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Dobbs and Exit in Antidiscrimination Law

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Abstract

In the last couple of decades, pursuit of what Robin West has called "exit rights" has played an increasingly important role in the development of antidiscrimination law. From religiously affiliated schools seeking to insulate employment decisions for employees through a judicially crafted ministerial exception, to corporate challenges to the Affordable Care Act's contraceptive mandate using the Religious Freedom Restoration Act, employers have sought to escape the burdens of complying with legal protections for workers. The current wave of litigation seeks broad exemptions from antidiscrimination laws for two types of employers: for-profit businesses who wish to discriminate against employees based on the employers' religious beliefs, and state and local government employers in states with socially conservative majority or super-majority governments. The Court's Dobbs *decision will almost certainly accelerate this trend, providing new grounds of argument for employers to seek exit from a variety of antidiscrimination requirements. This paper explores these issues, primarily in the context of two cases,* Bear Creek Bible Church v. EEOC *(now* Braidwood v. EEOC*) and* Kelley v. Azar *(now* Braidwood v. Becerra*), both of which seek to avoid application of federal law to for-profit entities that wish to discriminate. In the course of that discussion, this paper also considers related litigation brought by the same attorney, who also crafted one of the most sweeping and*

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problematic abortion statutes in the country, SB 8, along with a network of socially conservative legal organizations.

I. INTRODUCTION

The language is simple but broad. Title VII prohibits discriminating against any person because of "such individual's . . . sex . . ." among other things.[1] The contours of this prohibition, from the start, have been fleshed out case by case. This incremental and piecemeal development is a result of a lack of legislative history, at least in the original act, and the disdain early members of the Equal Employment Opportunity Commission (EEOC) had for its inclusion.[2] As a result, over time, courts have recognized that sexualized conduct can be discrimination,[3] that discrimination on the basis of sex-specific traits can violate Title VII,[4] that acting based on stereotypes can be discrimination,[5] and that discriminating on the basis of sexual orientation and gender identity can violate Title VII.[6] At every step, and with similar prohibitions on sex discrimination elsewhere, like in

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[1] 42 U.S.C. § 2000e-2(a)(1).

[2] *See* GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 1–2, 4 (2016). *See generally* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–41 (1997). The second executive director of the EEOC called the inclusion of sex in Title VII a "fluke." Herman Edelsberg, Exec. Dir., Equal Emp. Opportunity Comm'n, Statement at the New York University Annual Conference on Labor (Aug. 25, 1966), 62 Lab. Rel. Rep. (BNA) 253–55 (1966) (referring to it as "conceived out of wedlock" and rejecting the notion that men could be required to have male secretaries); *see also* FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960 46–47 (1999); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 235 (1991); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 252–53 (2008).

[3] *E.g.*, Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 59 (1986) (recognizing that harassment with sexual content was sex discrimination prohibited by Title VII).

[4] *E.g.*, City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 728 (1978) (prohibiting employer from charging women more for pension participation even though the statistically average woman will live longer than the statistically average man).

[5] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding that discriminating against a woman for not conforming to sex stereotypes was sex discrimination).

[6] Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020) (holding that discrimination on the basis of sexual orientation or gender identity was sex discrimination).

the Affordable Care Act,[7] were objections and arguments framed in the language of religious freedom, rights of association, and free speech.[8] These objectors warned against recognizing equal rights. And when those efforts were unsuccessful, the objectors claimed what Robin West has termed a "right to exit," to opt out of or be excused from legal obligations imposed on the general public.[9]

In some circumstances, the Religious Freedom Restoration Act (RFRA) provides a statutory right of exit from federal law and actions, and the Free Exercise Clause provides a constitutional right of exit from laws or actions by any government actor. The ability they provide to opt out is not by itself necessarily problematic. Allowing exemptions in some instances can promote greater participation in civil society. For example, allowing an exemption to a rule that bans head coverings in public buildings for people whose religion compels then to cover their heads allows those people to participate in public life. It gives them the same ability to participate in civil society as those who do not follow that religious practice. Most importantly, it does so without creating harms to third parties. Where opting out blocks *others* from full participation, however, it creates injustice. Opting out of rules that prohibit discrimination clearly creates injustice. The third-party harms—to workers, to competing employers, and to the public—are clear.

Although I recognize the irony in saying this in light of how the Court's decision in *Dobbs v. Jackson Women's Health Organization*[10] cast doubt on the virtue of judicial supremacy, enforcing rights is part of the job of the judicial branch in our democratic system. When there is no claim of right in opposition, no sufficiently weighty interest, the

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[7] 42 U.S.C. § 18116.

[8] *E.g.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (finding speech and association rights to not allow LGBTQ scout leaders); ROBERT GEORGE, TIMOTHY GEORGE & CHUCK COLSON, MANHATTAN DECLARATION: A CALL OF CHRISTIAN CONSCIENCE (2009), https://www.manhattandeclaration.org (a statement on behalf of certain Christian signatories asserting rights not to comply with laws or actions related to sexuality, reproduction, and marriage on religious grounds).

[9] Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 399, 402–03 (Zoe Robinson, Chad Flanders & Micah Schwartzman eds., 2015) (discussing the ministerial exception and other assertions of religious freedom from compliance with antidiscrimination laws as vivid examples of rights to exit); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 897–98 (2014) (coining the term and warning that these rights to exit posed a danger to civil society).

[10] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (reversing Roe v. Wade and holding no constitutional right to abortion).

court's job is easy. When there is a clash of asserted rights, though, or similarly weighty interests, courts must decide whose will give way. And the way RFRA and the Free Exercise Clause do this is on a case-by-case basis, giving consideration to the plaintiff's particular interest and beliefs and the government's interest in applying the regulation or law objected to.

The plaintiffs in the cases that are the focus of this article, particularly the lawyers behind these strategic lawsuits, are working to circumvent that process by providing anyone in the country a free pass from antidiscrimination enforcement or compliance. And for the case against the EEOC, if charge processing counts as EEOC action or a court judgment counts as "implementation" of federal law, that free pass may even extend RFRA's application to suits brought by private parties. In this way, a single successful lawsuit could insulate any employer in the country from any case seeking enforcement of a federal antidiscrimination law. So far this blueprint has been deployed primarily to challenge access to contraception and antidiscrimination protection on the basis of sexual orientation and gender identity. After *Dobbs*, that deployment will almost certainly expand to abortion, at least, and will also accelerate the push for exit rights from a wide range of antidiscrimination provisions.

This article explores the new wave of cases seeking to expand rights of exit and how they might be spurred on by the *Dobbs* decision. Part II lays out the current antidiscrimination framework for sexuality and reproduction in Title VII. Part III describes this new wave of cases. Part IV analyzes the decisions with an eye towards weakening their effectiveness. Part V briefly concludes.

II. BACKGROUND

Reproductive justice is essential to equality. Because of the lack of infrastructure supporting families or caregivers in this country, access to a full range of reproductive care through employers is especially important. Title VII prohibits sex discrimination, and that includes discrimination against employees who access reproductive care of all kinds, including abortion. It specifically defines discrimination "on the basis of sex" as including pregnancy, childbirth and "related medical conditions."[11] Because these terms are neutral, they encompass actions related to care that supports or prevents

[11] 42 U.S.C. § 2000e(k).

pregnancy and childbirth, including abortion.[12] The only caveat is that Title VII is explicitly neutral on health insurance for abortion in some circumstances of non-medically necessary care.[13]

This provision was added to Title VII after the Supreme Court had held that discrimination on the basis of pregnancy was not sex discrimination. Ruling first in *Geduldig v. Aiello*, a challenge brought under the Constitution, the court reasoned:

> The lack of identity between [pregnancy disability coverage] and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[14]

The Court followed *Geduldig* in a Title VII case, *General Electric Co. v. Gilbert*.[15] Congress enacted the Pregnancy Discrimination Act in 1978[16] in response to *Gilbert* to make clear that discrimination on the basis of pregnancy was sex discrimination. This, at least implicitly, also prohibited discrimination on the basis of reproductive capacity,[17] decisions to avoid pregnancy, and decisions to terminate a pregnancy.

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[12] *See generally* Ming-Qi Chu, *Abortion Rights Are Pregnancy Rights*, 27 EMP. RTS. & EMP. POL'Y J. 184 (2024); H.R. Cong. Rep. No. 95-1786 (1978) ("Because the conference substitute applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers decisions by women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.").

[13] This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

[14] Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

[15] 429 U.S. 125, 132–33 (1976).

[16] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

[17] *See generally* Int'l Union v. Johnson Controls, 499 U.S. 187, 207 (1991) (addressing a policy barring fertile women from some positions in a battery plant).

The EEOC and the courts that have considered the issue agree that the PDA prohibits discrimination on the basis of abortion.[18]

Despite this prohibition, some employers have used arguments grounded in religion or morality to justify pregnancy discrimination. For example, in *Chambers v. Omaha Girls Club*, a district court found that a policy requiring a pregnant staff member to take unpaid leave once her pregnancy began showing was not unlawful disparate treatment because the employer's policy was motivated by the need to provide positive role models in an attempt to discourage teenagers from becoming pregnant.[19]

Arguments based on religion have some grounding in Title VII, which allows certain employers to discriminate on the basis of religion. An employer that is a "religious corporation, association, educational institution, or society" may discriminate "with respect to the employment of individuals of a particular religion."[20] Religion "includes all aspects of religious observance and practice, as well as belief,"[21] so that employers allowed to discriminate on the basis of religion may condition employment on religious rules of conduct, like not engaging in sex out of wedlock. Thus, in *Boyd v. Harding Academy of Memphis*, a religious school's termination of a pregnant employee was held not to be sex discrimination, because the school presented evidence that it terminated her for having sex outside of marriage and presented evidence that other employees, including at least one male employee, were also disciplined for violating that rule when no pregnancies resulted.[22]

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[18] 29 C.F.R. pt. 1604 app. (2023) ("A woman is . . . protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion."); EEOC, EEOC-CVG-2015-1, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES § I.A.4.c (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4c; Doe v. C.A.R.S. Prot. Plus, Inc. 527 F.3d 358, 371 (3d Cir. 2008); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996); Ducharme v. Crescent City Déjà vu, LLC, 406 F. Supp. 3d 548, 569 (E.D. La. 2019).

[19] Chambers v. Omaha Girls Club, 629 F. Supp. 925, 947 (D. Neb. 1986).

[20] 42 U.S.C. § 2000e-1(a).

[21] *Id.* § 2000e-(j).

[22] 88 F.3d 410, 412, 414 (6th Cir. 1996). The school also retained a number of employees who were married and became pregnant. *Id.* at 412. At least one state has followed this general reasoning in interpreting its own state antidiscrimination law and parallel religious organization exception, although the court was less deferential to the employer and accepted the Catholic school's assertion without requiring examples of other employees terminated for

That exemption applies only to discrimination on the basis of religion, though. Religious employers may not discriminate on the basis of race, sex, or any other status protected by Title VII under that statute's exemption.[23] Therefore, in *Hamilton v. Southland Christian School*, summary judgment for a religious school was reversed where the plaintiff presented evidence that school officials commented repeatedly about her need for maternity leave, rather than that she had premarital sex.[24] Similar reasoning prevented summary judgment in *Dolter v. Wahlert High School*,[25] *Ganzy v. Allen Christian School*,[26] *Redhead v. Conference of Seventh Day Adventists*,[27] and *Vigars v. Valley Christian Center*.[28]

After the Supreme Court in *Dobbs* removed constitutional protection for abortion, more employers may be more motivated to impose policies that prohibit employees from seeking the full range of reproductive care. The legality of this is unclear. First, it is not clear whether discriminating on the basis of abortion for religious reasons is religious discrimination (which is allowed for religious non-profits) or sex discrimination (which is not). Second, while the majority of the pregnancy cases involve religious schools, a rise in litigation by for-profit entities seeking religious exemptions, like in *Burwell v. Hobby Lobby* and *Bear Creek v. EEOC*, discussed below, suggests that for-profit employers may increasingly seek to penalize employees who seek abortion or use contraception on religious grounds.

As these cases show, there is an organized network of activist plaintiffs, movement lawyers, and movement jurists ready to advance these kinds of cases. Steven Hotze, for example, the plaintiff in two of

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violating religious tenets. Crisitello v. St. Theresa Sch., 299 A.3d 781, 794–97 (N.J. 2023).

[23] This statement is limited to the exemption in 42 U.S.C. § 2000e-1(a). Religious entities are completely exempt from Title VII for conduct related to their ministers. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012). But not every religious entity entitled to Title VII's exemption will be a religious entity entitled to invoke the ministerial exemption, and not every employee will be a minister even for those religious entities that are entitled to invoke it. *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (considering the test for who counts as a minister in a Catholic school). A discussion of the ministerial exemption is thus, beyond the scope of this article.

[24] 680 F.3d 1316, 1320 (11th Cir. 2012).

[25] 483 F. Supp. 266, 267–71 (N.D. Iowa 1980).

[26] 995 F. Supp. 340, 360 (E.D. N.Y. 1997).

[27] 566 F. Supp. 2d 125, 137 (E.D.N.Y. 2008).

[28] 805 F. Supp. 802, 805 (N.D. Cal. 1992).

the cases described in the next section, has sued several times to challenge access to reproductive or sexual healthcare. He also has taken active roles to resist or prevent government recognition of LGBTQ rights. Jonathan Mitchell, the lawyer in all three cases is the former Solicitor General of Texas, and author of S.B. 8.[29] Mitchell is also working closely with the activists in the Sanctuary Cities for the Unborn movement, drafting anti-abortion ordinances and volunteering to defend them,[30] with the Alliance Defending Freedom, a conservative legal organization focused on religious issues that provides training and support to more than 4,600 attorneys nationwide,[31] and with America First Legal Foundation, which bills itself as the right-wing version of the ACLU,[32] all of which are working to limit access to reproductive care. Lastly, are movement jurists,[33] like Judge Reed O'Connor, who issued a number of decisions striking

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[29] Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court; Michael S. Schmidt, *Behind the Texas Abortion Law, A Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html.

[30] Amy Littlefield, *Mifeprestone Lawsuit that Could Trigger a National Abortion Ban*, THE NATION (Apr. 26, 2023), https://www.thenation.com/article/society/comstock-act-jonathan-mitchell; Isaiah Mitchell, *Lubbock Stakeholders, Lawyers Weigh in on Vague Future of Abortion Ban*, THE TEXAN (May 5, 2021), https://thetexan.news/issues/social-issues-life-family/lubbock-stakeholders-lawyers-weigh-in-on-vague-future-of-abortion-ban/article_f4ca43d0-e690-531a-9179-7fb4e0f09ff6.html.

[31] ALLIANCE DEFENDING FREEDOM (2023), https://adflegal.org; Mitchell and Erin Hawley, a lawyer with ADF, are defending the cities and counties in New Mexico in a mandamus action by the state Attorney General seeking to enjoin ordinances banning abortions in that state. Brief in Opposition to Emergency Petition for Writ of Mandamus and Request for Stay, N.M. ex. rel. Torrez v. Bd. of Cnty. Comm'rs for Lea Cnty., No. S-1-SC-39742 (filed Feb. 20, 2023) (showing Mitchell on the brief); Answer Brief of Bd. of Cnty. Comm'rs for Roosevelt Cnty, *N.M. ex rel. Torrez*, No. S-1-SC-39742 (filed May 10, 2023) (showing Hawley on the brief).

[32] AM. FIRST LEGAL (2023), https://aflegal.org. *See* Brief of Appellants/Cross-Appellees Braidwood Mgmt. et al., Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023) (No. 22-10145) (with America First Legal also representing Braidwood); *The Mission*, AM. FIRST LEGAL (2023), https://aflegal.org/about (describing leadership as "senior members of the Trump Administration who were at the forefront of the America First movement").

[33] *See generally,* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 UC DAVIS L. REV. 2149 (2024).

down key initiatives of the Obama administration,[34] and Judge Matthew Kacsmaryk, who came to the bench from the First Liberty Institute,[35] which brings actions to limit the reach of the Establishment Clause and on behalf of people who seek religious exemptions from antidiscrimination laws.[36] These movement actors, and others like them, will almost certainly be testing how far employers can go to limit employee access to the full range of reproductive services. They have already been challenging provision of that care. It is only a short step to penalize employees from seeking it themselves.

III. THE NEW BACKLASH

This section details the cases that illustrate the current move to expand employer prerogatives to opt out of antidiscrimination laws. Although the rulings in these cases are being limited to some extent on appeal,[37] the fact of these cases and the strategies show a roadmap for employers seeking to penalize employees for accessing reproductive care after Dobbs.

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[34] *E.g.* Texas v. United States, 336 F. Supp. 3d 664, 674 (N.D. Tex. 2018) (invalidating the ACA); Texas v. United States, 340 Supp. 3d 579, 611 (N.D. Tex. 2018) (invalidating the ACA); Mance v. Holder, 74 F. Supp. 3d 795 (N.D. Tex. 2015); Texas v. United States, 95 F. Supp. 3d 965 (N.D. Tex. 2015); Texas v. United States, 201 F. Supp. 3d 810, 835 (N.D. Tex. 2016) (holding that transgender students may be denied access to "intimate spaces" under Title IX); Texas v. United States, No. 16-cv-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (clarifying the scope of the injunction issued in Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016)); Franciscan All., Inc. v. Becerra, No. 16-cv-00108-O, 2021 WL 3492338 (N.D. Tex. Aug. 16, 2021) (enjoining HHS rule promulgated under the Affordable Care Act requiring medical providers to perform and insure gender-affirming surgeries and abortions).

[35] *Judge Matthew J. Kacsmaryk*, U.S. DIST. CT. N. DIST. TEX., https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk (last visited Apr. 29, 2023) (select "Biography" tab).

[36] *See Supreme Court Victories*, FIRST LIBERTY (2023), https://firstliberty.org/supreme-court-cases.

[37] *E.g.* Braidwood Mgmt. v. EEOC, 70 F.4th 914, 935 (5th Cir. 2023) (affirming in part, vacating in part, and reversing in part, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 625 (N.D. Tex. 2021)).

A. *Bear Creek Bible Church v. EEOC* (now *Braidwood Management, Inc. v. EEOC*)

In *Bear Creek Bible Church v. EEOC*, Jonathan Mitchell, brought a declaratory judgment action against the Equal Employment Opportunity Commission (EEOC) and its commissioners on behalf of Bear Creek Bible Church and Braidwood Management, Inc., one of Steven Hotze's companies, asserting that they had a right to discriminate on the basis of sexual orientation and gender identity because Title VII did not prohibit that discrimination, but even if it did, the plaintiffs had a religious right to do so.[38]

While the case was pending, the Supreme Court decided in *Bostock v. Clayton County*, that sexual orientation and gender identity discrimination violated Title VII because decisions made on those bases were inevitably decisions made on the basis of sex.[39] The named plaintiffs in *Bear Creek*, a Christian church and a for-profit, closely held corporation, amended their complaint to respond to *Bostock*, specifically, and sought exemptions from Title VII, asserting that compliance would conflict with their religious beliefs.[40] They sought two declaratory judgments: 1) that the absence of an exemption from Title VII for employers who "oppose homosexual or transgender behavior on religious grounds" would violate the First Amendment and the Religious Freedom Restoration Act; and 2) that after *Bostock*, Title VII allows employers to discriminate against bisexual employees and to have rules of conduct, like sex-specific dress codes, that apply to all applicants and employees as long as "both sexes" would experience the same sanction.[41] The plaintiffs sought to bring their First Amendment and RFRA claims as a class action, defining the class as "every employer in the United States that opposes homosexual or transgender behavior for sincere religious reasons."[42] They sought to bring the second claim as a class action of "every employer in the United States that opposes homosexual or transgender behavior for religious or nonreligious reasons."[43]

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[38] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 585–86 (N.D. Tex. 2021), *aff'd in part, vacated in part, & rev'd in part*, *Braidwood* 70 F.4th at 914.

[39] *Id.* at 585.

[40] *Id.* at 586–89.

[41] *Id.*

[42] *Id.* at 599.

[43] *Id.* at 600.

The claim was brought in the United States District Court for the Northern District of Texas, Fort Worth Division.[44] That choice created a high likelihood that the case would be assigned to Judge Reed O'Connor,[45] a judge who has issued very conservative decisions in a number of high profile cases, for example holding unconstitutional federal gun control provisions,[46] invalidating same sex marriage protections,[47] invalidating gender identity discrimination protections,[48] and invalidating central provisions of the Affordable Care Act.[49] Judge O'Connor has specifically defended the court's power to issue nationwide injunctions.[50]

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[44] Plaintiffs' Class-Action Complaint, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (N.D. Tex. 2021) (No. 4:18-cv-00824-O).

[45] On October 6, 2018, when the original complaint was filed, see *id.*, the district contained three judges: Reed O'Connor, John McBryde, and Terry R. Means. Judge Means had been on senior status since 2013, and three days after the complaint was filed, Judge McBryde retired into senior status, as well. Thus most cases filed in that division were assigned to Judge O'Connor until Mark Pittman was appointed to replace Judge McBryde in 2020. *See* Special Order No. 3-337 (N.D. Tex. May 25, 2020), https://www.txnd.uscourts.gov/sites/default/files/orders/SO3-337.pdf (providing for random assignment of cases with 45 percent to Judge O'Connor, 45 percent to Judge Pittman, and 10 percent to Judge Means).

[46] Mance v. Holder, 74 F. Supp. 3d 795 (N.D. Tex. 2015), *rev'd*, 896 F.3d 699 (5th Cir. 2018).

[47] Texas v. United States, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015). The injunction issued in this case was dissolved after the Supreme Court issued Obergefell v. Hodges, 576 U.S. 644, 671 (2015), holding that same sex marriage was constitutionally protected. Texas v. United States, No. 7:15-CV-00056-O, 2015 WL 13424776 (N.D. Tex. June 26, 2015).

[48] Franciscan Alliance, Inc. v. Becerra, 553 F. Supp. 3d 361, 378 (N.D. Tex. 2021) (enjoining HHS rule promulgated under the Affordable Care Act requiring medical providers to perform and insure gender-affirming surgeries and abortions); Texas v. United States, 201 F. Supp. 3d 810, 831 (N.D. Tex. 2016) (holding that transgender students may be denied access to "intimate spaces" under Title IX).

[49] Texas v. United States, 336 F. Supp. 3d 664, 675 (N.D. Tex. 2018) (holding *inter alia* that capitation requirements under the ACA violated the nondelegation doctrine), *rev'd sub nom.* Texas v. Rettig, 987 F.3d 518 (5th Cir. 2021); Texas v. United States, 340 Supp. 3d 579, 586 (N.D. Tex. 2018) (invalidating the individual mandate and as a result the entirety of the ACA), *affirmed in part*, 945 F.3d 355, 402 (5th Cir. 2019); *rev'd sub nom.* California v. Texas, 141 S. Ct. 2104 (2021).

[50] Texas v. United States, No. 16-cv-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (clarifying the scope of the injunction issued in Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016)).

The court considered whether to certify the class and ruled on cross motions for summary judgment in a single order issued on October 31, 2021,[51] certifying two classes, and granting in part, and denying in part the motions for summary judgment.

1. Refining the Claims

The court's first step was to divide the requests for declaratory relief into five separate claims. Three of them related to exemptions from, in the court's words, "*Bostock's* Interpretation Of Title VII."[52] Those exemptions were based on:

(1) RFRA;
(2) the Free Exercise Clause; and
(3) the right to expressive association under the First Amendment.

The remaining two claims were focused on employer conduct the plaintiffs asserted were allowed under *Bostock*:

(4) discrimination against bisexual employees or applicants; and
(5) establishment of sex-neutral rules of conduct that exclude "practicing homosexuals" and transgender people.[53]

2. The Class

The court framed the two requested classes expansively to include "every employer in the United States that opposes homosexual or transgender behavior for sincere religious reasons ('Religious Employers Class')," and any employers who oppose the same behavior for any reason "('All Opposing Employers Class')."[54] Ultimately, the court focused only on religious employers who were for-profit businesses producing secular products, holding that churches and religious non-profits were already exempt under Title VII, and certified the class on all five claims.[55] It named this subclass the

[51] This order was reissued with a minor factual clarification. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 625 (N. D. Tex. 2021).

[52] *Id.* at 586.

[53] *Id.*

[54] *Id.* at 599–600.

[55] *Id.* at 590–92, 600–01.

"Religious Business-Type Employers class," differentiating it from the "Church-Type Employers class."[56]

The defendants had argued against the certification and the sweep of the class, on the grounds that the class definition was too general and thus not ascertainable under Fifth Circuit precedent.[57] The plaintiffs addressed this by framing the organizing principle of the classes in a binary: "an employer either objects to homosexual or transgender behavior, or it does not."[58] The court mostly agreed with the plaintiffs, and certified this sweeping class.[59]

The defendants also argued against commonality for at least the RFRA claim since that claim requires an analysis of the sincerity of each plaintiff's religious beliefs.[60] This would seem to apply to the free exercise and free association claims, as well. After quoting *Wal-Mart v. Dukes* for the standard at length, the court simply concluded that the Religious Business-Type Employers subclass satisfied commonality without explanation.[61] Similarly, the court concluded that the All Opposing Employer class satisfied the commonality requirement for the two claims that challenged the application of *Bostock* to discrimination against bisexuals and gender-specific rules of conduct.[62] In the typicality analysis, the court rejected the defendants' argument that an individualized assessment of sincerity was required, stating that sincerity inquiry is not exacting and quoting a Fifth Circuit case that stated "[s]incerity is generally presumed or easily established."[63] Moreover, even if individual assessments turn out to be necessary, they can be made after class certification.[64]

The Fifth Circuit reversed certification of the classes, agreeing with the EEOC that the class definitions were too vague and dependent upon class members' individual states of mind.[65]

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[56] *Id.* at 600.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 601–06.

[60] *See id.* at 606.

[61] *Id.* at 603–04.

[62] *Id.* at 604.

[63] *Id.* at 606 (quoting Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 791–92 (5th Cir. 2012)).

[64] *Id.*

[65] Braidwood Mgmt. Inc. v. EEOC, 70 F.4th 914, 935 (5th Cir. 2023).

3. The Motions

One feature of this litigation strategy is the way that movement jurists construe standing and ripeness extremely broadly. Despite the fact that no charge had been filed against the plaintiffs, and there was no suggestion one would be, the district court held that the *Bear Creek* plaintiffs had standing because they could establish a credible fear of enforcement.[66] That fear was established by a single case brought by the EEOC against a completely unrelated employer who, only after the complaint was filed, asserted a religious defense—one of the cases consolidated with and decided by *Bostock*, itself.[67] In addition, guidance documents put online by the EEOC make clear that the actions the plaintiffs alleged they will take will violate Title VII.[68] The court further found that the case was ripe for review even though there was no current threat of litigation and no evidence of an employee or applicant that the plaintiffs were discriminating against.[69] Plaintiffs had taken action before *Bostock* that matched the conduct found to be discriminatory there.[70] Moreover, the court held that several issues were purely legal and would "not be clarified by further factual development."[71] Thus the issues were ripe.[72]

Having dealt with the justiciability issues and the class certification questions, the court turned to the substantive claims. The court first addressed the religious employers' claims that RFRA compels an exemption for employers to discriminate on the basis of sexual orientation and gender identity if motivated by religious beliefs. For the Church-Type Employers subclass, the court concluded that Title VII itself provides such an exception, where it allows "religious organizations" to discriminate on the basis of religion.[73] Because "religion" includes religious practices, religious organizations can require employees to conform to rules of conduct that are

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[66] *Bear Creek Bible Church*, 571 F. Supp. 3d at 596.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 597–98.

[70] *Id.* at 598.

[71] *Id.*

[72] Lastly, the court found that sovereign immunity did not protect the defendants because the suit challenged agency action such that the Administrative Procedure Act's waiver of sovereign immunity applied. *Id.* at 598–99.

[73] *Id.* at 609. Note that the discrimination at issue in this case is discrimination on the basis of sexual orientation or gender identity.

religiously motivated.[74] Churches are clearly religious organizations, and nonprofits organized for religious purposes are, as well, under prior precedent and the EEOC's guidance based on that precedent.[75]

For-profit entities, though, would not qualify as religious organizations under Title VII, and so would not be protected by it, but the court concluded that they were protected by RFRA.[76] The court noted that there was no dispute that the named plaintiff, Braidwood, had "sincerely exercise[d] its religious beliefs as embodied in its employment policies," which included a sex-specific grooming code and lack of recognition for same sex marriage in the company's health insurance plan, among other things.[77] The court further found that Title VII substantially burdened its ability to conduct its business according to its beliefs because those beliefs conflicted with Title VII, and the EEOC could bring an enforcement action, which could result in backpay, compensatory, and punitive damages.[78]

Having found that Braidwood's sincere religious beliefs were substantially burdened by Title VII, the court engaged in a fairly cursory strict scrutiny analysis. The court rejected the EEOC's framing of the government's interest as eradicating workplace discrimination, and instead framed what had to be proven as "whether the government has a compelling interest in *denying* employers like Braidwood a religious exemption."[79] With that frame the court concluded that the EEOC had failed to show a compelling governmental interest.[80] The court further found that denying an exemption was not the least restrictive means to serve whatever interest the government might have. The statute does not cover every employer in the country, for example not those with fewer than fifteen employees, and these carveouts for secular purposes undermine a claim that Title VII's enforcement against the plaintiffs are necessary.[81]

Those carveouts further led the court to apply what has come to be known as a strict "most favored nation" analysis, holding that because there were exceptions to Title VII's applicability, not having an exception for plaintiffs like Braidwood was not neutral toward

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[74] *Id.* at 590–92, 609.

[75] *Id.* at 609.

[76] *Id.* at 609–10.

[77] *Id.* at 610.

[78] *Id.* at 610–11.

[79] *Id.* at 611.

[80] *Id.*

[81] *Id.*

religion, and would violate the Free Exercise Clause unless enforcement could satisfy strict scrutiny.[82] Unlike in the RFRA analysis, the court acknowledged that the government's interest in preventing discrimination against gay and transgender people is "weighty," but again, found enforcement against any particular plaintiff not the least restrictive means to serve that interest.[83] Relying on *Burwell v. Hobby Lobby*, the court held that its task was to examine the "marginal interest" in enforcing Title VII in this context, and found that the government failed to explain how exemptions from Title VII interfere with the interest of preventing discrimination or how enforcement is narrowly tailored to that interest.[84]

The Fifth Circuit adopted a similar analysis with its own unusual features, framing the plaintiffs' religion as, essentially, requiring discrimination.[85] In addition, it suggested that the EEOC could provide religious employers with an exemption from compliance with Title VII, either through guidance or some sort of administrative process.[86] Its failure to do so demonstrated that requiring covered employees to comply with Title VII in all instances was not the least restrictive means of furthering the government's interest in preventing or remedying discrimination.[87] It is difficult to understand how an agency without substantive rulemaking power, could provide such an exemption, particularly to compliance with a statute that provides a private right of action that is completely independent of any conclusions that the EEOC might make about whether a violation of the statute has occurred.

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[82] *Id.* at 612–13 (citing Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (granting injunctive relief pursuant to a motion on the Court's emergency docket)).

[83] *Id.* at 613–14.

[84] The decision actually says that defendants "have failed to state how their interest, if it is compelling, is narrowly tailored." *Id.* at 613. That is not a correct statement of what has to be shown under strict scrutiny. The government action—prohibiting discrimination if that action is the statute itself, or enforcing that prohibition if the action is an EEOC enforcement action—must be narrowly tailored to the interest asserted.

[85] Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 938–39 (5th Cir. 2023).

[86] *Id.* at 940 n.59.

[87] *See id.*

B. *Kelley v. Azar* (now *Braidwood v. Becerra*)

The *Bear Creek* case is one example of employers seeking a right to exit ordinary rules of compliance, and it was clearly just one in a series of challenges movement actors seek to pursue. Two years after the initial complaint in *Bear Creek* was filed, Braidwood, along with other purchasers of health care insurance, represented by Mitchell, brought an action against the United States, the Secretary of Health and Human Services (HHS), the Secretary of the Treasury, and the Secretary of Labor, seeking to expand exemptions from compliance with the ACA—namely, health insurance coverage of pre-exposure prophylaxis (PrEP) drugs to prevent HIV infection, the human papillomavirus (HPV) vaccine, contraceptive services, and screening and behavioral counseling for sexually transmitted infections and drug use—on the grounds that requiring that coverage violated RFRA and the Free Exercise clause, along with a number of structural provisions of the Constitution.[88] This case, too, was filed in the Northern District of Texas, Fort Worth Division and assigned to Judge Reed O'Connor.

The plaintiffs asserted several claims. The most salient for this article were that the preventive-care mandates violated the Appointments Clause and nondelegation doctrine, and that the PrEP mandate violated RFRA.[89] The court dismissed the religious objections to the contraceptive mandate as barred by res judicata, and the Plaintiffs moved for summary judgment on the remaining claims.[90] Defendants responded and cross-moved for summary judgment.[91]

The district court used the *Bear Creek* precedent to analyze standing, concluding that it presented the easiest case because it self-insured and was large enough that it was required to provide ACA-compliant health insurance that included among other things, PrEP drugs, the HPV vaccine, and screenings and behavioral counseling for STDs and drug use.[92] Steven Hotze, the movement activist described above and owner of Braidwood, objected to providing that coverage, claiming it facilitated and encouraged same sex intimacy, intravenous drug use, and sexual activity outside of marriage between one man

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[88] *See* First Amended Complaint, Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022) (No. 4:20-cv-00283-O).

[89] *Braidwood Mgmt.*, 627 F. Supp. 3d at 634.

[90] *Id.* at 634.

[91] *Id.* at 635.

[92] *Id.* at 636.

and one woman.[93] Providing this coverage, he argued made him complicit in encouraging those behaviors. Because Braidwood had to provide this coverage, it suffered a tangible "pocketbook" injury and an intangible religious injury. This injury was traceable to the mandates challenged and redressable by the relief requested.[94]

Despite relying on religion to ground its standing analysis, the court's merits analysis was not limited to the religious arguments. And this move by plaintiffs, to combine both structural and rights-based arguments in their attacks, is a feature of this movement. Addressing the structural challenges, the court considered whether the members of the Advisory Committee on Immunization Practices, the Health Resources and Services Administration, and the U.S. Preventative Services Task Force, the three entities responsible for the decisions to include the objected-to coverage, were properly appointed or supervised by officers appointed by the President and approved by the Senate.[95] Most of the guidelines objected to were ratified by appropriately appointed officers.[96] The court also rejected the nondelegation challenge, finding that Congress had provided sufficient guidance regarding what drugs and services would be required.[97]

And then the court turned to the claim that requiring PrEP coverage violated Braidwood's rights under RFRA. In an analysis similar to that in the Title VII case and echoing the standing analysis, the court held that Braidwood's religious exercise was substantially burdened and that the requirement could not withstand strict scrutiny.[98] Despite the fact that HIV is a potentially fatal infectious disease, PrEP drugs significantly reduce the risk of that spread, the benefits of PrEP use by a portion of the population extend to the broader public, and the drug can be expensive, such that the PrEP mandate is a cost-effective solution at inhibiting the spread of HIV, the court rejected the government's interest as compelling.[99] The court held that

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[93] *Id.*

[94] *Id.* at 637. The court noted, however, that the other plaintiffs would also have to establish standing for them to be entitled to relief.

[95] *Id.* at 639. This was not true for the guidance requiring PrEP which was issued by the U.S. Preventative Services Task force. *Id.*

[96] *Id.* at 639–47.

[97] *Id.* at 648–52.

[98] *Id.* at 652–53.

[99] *Id.* at 653.

> Defendants provide[d] no evidence of the scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant "to the marginal interest" in enforcing the PrEP mandate in these cases.[100]

And just as in the Title VII context, the fact that the ACA exempted grandfathered plans and smaller employers further undermined the argument that this coverage was a compelling interest.[101] To demonstrate a compelling governmental interest, defendants would have to identify evidence connecting a policy to combat the spread of HIV to religious employers, or provide evidence distinguishing potential religious exemptions from existing secular exemptions.[102] Furthermore, like in *Hobby Lobby*, the court held that the government could simply assume the cost of providing the drugs to anyone unable to obtain them due to their employers' religious objections.[103]

C. *Neese v. Becerra*

A third case also illustrates the movement's motives and strategies to prevent access to care. In August of 2021, Mitchell, on behalf of two physicians, filed another class action complaint with strategies similar to the prior two cases. This claim challenged HHS regulations that interpreted ACA section 1557's prohibition on sex discrimination as also prohibiting sexual orientation or gender identity discrimination.[104] HHS had said it would interpret section 1557 in accordance with the Supreme Court's decision in *Bostock*.[105] This case was filed in the Northern District of Texas's Amarillo

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[100] *Id* at 654. This conclusion led the court in a later order to grant vacatur of "[a]ll agency action taken to implement or enforce the preventive care coverage requirements in response to an "A" or "B" recommendation by the U.S. Preventive Services Task Force on or after March 23, 2010 and made compulsory under" the ACA. Braidwood Mgmt., Inc. v. Becerra, No. 4:20-cv-00283-O, 2023 WL 2703229, at *14 (N.D. Tex. Mar. 30, 2023).

[101] *Braidwood Mgmt.*, 627 F. Supp. 3d at 654.

[102] *Id.*

[103] *Id.*

[104] Neese v. Becerra, 640 F. Supp. 3d 668, 673 (N.D. Tex. 2022).

[105] *See generally* Department of Health and Human Services, Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021).

Division, a single-judge district where, at the time, nearly every case was assigned to Judge Matthew J. Kacsmaryk, and now every case is.[106] As described above, Judge Kacsmaryk is a movement jurist. Judge Kacsmaryk's work and religious ideology have recently come under fire based on his decision voiding the FDA's approval in 2000 of mifepristone, a drug used for medication abortion and miscarriage care.[107]

The plaintiffs, doctors based in Texas and California, sought to represent a sweeping class, similar to the strategy in *Bear Creek*, of all healthcare providers subject to section 1557. The class was certified in October 2022.[108] The named plaintiffs argued that they made sex-specific decisions relevant to gender identity and that they would, at least in some circumstances, deny gender-affirming care to patients.[109]

This case did not raise a religious freedom defense, but only a declaration that the HHS regulation could not be enforced because Title IX (which provides the substantive rule for section 1557) did not prohibit discrimination on the basis of sexual orientation and gender identity, and that the Supreme Court's *Bostock* decision was inapplicable to Title IX.[110] Ruling on cross-motions for summary

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[106] Special Order No. 3-327 (N.D. Tex. July 3, 2019), https://www.txnd.uscourts.gov/sites/default/files/orders/3-327.pdf (providing that 95% of cases should be assigned to Judge Kacsmaryk); Special Order No. 3-344 (N.D. Tex. Sept. 14, 2022), https://www.txnd.uscourts.gov/sites/default/files/orders/3-344.pdf (ordering that all cases in the division should be assigned to Judge Kacsmaryk).

[107] *See* Alliance for Hippocratic Medicine v. U.S. Food & Drug Admin., No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023); Lindsay Whitehurst & Alanna Durkin Richer, *Abortion Pill Order Latest Contentious Ruling by Texas Judge*, AP (Apr. 8, 2023), https://apnews.com/article/texas-judge-matthew-kacsmaryk-abortion-pill-fda-75964b777ef09593a1ad948c6cfc0237; Devan Cole, *Matthew Kacsmaryk: The Trump-Appointed Judge Overseeing the Blockbuster Medication Abortion Lawsuit*, CNN (Apr. 7, 2023, 7:50 PM EDT), https://www.cnn.com/2023/03/15/politics/matthew-kacsmaryk-texas-judge-medication-abortion-lawsuit/index.html.

[108] 342 F.R.D. 399 (N.D. Tex. 2022). In connection with that decision, which relied in part on the Comstock Act, Mitchell has brought a new action in New Mexico on behalf of a municipality against the state of New Mexico seeking a declaration that drugs related to medication abortions cannot be sent into the state. City of Eunice v. Torres, No. D-5-6-CV-2023-00407 (Apr. 17, 2023).

[109] Neese v. Becerra, No. 2:21-CV-163-Z, 2022 WL 1265925, at *1–2 (N.D. Tex. Apr. 26, 2022) (denying motion to dismiss); Neese v. Becerra, 640 F. Supp. 3d 668, 672–74 (N.D. Tex. 2022) (granting in part motion plaintiffs' motion for summary judgment).

[110] *See Neese*, 640 F. Supp. 3d at 674–85.

judgment, the court issued a declaratory judgment in favor of the plaintiff class but declined to issue any injunctive relief.[111] The court's reasoning found *Bostock* distinguishable because Title IX's causal language was "on the basis of" rather than "because of" and because several provisions in Title IX "presume sexual dimorphism" by allowing things as long as they were allowed for "the other sex."[112]

Incorporating a number of conservative talking points about protection of women, the decision focused on the way that Title IX was more group-based in its approach, prohibiting treatment of women worse than treatment of men, and holding that HHS's regulation, "imperils the very opportunities for women Title IX was designed to promote and protect — categorically forcing biological women to compete against biological men."[113] Along the way, the court delighted in quoting justice Ginsburg's *U.S. v. Virginia* opinion in several places to reinforce a narrow biological view of true differences between only two sexes.[114] Lastly, the court rejected decisions by the 4th and 9th circuits holding that *Bostock*'s reasoning applied to Title IX as not persuasive, not engaging with the substance of either decision.[115]

IV. THE STRATEGY AND FUTURE DIRECTIONS

At first glance, *Neese*, because it does not involve employers, would seem to be less implicated by the downstream worklaw effects of the Court's decision in *Dobbs*. I have included it, though, as an example of the willingness of the activists in this area to use every means of argument at their disposal to roll back any civil rights gains related to sexuality and gender. Similarly, this article could have included a description of *Texas v. EEOC*, another case decided by Judge Kascmaryk, challenging the EEOC and HHS guidance that employers may not restrict access to gender affirming care.[116] Judge Kacsmaryk granted the relief and vacated and set aside the guidance—not just the parts that concerned gender affirming care—but the entire EEOC guidance on sexual orientation and gender

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[111] *Id.* at 686–87.

[112] *Id.* at 676–84.

[113] *Id.* at 682.

[114] *See Id.*

[115] *Id.* at 677–78.

[116] Texas v. EEOC, 633 F. Supp. 3d 824 (N.D. Tex. 2022).

identity discrimination under Title VII.[117] That action was brought by the state of Texas, rather than Mitchell, but Mitchell was quick to use that decision as supplemental authority in the appeal of *Bear Creek v. EEOC*.[118]

The district courts' decisions and reasoning in these cases are problematic in a number of ways. First, in all three cases, but especially in *Bear Creek v. EEOC*, the court seemed to apply a very loose standard for standing and ripeness. Perhaps more worrying, the Supreme Court seems very amenable to a relaxed standing analysis, given its finding in *303 Creative LLC v. Elenis*, discussed below, that a web designer who had not created any wedding websites but "worries that, if she does so, Colorado will force her to express views with which she disagrees,"[119] had standing and a ripe controversy to challenge Colorado's antidiscrimination statute.[120]

Ordinarily, in order for plaintiff to have standing, they must have experienced a concrete and particularized injury. They need not always wait for an injury to occur but the injury must at least be imminent. Additionally, a case will not be ripe if it depends on contingent future events.[121] In this case, there was simply no imminent injury. In order to be imminent, there must be a "credible threat of prosecution."[122] There simply was none. The EEOC had not suggested that it intended to sue any of the plaintiffs, nor was there any evidence that a charge had been filed or would be filed against the plaintiffs at any point. Moreover facts about the EEOC suggest that the likelihood of that agency bringing an action are very low. In 2018, the year this case was filed, about 76,000 charges were filed at

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[117] *Id.* at 838–44, 847 (holding that the guidance was not arbitrary and capricious but was substantive lawmaking outside of the EEOC's power under Title VII and not in compliance with the Administrative Procedures Act).

[118] Supplemental Citation, Braidwood Management Inc. v. EEOC, No. 22-10145 (5th Cir. filed Oct. 8, 2022).

[119] 600 U.S. 570, 580 (2023).

[120] *Id.* at 583 (describing the Tenth Circuit's analysis); *id.* at 587–88 (agreeing with most of the Tenth Circuit's holdings without expressly discussing standing). The Court accepted an analysis similar to that used by the Fifth Circuit in *Braidwood v. EEOC* (the appeal of *Bear Creek*) by relying on a single past enforcement action and that "'Colorado [has] decline[d] to disavow future enforcement' proceedings against" the plaintiff in that case. *Id.* at 583.

[121] Trump v. New York, 141 S. Ct. 530, 535 (2020).

[122] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014).

the EEOC.[123] About 25,000 of those were sex discrimination charges,[124] and only about 1,800 alleged LGTBQ+ discrimination.[125] In that same year, the EEOC brought only about 100 Title VII claims of any type.[126] Even if a charge were filed against one of these plaintiffs, the chances of the EEOC bringing a claim against any of them appears to be about 0.1 percent. Without a charge, that number falls drastically.

Courts have found ripeness and standing in situations where an agency has not yet brought an enforcement action, but those have been in regulatory regimes quite different from Title VII's. Those cases usually involve agencies that have independent enforcement power and can issue regulations with the force of law.[127] The EEOC has no power to issue substantive regulations with the force of law under Title VII. Additionally, it has no power to directly penalize a covered entity. It can investigate charges, attempt to conciliate them, but it does not adjudicate those charges or impose penalties.[128] Moreover, any determination by the agency regarding whether that there is cause to believe that Title VII was violated or not, has no bearing on subsequent litigation by the charging party.[129] The agency can only seek some kind of coercive enforcement by bringing an action in federal court against a covered entity.[130] And to exercise any of this power, the EEOC largely relies on private parties to bring charges to it. It is relatively passive as enforcement mechanisms go.

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[123] *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 (last visited Aug. 18, 2023).

[124] *Id.*

[125] *LGBTQ+-Based Sex Discrimination Charges*, EEOC, https://www.eeoc.gov/data/lgbtq-based-sex-discrimination-charges (last visited Aug. 18, 2023).

[126] *EEOC Litigation Statistics*, FY 1997 through FY 2022, EEOC, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2022 (last visited Aug. 18, 2023).

[127] *E.g.* Abbot Labs. v. Gardner, 387 U.S. 136 (1967) (involving the FDA); Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022) (involving HHS).

[128] *See* 42 U.S.C. § 2000e-5 (providing enforcement provisions). The EEOC does have enforcement powers in the federal sector. *Id.* § 2000e-16.

[129] *See id.* § 2000e-5(b) ("Nothing said or done during and as a part of [the EEOC's investigation and conciliation efforts] may be made public . . . or used as evidence without the written consent of the persons concerned."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798–99 (1973).

[130] 42 U.S.C. § 2000e-5.

The EEOC can act based on Commissioner's charges, which do not depend on an individual having brought a charge to the agency first,[131] but those are extremely rare. Only three such charges were filed in FY 2020 and the same number in 2021.[132] Interestingly, at least three Commissioners' charges were filed in the last half of 2022 by Commissioner Andrea Lucas, challenging companies' provision of abortion travel benefits, alleging that those benefits discriminate against pregnant and disabled workers who do not receive travel benefits for care.[133]

The ripeness conclusion in *Bear Creek v. EEOC* seemed to rest on the rationale that a number of the issues were only legal issues and thus that there was no need to develop the facts further.[134] This conclusion is misleading at best. By bringing a declaratory judgment action against an agency, the plaintiffs have the chance to be the only people who get to tell their stories the court. This erasure is troubling when those plaintiffs seek an exemption from a civil rights law. When they do so, they are asking the court to accept a certain level of harm to the beneficiaries of that law, who by design remain nameless, faceless "others." By hijacking the narrative, the plaintiffs assure that there is no sympathetic story of the harm their policies will cause. Those affected in the LGBTQ+ community have no chance to tell their stories. Their interests are never personalized; they are thus not real and concrete. All three declaratory judgment actions described in Part II used this strategy.

A similar strategy was at play in *303 Creative*. The plaintiff there, a web designer, brought a similar kind of declaratory judgment action, although not as a class action, seeking to enjoin application of Colorado's antidiscrimination law against her business.[135] Lorie Smith, the plaintiff, alleges that she would like to expand her business to include wedding websites but does not want to design them for same-sex weddings. She is represented by the Alliance Defending Freedom (ADF), a conservative legal organization focused on religious

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[131] *See id.* § 2000e-5(b).

[132] *Commissioner Charges and Directed Investigations*, EEOC, https://www.eeoc.gov/commissioner-charges-and-directed-investigations (last visited Aug. 23, 2023).

[133] J. Edward Moreno, *EEOC Official Quietly Targets Companies over Abortion Travel*, BLOOMBERG L: DAILY LAB. REP. (Nov. 14, 2022, 4:15 AM), https://news.bloomberglaw.com/daily-labor-report/eeoc-official-quietly-targets-companies-over-abortion-travel-20.

[134] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 598 (N.D. Tex. 2021).

[135] *See generally* 600 U.S. 570 (2023).

issues that provides training and support to more than 4,600 attorneys nationwide.[136] ADF created a video to highlight Lorie Smith, the plaintiff, framing her story in very sympathetic terms as an artist who "loves to visually convey messages" and promote causes "close to her heart" including "children with disabilities, . . . animal shelters, and veterans" who, "like most artists, can't promote every message" and is being censored by the state.[137] Nowhere is the story of the couple turned away or otherwise injured by the exclusion. While the video is an extreme use of messaging for maximum effect and not necessarily aimed at the Court, it illustrates the problem with missing the stories of those harmed by the exemption that is being sought.

Capitalizing on the invisibility of the harm an exemption from compliance with Title VII might cause, the effect of a class action declaratory judgment through the application of RFRA is especially perverse in *Bear Creek v. EEOC*.[138] The RFRA analysis requires courts to make an individualized assessment of the value of applying the statute to the particular party in this instance.[139] The analysis that the plaintiffs asserted and that the court engaged in elides this in a particularly manipulative way. Focusing on just Braidwood Management, a single, medium sized employer, the government will be hard pressed to show why enforcement against this one employer meets the demanding strict scrutiny requirements. But the plaintiff isn't Braidwood—or isn't only Braidwood—it's at least the class of all employers in the country who object to "homosexual and transgender behavior" on religious grounds. In its numerosity analysis, the court noted that "nearly 100 million congregants affiliated with . . . churches [that] have religious objections to homosexuality" and thus, the number of employers "would easily be in the hundreds, if not thousands."[140] Considering this, the government would *much* more likely have a compelling interest in enforcing the antidiscrimination

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[136] ALLIANCE DEFENDING FREEDOM (2023), https://adflegal.org.

[137] *303 Creative v. Elenis*, YOUTUBE, https://youtu.be/j3vyja7NKrM (last visited Aug. 18, 2023).

[138] *See generally* Marcia L. McCormick & Sachin S. Pandya, *The Braidwood Exploit: On the RFRA Declaratory-Judgment Class-Action and Title VII Employer Liability*, 58 RICHMOND L. REV. 413 (2024).

[139] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726–27 (2014).

[140] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 602–03 (N.D. Tex. 2021). The court only considered three Christian denominations, and no other religions because those were the arguments made by plaintiffs.

laws with no exemption. By focusing its analysis on Braidwood, the court elides this effect.[141]

Possibly the most unnerving substantive part of the district court's opinion in *Bear Creek v. EEOC* is its application of *Tandon v. Newsom*.[142] *Tandon* involved a request to enjoin application of California restrictions limiting the size of gatherings as part of its efforts to protect the public health and respond to the COVID-19 pandemic.[143] Decisions disposing of motions on the Court's emergency docket are not meant to be precedential. *Tandon* itself seems to have violated this rule by relying on various statements connected with prior per curiam orders disposing of emergency motions.[144] By relying on *Tandon* as precedential, the district court compounded the damage and extended the protection it found in RFRA to the Free Exercise clause, which would expand the effect of the district court's decision exponentially.

What is worse, the district court applied the rule it took from *Tandon* in an especially cursory way. The *Tandon* order set out what has been called a "most favored nation status" for religion.[145] Under *Employment Division, Department of Human Resources of Oregon v. Smith*, laws that are neutral towards religion and generally applicable need only be justified by a legitimate governmental interest that the law is rationally related to.[146] But "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[147] Moreover, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[148] In applying *Tandon*, the district court held that because Title VII allows all employers to discriminate against communists, allows some employers to discriminate in favor of members of Indian Tribes, and doesn't cover employers with fourteen or fewer employees at all, it had

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[141] For a more disciplined analysis of this part of the strategy, see McCormick & Pandya, *supra* note 138.

[142] *Id.* at 612–13 (citing Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam)).

[143] *See* Tandon v. Newsom, 593 U.S. 61, 62–63 (2021) (per curiam).

[144] *Id.*

[145] *See* Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 103–04 (2022).

[146] 494 U.S. 872, 879 (1990).

[147] *Tandon*, 593 U.S. at 62 (emphasis in original).

[148] *Id.*

made secular exemptions.[149] As a result, the court reasoned, an exemption for religiously-motivated employers also had to be made.[150]

Even if *Tandon* had been appropriate to rely on, the analysis misconstrued or overread it significantly. As Justice Kagan's dissent in *Tandon* explained, "[t]he First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct."[151] The exceptions that Title VII provides are simply not comparable to the exemption that the plaintiffs seek. The court's analysis completely overlooks the purpose of those exemptions. More egregiously, it overlooks the religious exemptions that *are* built in to Title VII. Title VII expressly exempts churches and religious organizations, including educational institutions, from some of its commands. Notably, though, the privilege to discriminate is limited to discrimination on the basis of religion, not any other basis. Rather than being anti-religion, Title VII is pro-religion. Congress was quite careful to balance the interests of religious employers, allowing them an exemption that other types of employers lack.

Bolstering this reading of RFRA is dictum from *Hobby Lobby*. Justice Alito, in that case, was careful to reject worries that the majority decision would allow for an exemption from compliance with Title VII:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The 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.[152]

This suggests that even if strict scrutiny were applied, say in a Free Exercise challenge, the Court views Title VII's commands as satisfying that scrutiny.

There is reason to be concerned that this statement, even if it were legally binding, would not reach the right of exit claimed in *Bear Creek v. EEOC*, though. It may be significant, for example, that the Court focused on race. The Court has suggested in a number of contexts that Congress possesses significant power to prevent and

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[149] Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021).

[150] *Id.*

[151] *Tandon*, 593 U.S. at 65 (Kagan, J., dissenting).

[152] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014).

remedy race discrimination, but in somewhat guarded terms that have suggested the power to remedy sex discrimination could be less.[153] That reassurance is further tempered by the majority's dicta in *Bostock* that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[154]

But there is reason for hope, as well. While one might be skeptical that the Fifth Circuit will reverse the trial courts' decisions in these cases,[155] it did reverse the class certification in *Bear Creek*,[156] and total reversal does remain a possibility for the others. Moreover, other courts may not follow these cases. For example, the Sixth Circuit, in *EEOC v. RG & GR Funeral Homes* that RFRA did not provide an exemption to an employer who fired a transgender woman because of his religious beliefs.[157] There, the court accepted that the employer's religious beliefs about gender were sincerely held but that they were not substantially burdened by a requirement that he allow a transgender woman to conform to the dress code for female funeral directors or that he continue to employ her.[158] Additionally, even if the employer's beliefs were substantially burdened, enforcing Title VII

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[153] I documented some examples in prior articles. *See generally* Marcia L. McCormick, *Constitutional Limitations on Closing the Gender Gap in Employment*, 8 FIU L. REV. 405 (2013); Marcia L. McCormick, *Disparate Impact and Equal Protection after* Ricci v. DeStefano, 27 WIS. J.L. GENDER & SOC'Y 100 (2012).

[154] 590 U.S. 644, 682 (2020).

[155] For example, a panel accepted the strained standing analysis in the mifepristone case, holding that because emergency room doctors might have to treat a patient in the future who suffered complications after taking mifepristone, those doctors suffered impending future injuries caused by the FDA's approval of the drug. Alliance for Hippocratic Medicine v. Food & Drug Admin., No. 23-10362, 2023 WL 2913725 (5th Cir. Apr. 12, 2023) (per curiam). And in the merits decision on that case, the court adopted that same analysis. Alliance for Hippocratic Medicine v. Food & Drug Admin., 78 F.4th 210, 233–34 (5th Cir. 2023). Even more curious, Judge Ho described the injury as both a "conscience" injury and an "aesthetic" one, stating that

> [u]nborn babies are a source of profound joy for those who view them. Expectant parents eagerly share ultrasound photos with loved ones. Friends and family cheer at the sight of an unborn child. Doctors delight in working with their unborn patients—and experience an aesthetic injury when they are aborted.

Id. at 259 (Ho, J., concurring).

[156] Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023).

[157] 884 F.3d 560, 585–97 (6th Cir. 2018).

[158] *Id.* at 588–89.

was the least restrictive means to serve the government's compelling interest in eradicating sex discrimination from the workplace.[159]

The question thus becomes what will happen when, inevitably, an action is brought to insulate employers from liability for discriminating against employees based on their reproductive decisions. The litigation might look just like the declaratory judgment class action in *Bear Creek v. EEOC*: a group of employers, maybe even including Braidwood, bringing an action on behalf of all religious employers that the EEOC's guidance prohibiting discrimination against employees who have had abortions or use contraception violates their rights under RFRA, the Free Exercise clause, and the First Amendment's right to Freedom of Association. Capitalizing on *Texas v. EEOC*, the action might challenge the guidance as exceeding the EEOC's authority, as well. That action could be brought in the Amarillo division of the Northern District of Texas, guaranteeing that Judge Kacsmaryk is assigned it, or in the Wichita Falls District, guaranteeing that Judge O'Connor is assigned it, maximizing the likelihood of a favorable ruling. The analyses would likely play out just as they did in *Bear Creek*, *Braidwood* and *Neese*.

There are some differences, however, in the context of discrimination against an employee accessing reproductive care and discrimination on the basis of sexual orientation and gender identity. The biggest difference is that when Title VII explicitly defines sex to include pregnancy, childbirth, and related medical conditions, it addresses what might be thought of as conduct related to sex in addition to the status of sex. Moreover, Congress itself used the term abortion in that definition in making clear that insurance coverage need not be provided for abortion care,[160] at least implying strongly that Congress thought that abortion was pregnancy, childbirth, or a related medical condition. Additionally, by focusing only on the reproductive capacity of one half of the population[161] this definition of sex discrimination takes into account ways that different sexes are differently situated as a matter of social hierarchies in addition to biological variations.

Given the language and structure of Title VII's definition of sex, courts may more easily conclude that discrimination based on

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[159] *Id.* at 594–95.

[160] 42 U.S.C. § 2000e(k).

[161] I do not mean to engage in any biological essentialism here. Of course many cis women cannot become pregnant and at least some trans men can. At the same time, the vast majority of people who get pregnant or who are perceived to be potentially pregnant are women.

whether a person has accessed reproductive care would be sex discrimination. Recall that the language of Title VII's internal exemption for religious organizations allows those entities to discriminate on the basis of religion. Two challenges temper this observation. First, Title VII's internal exemption does not necessarily address how RFRA might operate as a defense. A court determined to protect conservative religious actors can simply hold that those actors' religious rights trump any right to be free from discrimination on the basis of any protected class, or at least from discrimination on the basis of sex. Second, the *Dobbs* majority rejected any type of equality frame for abortion access, relying on *Geduldig v. Aiello* to conclude that "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex . . . .'"[162] Although Title VII effectively requires strict scrutiny, the fact that only "members of one sex" can receive abortion care may make the Court view it as not an issue of equality that Title VII is meant to reach.

Still, the existence of precedent agreeing with the EEOC's guidance that discriminating against employees for having or seeking abortions also may make a difference, as will the pregnancy discrimination cases where religious organizations' defenses were not recognized. One area of concern, though, might be that the result in these pregnancy cases may not obtain in the abortion context. In the pregnancy context, successful plaintiffs were able to cast doubt on the employers' assertions by pointing either to male comparators treated differently or to the lack of male comparators treated the same way. It is not clear that abortion has a correlate for men. Perhaps a plaintiff could show that other employees whose partners terminated a pregnancy were not treated the same way, but that might prove a bigger challenge than in the sex-out-of-wedlock context.

V. CONCLUSION

As this article suggests, rights and settled understandings of legal obligations under Title VII are in flux. What is clear is that the decisions in *Bear Creek*, *Braidwood*, and *Neese* along with the ambiguity from prior caselaw will fuel more attempts by employers to limit enforcement of Title VII in cases involving sex, gender, and sexuality. *Dobbs* will only accelerate that. Since the *Dobbs* decision was issued, fifteen states have banned abortions, two more have

[162] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236–37 (2022).

banned them after six weeks, another two have pre-viability gestational limits, and three additional states are likely to pass bans.[163] Activists are also pushing for a national abortion ban and recognition of fetal personhood.[164] Additionally, anti-LGBTQ measures are being introduced and enacted at a record pace, with over 385 introduced in the first two months of 2023, more than in the prior five years combined.[165]

The *Dobbs* decision was disorienting in so many ways. It upended assumptions about the stability of constitutional rights, fundamentally disrupted the reliance that people had about controlling their reproductive lives, and undermined a host of rights connected with sex and gender that guarantee equal dignity and full participation in civic life. It is hard not to feel concerned, confused, and at sea, particularly with the rise in litigation and legislation to further erode rights of bodily autonomy and equality. At the same time, there are reasons to be hopeful that Title VII's protections can be maintained. Moreover, popular opinion supports abortion access and LGBTQ+ rights.[166] Title VII's protections will be harder to erode

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[163] Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup.

[164] Lisa Lerer & Katie Glueck, *After* Dobbs*, Republicans Wrestle with What It Means to Be Anti-Abortion*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/us/politics/abortion-republicans-roe-v-wade.html; Pooja Salhotra, *Does a Fetus Count in the Carpool Lane? Texas' Abortion Law Creates New Questions About Legal Personhood*, TEX. TRIB. (Sept. 13, 2022, 5:00 AM CDT), https://www.texastribune.org/2022/09/13/texas-personhood-laws-abortion-law.

[165] Ella Ceron, *2023 Is Already a Record Year for Anti-LGBTQ Bills in the US*, BLOOMBERG (Mar. 8, 2023, 1:53 PM), https://www.bloomberg.com/news/articles/2023-03-08/2023-is-already-a-record-year-for-anti-lgbtq-bills-in-the-us. Anti-LGBTQ political rhetoric was boosted by the *Dobbs* decision. Trip Gabriel, *After* Roe*, Republicans Sharpen Attacks on Gay and Transgender Rights*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/us/politics/after-roe-republicans-sharpen-attacks-on-gay-and-transgender-rights.html.

[166] *See generally Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion; *Abortion Attitudes in a Post-*Roe *World: Findings from the 50-State 2022 American Values Atlas*, PRRI (Feb. 23, 2023), https://www.prri.org/research/abortion-attitudes-in-a-post-roe-world-findings-from-the-50-state-2022-american-values-atlas; *American's Support for Key LGBTQ Rights Continues to Tick Upward*, PRRI (Mar. 17, 2022), https://www.prri.org/research/americans-support-for-key-lgbtq-rights-

and might even serve as a bulwark to protect access to reproductive care through employers. But we cannot do that if we're not watching the movement to undermine those rights.

continues-to-tick-upward (also showing declining support for religiously based defenses to antidiscrimination requirements). One concerning caveat is that the onslaught of bills to ban gender affirming care for minors has increased support for such bans by 15 percent since April 2021. *See* Laura Santhanam, *Majority of Americans Reject Anti-Trans Bills, but Support for this Restriction Is Rising*, PBS NEWS HOUR (Mar. 29, 2023, 5:00 AM EDT), https://www.pbs.org/newshour/politics/majority-of-americans-reject-anti-trans-bills-but-support-for-this-restriction-is-rising. The sustained campaign of misinformation used to support these bans is likely part of that reason.