality test analyzed in Part II) offers a workable means of limiting the universe of potential RFRA claims without vetting their religious aspects. In contrast to the causality test, courts employing this approach need not consider the metaphysical question of whether a regulation actually requires activity amounting to complicity; rather, following the guidance of *Bowen* and *Lyng*, courts need only to consider whether the religious compliant is premised on a restriction of religious exercise or merely the conduct of third parties.<sup>138</sup> This analysis suggests a usable bright line rule for substantiality in the context of complicity claims: even if a law interferes with private persons’ ability to pursue “spiritual fulfillment,”<sup>139</sup> it is not a substantial burden so long as it does not affirmatively compel religious adherents to refrain from religiously motivated conduct or to undertake religiously objectionable conduct.<sup>140</sup> On this basis, one may draw a principled distinction between *Hobby*

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133. “Under *Thomas*’ guidance, it is simply irrelevant what the HHS-mandate courts think about the causal connection between an employer’s purchase of contraceptive-services coverage and the employee’s use of those services. Rather, *the question is whether the mandate substantially burdens the practices of the plaintiffs as judged by the tenants of their beliefs . . .*” Lyons, *supra* note 46, at 302 (emphasis added).

134. *Grace Schs. v. Burwell*, 801 F.3d 788, 808 (7th Cir. 2015), (Manion, J., dissenting) *vacated*, 136 S. Ct. 2011 (2016).

135. *See id.* at 812.

136. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1212 (10th Cir. 2015) (Baldock, J., dissenting), *vacated*, 136 S. Ct. 1557 (2016).

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

138. *See Geneva Coll. v. Sec’y Dept. of Health & Human Servs.*, 778 F.3d 422, 441 (3d Cir. 2015) (“[T]he case law clearly draws a distinction between what the law may impose on a person over religious objections, and what it permits or requires a third party to do.”), *vacated*, 136 S. Ct. 1557 (2016).

139. *See Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

140. *See Bowen v. Roy*, 476 U.S. 693, 703 (1986) (finding the administrative requirement to provide a Social Security number not burdensome on religious faith because “[i]t may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively

*Lobby and Geneva College*: in the former, the plaintiffs directly objected to the action required by law, paying for contraceptives,<sup>141</sup> whereas in the latter, the plaintiffs objected only to the downstream activities of others while specifically admitting no objection to their own legally required role.<sup>142</sup> The latter claim is not articulable under RFRA because it references only the plaintiffs' inability to proceed with a clear conscience, not their ability to engage in religious conduct without significant burden.<sup>143</sup>

This approach to complicity claims may be conceptualized using a two-step judicial inquiry. First, the court must determine whether the relational element of an adherent's complicity claim is itself founded upon sincere religious belief. A complicity claim relies upon two separate moral objections: an objection to the conduct of the third party and a judgement that a certain degree of participation in the third party's conduct is itself objectionable. In order to find a substantial burden on religious practice, a court must determine that both claims are sincerely held religious beliefs. Second, the court must determine whether the latter religious objection goes towards some affirmative conduct that compliance with the challenged law or regulation would actually require.

In order to demonstrate a substantial burden on religious practice under this test, a complicity-based claim would need to withstand both inquiries. For instance, the *Geneva College* plaintiffs failed to assert an actionable RFRA claim with regard to the first inquiry. By conceding that "the mere act of completing the EBSA Form 700 does not impose a burden on their religious exercise," the plaintiffs admitted that their objection to the accommodation scheme was premised entirely on their moral objection to the conduct of third parties.<sup>144</sup> In other words, the plaintiffs failed to allege a sincerely held religious belief that their conduct under the law would itself be sinful; rather, the plaintiffs' claim amounted to a naked objection to the conduct of others. A failure with regards to the second inquiry would resemble the plaintiff's argument in *University of Notre Dame v. Burwell*. Therein, the plaintiff sought to enjoin the government against forbidding it from barring its insurer's providing contraceptive coverage.<sup>145</sup> The court denied this relief because RFRA does not afford a religious objector, once relieved of the obligation to undertake objectionable conduct, the right to raise a religious complaint regarding whatever arrangements the

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compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons" (internal footnotes omitted)).

141. See *supra* note 24 and accompanying text.

142. See *supra* note 116 and accompanying text.

143. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors." *Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated*, 136 S. Ct. 1557 (2016).

144. *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016).

145. *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016).

government makes for a substitute.<sup>146</sup> Under the second inquiry, a RFRA claimant may not wield a religious objection in order to “veto” the conduct of a third party; rather, a claimant may only object to what the law requires of her personally.<sup>147</sup>

Importantly, neither of these inquiries requires judicial scrutiny regarding the reasonableness of a plaintiff’s moral judgments; rather, this test only requires that the plaintiff allege that whatever is required by law actually violates a sincerely held religious belief on account of, at least in part, her own conduct.

#### CONCLUSION

The survey of judicial approaches in this analysis reveals the complexity and contradictions that characterize the state of RFRA jurisprudence following *Hobby Lobby* and *Zubik*. The various circuit courts that considered complicity-based claims similar to those in *Hobby Lobby* articulated at least three separate, mutually-exclusive tests prior to the Supreme Court’s granting certiorari in *Zubik*. But, with an evenly divided court, *Zubik* failed to articulate a usable standard.

Rather than clarifying the viability of complicity-based claims under the RFRA, *Zubik* disposed of the matter with instructions counseling a compromised solution to the plaintiffs’ religious objections. After oral argument, the Court directed the parties to prepare supplemental briefs addressing “whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies without . . . notice from petitioners.”<sup>148</sup> In effect, the Court queried the parties whether the government interest, cost-free provision of contraceptives, could be fulfilled without the self-certification process to which the plaintiffs object. The parties agreed that “such an option is feasible.”<sup>149</sup> And, specifically, the plaintiffs clarified that “their religious exercise is not infringed where they ‘need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception.’”<sup>150</sup> Because the parties agreed that an inoffensive alternative to the self-certification process was available, the Court remanded the matter with instructions to allow the parties “an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’”<sup>151</sup>

On the basis of this compromise solution, the confused and contradictory jurisprudence of the circuits analyzed within this Note persisted *Zubik*’s remand order. Explicitly, the Court “express[ed] no view on the merits of the cases” and, importantly, did not reach the question of whether plaintiffs’ “religious exercise has been substantially burdened.”<sup>152</sup> Accordingly, although *Zubik* vacated the decisions

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146. *See id.* at 623 (Hamilton, J., concurring).

147. *See Geneva Coll.*, 778 F.3d at 439.

148. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016) (per curiam).

149. *Id.* at 1560.

150. *Id.* (quoting Supplemental Brief for Petitioners at 4, *Zubik v. Burwell*, No. 14-1418 (U.S. May 16, 2016) (per curiam)).

151. *Id.* (quoting Supplemental Brief for Respondents at 1, *Zubik v. Burwell*, No. 14-1418 (U.S. May 16, 2016) (per curiam)).

152. *Id.*

in *East Texas Baptist University*, *Little Sisters of the Poor*, *Geneva College*, and the other circuit court decisions considered therein, it did not preclude the lower courts, on remand, from “reach[ing] the same conclusion” in the questions presented.<sup>153</sup> Indeed, Justices Ginsburg and Sotomayor, both dissenters in *Hobby Lobby*,<sup>154</sup> explicitly joined per curiam order only on the understanding that the Court’s instructions should not be construed as “signals of where this Court stands” on the questions of complicity under RFRA.<sup>155</sup> Without a conservative majority on the court, this language suggests that it remains unclear whether the complicity logic endorsed in *Hobby Lobby* will remain viable.

The state of RFRA jurisprudence after *Zubik*, then, remains fluid and unpredictable. The parties’ compromise solution in the case effectively rendered the question of substantial burdens on religious exercise moot: the government admitted its willingness to remove the objectionable self-certification step from its process, and the plaintiffs claimed no religious objection to the government’s provision of contraceptive coverage without their having to self-certify. Whether the plaintiffs’ vociferous objections to self-certification demonstrated a substantial burden on their religious exercise within the meaning of RFRA remained unanswered. As such, the contradictory jurisprudence surrounding the question of complicity under RFRA remains unresolved.

Moving forward, courts ought to recognize the sound distinction between burdens on religious conduct, which enjoys protection under RFRA, and mere religious sentiment. Such an approach would allow courts to clarify their consideration of complicity-based claims without delving into a forbidden analysis of the content of religious belief. This Note concludes that the deference that must be afforded to religious claims forecloses significant judicial inquiry into the nexus between regulatory mechanics and moral commitments, so Courts should instead delineate substantial and insubstantial burdens on religion under the act according to whether compliance actually burdens religious conduct or merely impinges upon religious conscience. This approach represents a first, tentative step into the complex field of complicity-based religious freedom litigation, but it would allow courts to clarify a coherent post-*Hobby Lobby*, post-*Zubik* jurisprudence.

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153. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1562 (2016) (Sotomayor, J., concurring).

154. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

155. See *Zubik*, 136 S. Ct. at 1561–62 (Sotomayor, J., concurring).