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The Impact of RFRA on Employment Discrimination: Will the Hobby Lobby Decision Erode the Purpose of Title VII?

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Introduction:

Throughout our nation's history, many Supreme Court decisions have affected the employer-employee relationship. A recent example was *Burwell v. Hobby Lobby Stores, Inc.*,[1] a decision which arguably protected the free exercise rights of a private corporation above the interests of its workers. The Court did so by allowing closely-held, private corporations to invoke protections provided by the Religious Freedom Restoration Act ("RFRA")[2] like a private individual could. Although corporate personhood is not a new concept, this was the first time that the Supreme Court allowed Free Exercise Claims to be asserted by a company that is not religious in nature or mission. Generally, a claim that a neutral law of general applicability interferes with a plaintiff's free exercise of religion is a Constitutional Claim.[3] In 1990, the Supreme Court, in *Employment Division, Dept. of Human Resources of Oregon v. Smith,* cut off the availability of these types of claims by holding that neutral laws of general applicability could not interfere with the First Amendment's free exercise protections.[4] Congress reacted by enacting RFRA. The intent of RFRA was to restore the pre-*Smith* compelling interest test.[5] However, interpretation of RFRA by the Supreme Court has shown that instead, RFRA expanded available protections for business. The prediction by the Court in *Smith*,[6] that a strict compelling interest test would undermine many of our nations laws, has begun to come true. Not

[1] 134 S. Ct. 2751 (2014).
[2] The Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq.*
[3] *See, e.g.* United States v. Lee, 455 U.S. 252, 254 (1982); Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
[4] *Id.* at 878; *see also* 137 CONG. REC. E3083-02 (September 18, 1991) (statement of Hon. Glenn M. Anderson of California) ("Justice Scalia is content to ignore the constitutional rights of two men because of the precedent he fears it might set for mass exceptions to other generally applicable laws.").
[5] 137 CONG. REC. E2422-01 (June 27, 1991) (statement of Hon. Stephen J. Solarz of New York).
[6] 494 U.S. at 888 ("many laws would not meet the [compelling interest] test. Any society adopting such a system would be courting anarchy . . . We cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

surprisingly, the dissent in *Hobby Lobby* also predicted the coming of many RFRA claims by both religious and private employers, specifically warning of potential interference with long-held protections for employees under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Fair Labor Standards Act.[7] Though the majority states that the holding will not extend so far,[8] some closely held corporations have already begun to use this holding to assert a RFRA defense to Title VII discrimination claims.[9] Our current Congress is probably unlikely to amend RFRA again to curtail its expansion. Unless a limitation on these types of claims is adopted by the Supreme Court, RFRA and *Hobby Lobby* could severely undermine protections against discrimination in the workplace.

Part I of this paper will analyze the history and development of free exercise claims against facially neutral laws in the employment context, including the passage of RFRA and its applications. Part II will discuss the purpose of Title VII and how it relates to the government's compelling interest when challenged by free exercise claims. It will further examine religious protections for both employers and employees which are already in place under Anti-discrimination statutes and the common law ministerial exception. Part III discusses whether RFRA should be available as a defense against discrimination claims for closely-held, for-profit corporations. Finally, Part IV concludes that if the RFRA defense is available, the existing framework for analyzing religious defenses, the ministerial exception, should become the model

[7] 134 S.Ct. at 2802 (Ginsburg, J., dissenting) ("Suppose an employer's sincerely held religious belief is offended by . . . paying the minimum wage.").
[8] *Id.* at 2783 ("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.").
[9] E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d 837 (E.D. Mich 2016) (granting summary judgment on Employee's Title VII sex discrimination claim to funeral home employer where the "religious" owner successfully asserted a RFRA defense), *reversed and remanded*, 884 F.3d 560, 567 (6th Cir. March 7, 2018).

for determining whether a neutral law substantially burdens the "religion" of a closely-held, for-profit employer.

I. Free Exercise Jurisprudence, From *Sherbert* to *Hobby Lobby* and Beyond

A. The Development of the Compelling Interest Test

The First Amendment prevents the government from making laws which expressly interfere with a person's free exercise of religion.[10] As a result, it is hard to find a law which, on its face, prefers or burdens a religious practice. However, there are many facially neutral laws which could, when applied or enforced, burden a person's free exercise of religion. Our jurisprudence is full of these types of claims.[11] To make such a claim, a person must show that application and enforcement of a law to that person would violate their sincerely held religious beliefs.[12] An early case, which set forth the standard for finding a free exercise violation, was *Sherbert v. Verner*.[13]

In *Sherbert*, the plaintiff, a Seventh Day Adventist who was prohibited by her sincerely held religious beliefs from working on Saturdays, challenged the denial of her unemployment compensation claim under South Carolina law.[14] Her employer scheduled her to work Saturdays,

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[10] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[11] *See, e.g.* United States v. Lee, 455 U.S. 252 (1982) (requirement to pay social security tax violates sincerely held beliefs of the Amish); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance violates sincerely held religious beliefs of the Amish); Hobbie v. Unemployment Appeals Com., 480 U.S. 136 (1987) (denying a seventh day Adventist unemployment because she would not work on Saturday was a violation of the First Amendment).

[12] *See* Gonzales v. O Centro Espirito Beneficiente Uniao de Vegetal, 546 U.S. 418, 428 (2006) (a "prima facie case under RFRA . . . [shows that] application of [a neutral law] would (1) substantially burden (2) a sincere (3) religious exercise.").

[13] 374 U.S. 398 (1963). Note that prior to *Sherbert*, claims of interference with a plaintiff's free exercise of religion were found to be without merit. *See, e.g.* Gallager v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961) (holding that Massachusetts's Sunday closing laws were not an impermissible burden on Orthodox Jewish plaintiff's religious beliefs which prevented him from doing business on Saturdays because the Sunday closing law did not have religious purpose).

[14] 374 U.S. at 399-401.

forcing her to quit, and she refused to take other employment that required Saturday work.[15] This refusal to take available employment led to the denial of her unemployment benefits.[16] The plaintiff claimed that this denial was an impermissible burden on her free exercise of religion, and the Supreme Court agreed.[17] The Supreme Court reversed the South Carolina Supreme Court's holding that because the law did not expressly burden religion on its face, she could not make out a valid claim.[18] For the first time, Justice Brennan articulated what became known as the compelling interest test: if a plaintiff can make out a prima facie case that a facially neutral and generally applicable law substantially burdens her free exercise of religion, the law cannot be applied to that plaintiff unless the government can show that it (1) had a compelling interest in applying the law and (2) enforcing the law against this plaintiff was the least restrictive means of accomplishing its compelling interest.[19] The South Carolina government failed to meet this high burden, resulting in a finding that the denial of unemployment was unconstitutional as applied to the plaintiff.[20]

Over the next twenty-seven years, the Court applied the *Sherbert* compelling interest test to a handful of other cases, most often finding for the government.[21] Most notable was the Court's consideration of compulsory Social Security Tax payments as applied to an Amish employer.[22] The Court agreed with the plaintiff's argument that since his Amish religion required

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").
[18] *Id.* at 401-02.
[19] *Id.* at 406-07.
[20] *Id.*
[21] *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: an Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412-16 (1992).
[22] United States v. Lee, 455 U.S. 252 (1982).

him to take care of the elderly as part of a religiously-defined social welfare system, paying money into a social security system he would not use was a substantial burden on his sincerely-held religious belief.[23] This was sufficient to meet the first prong of the compelling interest test. Nevertheless, the Court found the Government's compelling interest in preserving the Social Security System outweighed the burden to the plaintiff, holding that "not all burdens on religion are unconstitutional."[24] The Court commented that when a religious person chooses to operate a business with a non-religious purpose and avail himself of the benefits therefrom, he inevitably sacrifices some of his free exercise rights.[25] Justice Stevens's concurrence went further, suggesting that if a person wants to challenge the government's interference with his free exercise of religion based on the application of a law of general applicability, the burden should be on the challenger, not the government, to prove there is a "unique reason for allowing him a special exemption."[26] In the years after *Sherbert*, the Court did not often hold in favor of religious challengers to neutral laws.

B. The End of the Compelling Interest Test: *Employment Division v. Smith*

In 1990, with another challenge to the loss of unemployment benefits, the Court did away with the compelling interest test, holding that incidental effects of neutral laws on free exercise do not raise first amendment concerns.[27] In *Smith*, the plaintiffs challenged the State's denial of their unemployment benefits after they were fired for the "misconduct" of smoking peyote, a Schedule I narcotic, outside of work hours.[28] The plaintiffs engaged in this act, illegal under Oregon law, as part of a religious observance.[29] Justice O'Connor's concurrence points out that

[23] *Id.* at 254.
[24] *Id.* at 257.
[25] *Id.* at 261.
[26] *Id.* at 262. Subsequent jurisprudence has not gone in this direction.
[27] Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878 (1990).
[28] *Id.* at 874.
[29] *Id.*

forcing the plaintiffs to choose to observe their religion or violate the law could easily be interpreted as a substantial burden to the plaintiffs' free exercise rights.[30] However, the majority declined to follow, and essentially overruled, the compelling interest test, holding that neutral laws of general applicability should no longer be held to interfere with free exercise rights.[31]

> It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . . [W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. . . . [32]

The Court did not agree with the plaintiffs' broad interpretation of the free exercise clause, saying that "Respondents urge us to hold . . . when otherwise prohibitable conduct is accompanied by religious convictions, . . . it must be free from governmental regulation. We have never held that, and decline to do so now."[33] This holding reflected the Court's worry that such a strict burden on the government to defend free exercise claims against neutral laws would lead to anarchy.[34] However, in the years that followed, with Congress' subsequent direction in the form of the Religious Freedom Restoration Act ("RFRA"), the Court has reversed course, broadening both the available challenges to free exercise burdens and the class of people that can invoke a free exercise defense.

C. The Enactment of RFRA

RFRA was first introduced on July 26, 1990.[35] A year later, Representative Stephen J. Solarz reintroduced the bill, clearly stating Congress' distaste for the Court's decision in *Smith*.

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[30] *Id.* at 904 (O'Connor, J., concurring).
[31] *Id.* at 878.
[32] *Id.* at 878-79.
[33] *Id.* at 882.
[34] *Id.* at 888. ("The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.").
[35] *Ryan, supra* note 21, at 1436 and nn. 164-66.

> This legislation has the narrow purpose of restoring the compelling interest test . . . . The test strikes an appropriate balance between the needs of the majority and the rights of religious minorities. It would provide a claim or defense to persons whose religious exercise is burdened by Government.[36]

The current form of RFRA was introduced in both the house and the senate on March 11, 1993.[37] The bill was overwhelmingly supported in both houses, and was signed into law on November 16, 1993.[38] RFRA restores the compelling interest test, allowing claims of interference with free exercise of religion to be a defense to the enforcement of any law, even one of general applicability.[39] A RFRA defense is a statutory claim, often made in addition to a constitutional claim. The relevant text of RFRA is as follows:

> (a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[40]

It is clear from the legislative history that Congress intended to restore the compelling interest and nothing more.[41] However, in the years since RFRA's passage, it has been used expansively by individuals, not-for-profit religious organizations, and even private corporations to claim exemptions from neutral laws of general application, expanding its reach beyond giving guidance to the Court. The only curtailment of RFRA has been that it has been declared unconstitutional as applied to State law.[42] The states have had very different reactions to this;

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[36] 137 CONG. REC. E2422-01 (June 27, 1991) (statement of Hon. Stephen J. Solarz of New York).
[37] *H.R. 1308 — 103rd Congress: Religious Freedom Restoration Act of 1993*, GOVTRACK.US, https://www.govtrack.us/congress/bills/103/hr1308.
[38] *Id.*
[39] Pub. L. 103-141 (1993), codified at 42 U.S.C. § 2000bb-1.
[40] *Id.*
[41] *Ryan, supra* note 21 at 1410 n. 17, 1437 n. 166.
[42] City of Boerne v. Flores, 521 U.S. 507, 511(1997).

California applies the rational basis test to free exercise challenges,[43] while Indiana enacted its own RFRA which was intended to be even broader than the federal statute.[44] It remains to be seen how far the Court will go in protecting free exercise claims against neutral laws since the passage of RFRA, however, it is clear that it has only been expanding since *Smith*.

RFRA is intended to be used as a defense to *government* action.[45] Since its passage, the Supreme Court has considered several claims which raise a RFRA defense against the government.[46] One important such case was *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[47] This case has facts very similar to the claims rejected in *Smith*, making it a good illustration of how the Court changed course after RFRA. Members of a small religious group, the UDV church, challenged the government's prohibition of their use of *hoasca*, a sacred mixture which contained DMT, a Schedule I hallucinogen prohibited by the Controlled Substances Act ("CSA").[48] The Court held that the church, by showing that "application of [a neutral law] would (1) substantially burden (2) a sincere (3) religious exercise," had made out a *prima facie* case for a RFRA defense to enforcement of the CSA against them.[49] The Court remanded the case for consideration of a RFRA defense, saying that the Government now had the ultimate burden of proof on the CSA's constitutionality as applied to the church.[50] Interestingly, the Court spent a lot of time discussing the current exceptions in the CSA for other

[43] Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal 4th 527, 566-67 (2004).
[44] Tyms-Bey v. State, 2017 Ind. App. LEXIS 11, *9-*12 (January 13, 2017).
[45] 42 U.S.C. §2000bb-1(a) (1993).
[46] *See, e.g.* City of Boerne v. Flores, 117 S.Ct. 2157 (1997) (RFRA is unconstitutional as applied to the states); *Hobby Lobby*, 134 S.Ct. 2751 (2014) discussed *infra*, Section I.E.; Wheaton College v. Burwell, 134 S.Ct. 2806 (2014) (holding that the reporting requirement for opting out of the contraceptive mandate of the ACA may also violate RFRA); Holt v. Hobbs, 135 S.Ct. 853 (2015) (grooming policies for prisons which did not allow religiously mandated beards violated RFRA); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding, in a case almost on all fours with *Smith*, that preventing the use of *hoasca*, a sacred drink containing a Schedule I narcotic, made out a prima facie violation of RFRA.).
[47] *Id.*
[48] *Id.* at 425.
[49] *Id.* at 428.
[50] *Id.* at 429.

Native American religious rituals which use Schedule I drugs.[51] Because that exception already existed, it likely was difficult for the Court to honestly hold that there was no less restrictive means of burdening the UDV church's free exercise of religion.

D. Where the Government is Not a Party, Circuits Disagree as to Whether RFRA is Available as a Defense.

The Court's holdings since the passage of RFRA clearly outline a path to relief against government interference with free exercise. RFRA and the *Gonzales* decision lay out, in more or less simple terms, the steps for a *prima facie* case and the high standards the government must meet in order to satisfy the compelling interest test and burden a person's free exercise of religion. Nevertheless, there have been several attempts to expand the application of RFRA, including attempting a RFRA defense against a private party instead of the government. The availability of this defense remains somewhat of an open question.

The Seventh Circuit has expressly determined that RFRA is not available as a defense in suits between private parties. In *Listecki v. Official Committee of Unsecured Creditors*, the Catholic Church of Milwaukee, facing bankruptcy, transferred $55 million into its cemetery perpetual care funds in order to avoid paying its creditors, victims of church sexual abuse.[52] The creditors filed suit, claiming fraud under the bankruptcy code, and the church asserted defenses under both RFRA and the First Amendment.[53] The court held that since the creditors' committee was not acting "under color of law," it was not the "government" for purposes of RFRA, and therefore invoking RFRA as a defense was improper.[54] However, the court recognized that the

[51] *Id.* at 432-33.
[52] 780 F.3d 731, 734 (7th Cir. 2015).
[53] *Id.*
[54] *Id.* at p. 738 (no "close nexus" between the creditors' committee and the government existed to invoke the State Action Doctrine), 741.

creditors' challenge raised First Amendment implications as to the activities of the Church.[55] Since RFRA was unavailable, the court applied strict scrutiny to this constitutional claim, and found that (1) the burden to the church was outweighed by the compelling governmental interest of providing relief from bankruptcy to its citizens, and (2) it was narrowly tailored to achieve that interest.[56] The court noted further that "The [Supreme] Court has rejected the idea that fraudulent or improper actions can be excused in the name of religion."[57] The Court used traditional constitutional analysis to find against the church, and also rejected the church's attempt to use a RFRA defense against a private party. In the Seventh Circuit, RFRA is not available as a defense in suits between private parties.

The Second Circuit has other ideas about applying RFRA in suits between private parties. In *Hankins v. Lyght*, a minister challenged his church's mandatory retirement age for ministers by filing an age discrimination suit under the Age Discrimination in Employment Act ("ADEA").[58] The district court dismissed, saying that the common law ministerial exception applied to bar the suit.[59] On appeal, the Second Circuit held that "the RFRA must be deemed the full expression of Congress' intent with regard to the religion-related issues before us and displace earlier judge-made doctrines [the ministerial exception] that might have been used to amelieorate the ADEA's impact on religious organizations and activities."[60] In other words, RFRA effectively amended the ADEA (and all statutes), and must be considered in religious

[55] *Id.* at 741-42 (finding that making the $55 million available to the creditors could be a burden on the religious activity of caring for the dead).
[56] *Id.*; *see also id.* at 146 (like the importance of the availability of a strong social security system upheld against a religious challenge in *U.S. v. Lee*, discussed *infra* Part I.A., providing a safety net (the bankruptcy code) for citizens who experience financial trouble is a compelling government interest).
[57] *Id.* at 749.
[58] 441 F.3d 96, 100 (2d Cir. 2006).
[59] *Id.*; *see infra*, Part II.B. for an explanation of the common law ministerial exception.
[60] *Id.* at 102.

challenges to neutral laws.[61] Further, since the Equal Opportunity Employment Commission ("E.E.O.C.") had the ability to file this lawsuit on behalf of the minister, that was sufficient governmental action to make RFRA available as a defense.[62] The case was remanded for consideration of the RFRA defense.[63] Because of this holding, parties with free exercise claims in the Second Circuit had to expressly waive their RFRA defense or it would be automatically considered by the court.[64] RFRA is now available as a defense to suits between private parties in the Second Circuit.[65]

As of the writing of this paper, the Supreme Court has not considered this circuit split[66] on whether RFRA applies to suits between private parties. Nevertheless, prior to invoking a RFRA defense in employment claims, a court should ask the natural threshold question: what is the nature of the employer/employee relationship? RFRA is intended to protect citizens against interference by the *government* in their free exercise of religion. A private party should not be excused from following the law in its interactions with other citizens, especially when it has power over those citizens as employees, just because of his or her religious beliefs. Part of living in a civilized society is sacrificing some personal autonomy for the greater good.[67] Part of being

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[61] *Id.* at 104, 106.
[62] *Id.* at 103 ("the substance of the ADEA's prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party.").
[63] *Id.* at 109. Note that the church did not plead the RFRA defense, it was imposed by the court. On remand, the court reached the same conclusion as it did the first time when applying the ministerial exception, and also held that the ministerial exception was still a valid consideration in these types of claims. *Hankins v. New York Conf. of the United Methodist Church*, 516 F.Supp.2d 225, 233, 236-38 (E.D.N.Y. 2008) (further considering subsequent case law which distinguished claims under RFRA from the ministerial exception).
[64] *See Rweyemanu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (RFRA examines the burden on a sincerely held religious belief, while the ministerial exception prevents the government from impermissibly interfering with matters of church government and administration).
[65] *See* Redhead v. Conf. of Seventh Day Adventists, 440 F.Supp.2d 211, 219 (E.D.N.Y. 2006) (the court does not want to consider RFRA as a defense between private parties but is bound by the decision in *Hankins* to do so).
[66] In addition to the cases considered in the Seventh and Second circuits, the defense is not available in a suit between private parties in the Third Circuit. *See* Mathis v. Christian Heating & Air Conditioning, Inc., 158 F.Supp. 3d 317, 325-26 (E.D. Penn. 2016).
[67] *See Lee*, 455 U.S. at 261 ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); John Locke, *A Letter About Toleration*, Chapter

a business owner is sacrificing some property and liberty rights in order to take advantage of certain laws.[68]

E. The Impact of Hobby Lobby on the RFRA Defense

In June of 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*[69] The Court was not considering the question of whether RFRA applied in suits between private parties, but rather the Court considered an expansion of RFRA which would prohibit the government from interfering with the sincerely held religious beliefs of a *closely-held, for-profit corporation.* Brought as a challenge to the requirement, in the Affordable Care Act, that employer-provided healthcare include contraceptive coverage ("the contraceptive mandate"), the issue in *Hobby Lobby* was if corporate personhood extended far enough that a *corporation's* First Amendment free exercise right could be burdened.[70] The claim was brought by the owners of Hobby Lobby Stores ("The Greens") and Conestoga Wood Specialties ("The Hahns"), two "closely-held, for-profit" companies.[71] Both the Greens and the Hahns run their companies according to "Christian" values, including their personal belief that life begins at conception and abortion is morally wrong.[72] As a result, they objected to the all-inclusive contraceptive mandate

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6(d) (1689), http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf ("things that are forbidden by law because in their ordinary use they are harmful to the public ought not to be permitted to churches in their sacred rites.").

[68] *See* 137 CONG. REC. E3083-02 (September 18, 1991) (Statement of Hon. Glenn M. Anderson of California) (In support of the passage of RFRA, the congressman still says that "law must weigh restrictions on our constitutional freedoms to protect societal order.").

[69] 134 S.Ct. 2751 (2014).

[70] *Id.* at 2770-74; *c.f.* Citizens United v. Federal Elections Comm'n, 558 U.S. 310 (2010) (giving corporations the first amendment right to free speech in the form of campaign contributions).

[71] *Hobby Lobby*, 134 S.Ct. at 2766.

[72] *Id.* at 2764-66. Conestoga's board has adopted a "Vision and Values Statement" which affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage" and a "Statement on the Sanctity of Human Life," including the belief that it is "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." "Hobby Lobby's statement of purpose commits the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.' Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries."

because they did not want to provide four "abortifacient" drugs to their employees.[73] The Greens and the Hahns, on behalf of their corporations, sued the Department of Health and Human Services ("HHS"), the agency responsible for enforcing the Affordable Care Act, claiming interference with their free exercise rights and a violation of RFRA.[74]

The Court gave extensive analysis to the arguments of HHS that a RFRA defense should not be extended to closely-held, for-profit corporations, but rejected each, holding that Hobby Lobby and Conestoga had sincerely held religious beliefs which were substantially burdened by the contraceptive mandate.[75] The substantial burden came in the form of the fines or penalties the companies would have to pay if they failed to comply: amounts reaching the tens of millions of dollars.[76] The Court assumed there is a compelling government interest in ensuring that women receive comprehensive health coverage, but it held that enforcing the mandate against Hobby Lobby, Conestoga, and similar corporations was not the least restrictive means of furthering that interest.[77] The Court allowed the plaintiffs to opt out of the contraceptive mandate using the process already available to religious organizations.[78]

Perhaps the Court reached the conclusion it did because an exception to the contraceptive mandate already existed for religious institutions.[79] Certainly the availability of the exemption, which allowed religious organizations with sincerely held religious objections to providing contraceptives to opt out and let the insurance company cover the cost of contraceptives for its employees,[80] made it easy for the court to extend RFRA protection to for-profit corporations

[73] *Id.* at 2765.
[74] *Id.*
[75] *Id.* at 2785.
[76] *Id.* at 2775-76.
[77] *Id.* at 2782 (the compelling interest was in preserving public health).
[78] *Id.*
[79] *See* 45 C.F.R. §147.131 (as amended on September 14, 2015 to include the types of corporations involved in *Hobby Lobby*).
[80] *Hobby Lobby*, 134 S.Ct. at 2782.

with similar beliefs. Recall *O'Centro*, where the Court also pointed to the existence of a previously-existing exception to reach the conclusion that the government had not used the least restrictive means of furthering its compelling interest.[81] However, the *Hobby Lobby* holding could have immense impact on free exercise jurisprudence if closely-held, for-profit corporations start challenging other laws with a RFRA defense.[82] *Hobby Lobby* was not the first case in which a company challenged the new Affordable Care Act's contraceptive mandate, but its success opened the door for other claims.[83]

F. Free Exercise and RFRA Claims Since *Hobby Lobby*

Since *Hobby Lobby* was decided, attempts have been made to expand the reach of its holding. In several circuits, plaintiffs have claimed that even the required reporting form for the exemption to the contraceptive mandate is too much of a burden, and the Supreme Court agreed.[84] One court has considered, but rejected, applying the *Hobby Lobby* exception to organizations that object to the contraceptive mandate on *moral*, not *religious* grounds.[85] An injunction against enforcement of another part of the Affordable Care Act, the interpretation of the meaning of "sex" for the purpose of providing gender-specific health services, was granted to religious plaintiffs who would likely succeed on their RFRA claims that providing gender

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[81] Gonzales v. O Centro Espirito Beneficente Uniao do Vegetal, 546 U.S. 418, 436-37 (2006).
[82] *See Hobby Lobby*, 134 S.Ct. at 2787 (Ginsburg, J., dissenting) ("In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.").
[83] *See, e.g.* Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 627-28 (6th Cir. 2013); *Hobby Lobby*, 134 S.Ct. at 2802 (Ginsburg, J., dissenting) (suggesting the holding could be extended to excuse an employer from paying the minimum wage).
[84] *See* Wheaton College v. Burwell, 134 S.Ct. 2806, 2807 (2014) (Since government already had notice of Wheaton's objection, court granted injunction which excused them from filling out the form). *But see id.* at 2814 (Sotomayor, J., dissenting), wondering how, without an official notice form, the government is supposed to know when religious organizations are objecting to the mandate.
[85] Real Alternatives, Inc. v. Burwell, 150 F.Supp.3d 419 (M.D. Penn. 2015).

transition services substantially burdened their free exercise of religion.[86] The Catholic Church of Milwaukee tried to use RFRA get out of complying with the bankruptcy code.[87] There have been others.

A concern of the dissent in *Hobby Lobby* was that, after the majority's holding, private employers would use a RFRA defense to all kinds of claims, including discrimination claims by employees.[88] Though the majority expressly stated that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce,"[89] there have been at least two claims in the district courts since *Hobby Lobby* which test the Court's resolve not to allow a RFRA defense to Title VII.[90]

In the Eastern District of Pennsylvania, the court heard *Mathis v. Christian Heating & Air Conditioning, Inc.*[91] The plaintiff, an atheist, worked for a closely-held, for-profit HVAC company whose owner wanted to run the company with Christian values.[92] To that end, on the back of each employee's ID badge was the company's mission statement:

> This company is not only a business, it is a ministry. It is set on standards that are higher than man's own. Our goal is to run this company in a way most pleasing to the Lord.
>
> Treating employees and customers as we would want to be treated along with running a business as if we are all part of one big family is our plan.[93]

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[86] Franciscan Alliance v. Burwell, 2016 WL 7638311, No. 7:16–cv–00108–O,*1 (N.D. Texas, December 31, 2016).
[87] *See* Listecki v. Official Committee of Unsecured Creditors, 780 F.3d. 731 (7th Cir. 2015), discussed *infra*, section I.D.
[88] 134 S.Ct. at 2797 (Ginsburg, J., dissenting).
[89] *Id.* at 2783 (mentioning the example of discrimination on the basis of race, though the same section of Title VII also prohibits discrimination on the basis of color, religion, gender, and national origin. *See* 42 USC § 2000e-2(a)).
[90] E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d 837 (E.D. Mich 2016), *reversed and remanded*, 884 F.3d 560, 567 (6th Cir. March 7, 2018); Mathis v. Christian Heating & Air Conditioning, Inc., 158 F.Supp. 3d 317 (E.D. Penn. 2016).
[91] *Id.*
[92] *Id.* at 320.
[93] *Id.* at 321.

As an atheist, the plaintiff was uncomfortable with this mission statement, so he covered it with tape.[94] When his boss found out, he was asked to remove the tape or leave the company.[95] That was his last day of employment.[96] Mathis filed charges of discrimination against the company, claiming that they had discriminated against him because of his religion, or lack thereof.[97] The company owners made it clear that they would have preferred Mathis to act like, if not actually be, a Christian.[98] The Company asserted a RFRA defense, claiming that forcing them to comply with Title VII's anti-discrimination provision by attempting to reasonably accommodate Mathis's atheism was a burden on the company's free exercise rights.[99] Using traditional Title VII analysis, the court found that a reasonable jury could find that covering up the mission on his badge with tape did not cause undue hardship to the employer and denied summary judgment to the company.[100] Unfortunately, the *Mathis* court did not address the merits of the company's RFRA defense because RFRA is not available as a defense in suits between private parties in the Third Circuit.[101] It could also be argued that the court was not convinced that it made sense to excuse a company's failure to accommodate an *employee's* religious concerns by insisting that the *company's* religious beliefs were more important. Engaging in this type of inquiry not only creates an unfair advantage for the employer, but could also violate the Establishment Clause.

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[94] *Id.* at 322.
[95] *Id.* at 323.
[96] *Id.* The company claimed that this was a resignation and denied his unemployment. He claims it was a termination.
[97] *Id.* at 324.
[98] *Id.* at 321-22.
[99] *Id.* at 320. Title VII requires employers to accommodate employees' religious practices in the workplace unless it causes "undue hardship." *See* Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 75-76 (1977). In the context of religious accommodation, an undue hardship is usually considered anything more than a "de minimus" cost to the employer. *Id.* at 84. Further, an employer cannot take an adverse employment action based on an assumption that it cannot accommodate a religious practice, even if that assumption would be true. E.E.O.C. v. Abercrombie and Fitch Stores, Inc., 135 S.Ct. 2028, 2033 (2015).
[100] *Id.* at 333.
[101] *Id.* at 328.

The Eastern District of Michigan was not afraid to engage in this kind of inquiry, however. In *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, the court allowed a private employer to raise a RFRA defense to a sex discrimination claim, resulting in summary judgment for the employer.[102] The complainant, a biological man, worked for the defendant as a funeral director.[103] When he told his boss that he was transgender and would begin dressing as a woman, he was fired.[104] The E.E.O.C. filed a lawsuit on his behalf, claiming that this was sex discrimination prohibited by Title VII.[105]

The defendant funeral home claimed a RFRA defense, even though it is "not affiliated with or part of any church and . . . do[es] not avow any religious purpose. Its employees are not required to hold any religious views."[106] However, it is a closely-held corporation, like the companies in *Hobby Lobby*, whose owner believes that believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of [the Funeral Home]."[107] Further, the owner testified that if he

> were forced to violate [his] sincerely held religious beliefs by paying for or otherwise permitting one of [his] employees to dress inconsistent with his or her biological sex, [he] would feel significant pressure to sell [the] business and give up [his] life's calling of ministering to grieving people as a funeral home director and owner.[108]

[102] 201 F.Supp.3d 837, 870 (E.D. Mich 2016).
[103] *Id.* at 840.
[104] *Id.* at 845.
[105] *Id.* at 841. The E.E.O.C. followed a theory that this was impermissible sex-stereotyping, as prohibited by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990). Though the court admits that the E.E.O.C. had uncovered rare "direct evidence" that Stephens was fired "because of" his sex, that was not enough to survive the RFRA defense. *Id.* at 850, 854.
[106] *Id.* at 843.
[107] *Id.* at 848.
[108] *Id.*

This was enough for the court to agree with the defendant that the funeral home had made out a prima facie case that its free exercise rights would be violated if it had to follow the law and allow the plaintiff to dress as a woman.[109]

The court then proceeded to analyze the next part of the RFRA test: whether the E.E.O.C. had shown a compelling interest and whether the restrictions on the funeral home were the least restrictive means of furthering that interest.[110] Assuming that enforcement of Title VII was a compelling interest, the court found that the E.E.O.C. had not shown that insisting the funeral home allow Stephens to dress as a woman was the least restrictive means of furthering that interest.[111] Instead, the court seemed to chastise the E.E.O.C. for pushing an alternative agenda: trying to "bootstrap" Title VII to include protections for gender identity.[112] The outcome of this case is that a closely-held, for-profit employer was successfully able to assert a RFRA defense to a discrimination claim. As in *Hobby Lobby*, the court's focus was on the government's inability to show that it was imposing the least restrictive means of enforcing a law which interfered with the company's free exercise. The E.E.O.C. has filed for an appeal to the Sixth Circuit, which will apply *de novo* review.[113] On review, perhaps the court will distinguish this case from *Hobby Lobby* by considering more strongly the first prong of the RFRA test, the substantial burden, and find that the burden on the Funeral Home director's religion, simply allowing an employee to dress like a woman, is not nearly as substantial as millions of dollars in fines. Further, following Justice

[109] *Id.* at 855.
[110] *Id.* at 857 ("The Funeral Home Is Entitled To An Exemption Unless The E.E.O.C. Meets Its *Demanding* Two-Part Burden. (emphasis added)).
[111] *Id.* at 860-63 (questioning why the E.E.O.C. did not try to suggest any alternatives, such as a gender neutral dress code).
[112] *Id.*; *c.f.* Hively v. Ivy Tech Community College, 830 F.3d 698, 706 (7th Cir. Ind. 2016) ("a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."). *But see* Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017) (reh'g *en banc*) (holding that discrimination on the basis of sexual orientation *is* discrimination because of sex), the Sixth Circuit should take note of this holding in the appeal of the *Funeral Home* case.
[113] Bentkowski v. Scene Magazine, 637 F.3d 689, 693 (6th Cir. 2011).

Ginsberg's reasoning in dissent, because the relationship between the funeral home owner and the employee was not a religious one, the funeral home owner's religious beliefs are too attenuated from the discriminatory practices of the company to be a violation of RFRA.[114] Unlike *Hobby Lobby*, the employer's substantial burden claim was evaluated on a largely subjective, as opposed to financial, basis. Though the government's compelling interest in this case was assumed, just like it was in *Hobby Lobby*, [115] there is not a substantial enough burden on the Funeral Home Director's religion to allow a RFRA defense and erode the purpose of Title VII.[116]

II. Employment Discrimination and the Free Exercise of Religion

A. The Purpose of Title VII and the Anti-Discrimination Statutes is to Eradicate Workplace Discrimination, which is a Compelling Interest.

Title VII of the Civil Rights Act of 1964 was enacted with the purpose of eradicating workplace discrimination in the United States.[117] Title VII protects employees from discrimination based on their race, color, national origin, sex, and religion.[118] Title VII was enacted with the purpose of righting a major societal wrong. We live in a nation that values equal treatment, and these statutes are intended to ensure that minorities do not lose the means of providing for themselves and their families simply because they are different. To that end, many

[114] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting) ("I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.").
[115] *Id.* at 2780; 201 F.Supp.3d 837, 841 (E.D. Mich. 2016).
[116] *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (March 7, 2018). The Sixth Circuit agreed with this assessment, holding that, "the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; [and] even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens."
[117] *See* Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971) ("Title VII . . . should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate . . . discrimination.").
[118] 42 U.S.C. § 2000e-2(a)(1).

courts have held that the government's interest in enforcing anti-discrimination statutes is always a compelling one.[119]

On the other hand, we live in a nation where the default is at-will employment. Ever since the Supreme Court's landmark decision in *Lochner v. New York*,[120] the freedom to enter into employment contracts at-will has been an American staple. Anti-discrimination statutes interfere with an employer's ability to terminate an employee at-will; under the circumstances described in such statutes, an employer must not interfere with the terms and conditions of their employees' employment just because of an immutable characteristic or deeply held belief. *Hobby Lobby* further suggests an expansion to the class of employers that can claim *religious* exceptions to the anti-discrimination statutes. The dissent warned of the perils of this expansion:

> The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. . . . [I]ts logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood . . . invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.[121]

As shown in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*,[122] this could have tremendous implications for employee protections from discrimination in the future.

B. Protections for Religion for Both Employers and Employees

Under Title VII, employees are protected from discrimination on the basis of religion. This is of course in addition to their First Amendment right to be free from governmental

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[119] *See* State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 852 (Minn. 1985) ("Invidious private discrimination . . . has never been accorded affirmative constitutional protections."); E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d 837 (E.D. Mich 2016); Redhead v. Conf. of Seventh Day Adventists, 440 F.Supp.2d 211, 220 (E.D.N.Y. 2006); Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2783 (2014) (The government has a compelling interest in providing equal opportunity in the workforce).

[120] 198 U.S. 45 (1905) (holding that a state labor law which limited hours in a workweek violated an employer's due process rights, and supporting the premise that both employers and employees have a fundamental right to the freedom to contract for employment).

[121] *Hobby Lobby*, 134 S.Ct. at 2797 (Ginsburg, J., dissenting).

[122] 201 F.Supp.3d 837, *reversed and remanded*, 884 F.3d 560, 567 (6th Cir. March 7, 2018).

burdens on their free exercise of religion. An employer is prohibited from making employment decisions based on an employee or applicant's religion or lack thereof.[123] Further, an employer is required to *reasonably accommodate* an employee's religion in the workplace, as long as it does not cause undue hardship to the employer.[124] Since claims under the First Amendment are constitutional claims and RFRA is a statutory claim against the government, RFRA likely does not protect an employee against his private employer, even in a discrimination suit.[125] However, Employers may assert a RFRA defense to discrimination claims in certain circumstances.

Religious employers are statutorily protected from interference with their religion. Qualifying organizations such as churches, religious schools, organizations run by not-for-profit religious orders, and others whose business purpose is religious in nature have a right, by statutory exception,[126] to prefer employees who share the organization's beliefs. In addition, the courts have also recognized a common-law "ministerial exception."[127] The ministerial exception essentially protects religious organizations from "excessive government entanglement with religion."[128] If an organization raises a successful ministerial exception argument, it will act as a complete defense to a discrimination claim. The reasoning is simple: in the absence of direct evidence of discrimination (which rarely exists), proving discrimination requires a plaintiff to show that his or her employer's reason for the challenged employment action is pretextual.[129] A

[123] *See* E.E.O.C. v. Abercrombie and Fitch Stores, Inc., 135 S.Ct. 2028 (2015) (holding that even the assumption on the part of an employer that an applicant's religious beliefs will cause her to engage in conduct the employer is unwilling to accommodate is sufficient to find a violation of Title VII).
[124] *See* Trans World Airlines, Inc., v. Hardison, 432 U.S. 63 (1977).
[125] *See, e.g.* Harrell v. Donahue, 638 F.3d 975, 983 (8th Cir. 2011) (Title VII provides the remedy for claims of religious discrimination and the drafters of RFRA did not intend to affect religious accommodation under title VII).
[126] 42 U.S.C. § 2000e-1(a); *see* LeBoon v. Lancaster Jewish Community Center Ass'n., 503 F.3d 217, 226 (3d Cir. 2007) (stating factors used to determine whether an organization qualifies for the religious exemption in Section 702 of Title VII).
[127] *See* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 188 (2012) (recognizing a ministerial exception at the national level).
[128] Rweyemanu v. Cote, 520 F.3d 198, 208-09 (2d Dist. 2008).
[129] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

court cannot consider the "pretext" that a church's "minister" did not properly observe or promote his or her religion, without implicating the Establishment Clause.[130] Therefore, if a person bringing an employment discrimination claim against his religious employer is considered to be a "minister" of that religious organization, someone responsible for relaying the religious message to others, the court will not apply anti-discrimination laws to the employment of the minister.[131] The Supreme Court first discussed the ministerial exception is *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*.[132] A teacher at the defendant's school brought discrimination claims when she was fired after a disability leave.[133] The defendant claimed that the plaintiff could not bring claims under the ADA because the teacher was a "minister" of their faith.[134] The Court discussed extensively the history and purpose of the Establishment and Free Exercise Clauses, reiterating that the Constitution prevents the government from interfering in a religion's selection of "ecclesiastical individuals."[135] To that end, the Court recognized a "ministerial exception" to discrimination claims against a religious organization.[136] Next, the court engaged in an extensive discussion of the plaintiff's job duties, training, expectations, and other related facts to determine that the plaintiff was, in fact, a minister and the defendant was entitled to the complete defense offered by the ministerial exception.[137] What the Court in *Hosanna-Tabor* made clear is that whether or not the ministerial exception applies as a defense to a religious discrimination claim by an employee is a fact-

[130] *See Rweyemanu*, 520 F.3d at 208-09.
[131] The exception is not limited in application to ordained ministers, but rather is a fact-intensive inquiry which can encompass any employee whose position is "important to the spiritual and pastoral mission" of a religious organization. E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000).
[132] 565 U.S. 171 (2012).
[133] *Id.* at 179.
[134] *Id.*
[135] *Id.* at 182-85.
[136] *Id.* at 188.
[137] *Id.* 191-94.

specific inquiry which must be carefully considered in each case, so that the court does not impermissibly entangle itself in the affairs of the church.[138]

The ministerial exception is not available if the employee is not a "minister." This is similar to a RFRA defense, which can only be invoked where there is a "substantial burden" to free exercise. An employer who believes that a law substantially burdens its free exercise of religion may argue either that it is entitled to the ministerial exception or that it has a defense under RFRA. Both protect a religious employer's right to statutory exceptions to laws of general applicability. The analysis should be the same: if the employer/employee relationship is not established as a religious one, neither the ministerial exception nor RFRA should be available to the employer as a defense. For example, in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, the funeral home owner claimed that his sincerely held religious beliefs would be burdened by a male employee dressing as a female at work.[139] However, he did say that his religious beliefs would not be offended by Stephens dressing as a woman *outside* of work.[140] This comment should have undermined the sincerity of his religious beliefs and stopped the inquiry into the RFRA defense.[141] Regardless, whether sincerely or not, employers have attempted to invoke both of these defenses many times since RFRA's passage.

C. RFRA As a Possible Defense to Employment Discrimination Claims

[138] *Id.* at 190 (no bright line rule for when the ministerial exception applies), 191-93 (considering the facts as applied to the plaintiff); *See also* E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) ("the ministerial exception promotes the most cherished principles of religious liberty, [but] its contours are not unlimited and its application in a given case requires a fact-specific inquiry.").
[139] 201 F.Supp.3d 837 (E.D. Mich 2016).
[140] *Id.* at 848.
[141] *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. March 7, 2018), reversing the circuit court and holding that the Funeral Home was not entitled to a RFRA defense, and even if it were, the government established that enforcing Title VII *is* the least restrictive means of enforcing the compelling interest of eradicating workplace discrimination.

Since RFRA was enacted, there have been several attempts by employers to invoke its protections after being sued for employment discrimination. One of the first, and probably the one to take such a defense the most seriously, was *Hankins v. Lyght*.[142] Recall that in *Hankins*, the Second Circuit imposed a RFRA defense on the employer of a minister who had filed for age discrimination, saying that RFRA should be the extent of the religious inquiry in free exercise claims.[143] This holding also displaced the common law ministerial exception, at least temporarily, in the Second Circuit. On remand, the court said that the ministerial exception was not necessarily replaced by RFRA; instead, since it would be impermissible under the First Amendment for the court to interfere with the church's process for choosing its ministers, a finding that the challenged action was subject to the ministerial exception was *prima facie* evidence of a substantial burden.[144] Therefore, in circumstances where a the employment of a "minister" at a religious institution is at stake in the Second Circuit, the employer meets the first prong of the RFRA defense, the substantial burden, if the employee qualifies as a minister under the common law ministerial exception.[145]

This holding was based largely on the district court's decision in *Redhead v. Conference of Seventh-Day Adventists*.[146] The defendant employer in *Redhead* was a religiously-run elementary school.[147] When the plaintiff employee, an unmarried female, became pregnant, the defendant fired her because her pregnancy was evidence of "fornication," conduct prohibited by

[142] 441 F.3d 96 (2d Cir. 2006) (discussed *infra*, section I.D.).
[143] *Id.* at 102 ("the RFRA must be deemed the full expression of Congress' intent with regard to the religion-related issues before us and displace earlier judge-made doctrines [the ministerial exception] that might have been used to amelieorate the ADEA's impact on religious organizations and activities.").
[144] *Id.* at 236.
[145] See *Infra*, Part III.D., suggesting that this type of analysis should be applied in all cases where an employer wishes to use RFRA as a defense to an employment discrimination claim.
[146] 440 F.Supp. 2d 211 (E.D.N.Y. 2006).
[147] *Id.* at 214.

the employer's religion.[148] She filed claims of sex discrimination under Title VII, and the defendant asserted RFRA as its defense.[149] The court did not want to consider RFRA given that this was a suit between two private parties, but was bound by the circuit precedent in *Hankins* to do so.[150] Interestingly, the court re-examined the relationship between RFRA and the ministerial exception, holding that the two were not mutually exclusive.[151] Instead, applying the ministerial exception, it found that because the plaintiff was not a "minister," there was no substantial burden to the school's free exercise and therefore RFRA was not implicated.[152] Further, the court surmised that

> the ministerial exception guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise. It is . . . relevant to whether a religious organization's hiring decisions regarding a particular individual should be insulated based on First Amendment concerns. . . . For the RFRA analysis in particular, the ministerial exception is *necessary for a case-specific application of the compelling interest test*."[153]

Most likely, if this case had been decided one year later after *Hobby Lobby*, the outcome would be different. It seems apparent after *Hobby Lobby* that if religious non-profits and closely held for-profit corporations with religious owners can claim a RFRA defense to a neutral law, so can non-profit hospitals *run by* religious organizations. In the Second Circuit, under the right circumstances, a "religious employer," regardless of not-for-profit status, could raise a RFRA defense to a Title VII claim of discrimination.[154] Those circumstances are limited but were definitely expanded after *Hobby Lobby*, as is evidenced by *E.E.O.C. v. R.G. & G.R. Harris Funeral*

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[148] *Id.* at 224.
[149] *Id.* at 214.
[150] *Id.* at 219.
[151] *Id.* at 220.
[152] *Id.* at 221.
[153] *Id.* at 220 (citations omitted) (emphasis added).
[154] *See* Penn v. N.Y. Methodist Hosp., 2013 U.S. Dist. LEXIS 142109 at *27-28 (S.D.N.Y. Sep. 30, 2013) ("It is implicit from Rweyemamu that the second circuit would have held that the RFRA amended Title VII . . .") *but see* Francis v. Ridge, 2005 U.S. Dist. LEXIS 40015, *5-8 (D. Virg. Isl. December 27, 2005) (based on the legislative history of both statutes, Title VII preempts the RFRA).

Homes, Inc.[155] However, the existence of an almost automatic compelling interest in eradicating workplace discrimination should (1) severely limit the circumstances under which a RFRA defense can be brought and (2) require courts to use a ministerial exception type analysis when evaluating whether the religious burden on an employer is "substantial." Such an in-depth, case-by-case analysis is sensitive to First Amendment concerns and will prevent abuse of the RFRA defense.

III. Closely-held, For-profit Corporations Should Not Be Able to Use RFRA as a Defense to Employment Discrimination Claims.

Hobby Lobby expanded the types of organizations that can claim a RFRA defense. Prior to *Hobby Lobby*, in order to claim that any law interfered with a party's free exercise of religion, that party had to have a "religion." Logically, then, the claim was available to individuals and to religious organizations. After *Hobby Lobby*, "religion" can be attributed to closely-held, for-profit, private corporations when the company's owners have sincerely held religious beliefs. It is possible, based on precedent, that these types of corporations could use RFRA as a defense when faced with employment discrimination claims, if they can show that the government's enforcement of those anti-discrimination statutes against them substantially burdens a sincerely held religious belief. Of course, under the language of RFRA, if a company makes such an assertion, the government must have a chance to show that enforcing the law is the least restrictive means of furthering a compelling government interest. The government has a strong compelling interest in preventing discrimination in the workplace, which should not be displaced with laws like RFRA. The courts should not allow closely-held, for-profit corporations to assert RFRA as a defense to a claim of employment discrimination because it will undermine the purpose of Title VII.[156] If, however, the Court allows such a defense, it should be used only

[155] *See* 201 F.Supp.3d 837 (E.D. Mich. 2016), *reversed and remanded*, 884 F.3d 560, 567 (6th Cir. March 7, 2018), discussed *infra*, section I.F.

[156] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2783 (2014) ("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

where (1) the government is a party and (2) a standard is established for evaluating whether there is a substantial burden on the company's free exercise of religion. Applying a ministerial exception-type analysis to evaluate the employer-employee relationship would be an appropriate "substantial burden" standard that aligns with prior precedent.[157] Only in those narrow circumstances should the Court apply the RFRA compelling interest test.

A. Most Employment Discrimination Lawsuits are Between Two Private Parties. If the Government is Not a Party, It Would Be Too Burdensome To Assert The Compelling Interest in Every Claim

When an employee feels he or she has been discriminated against by an employer, he must file a charge with the E.E.O.C. or with the equivalent state organization.[158] The E.E.O.C. may decide, based on the charge, to enforce the anti-discrimination statutes against that employer itself, but most often it issues a Notice of Right to Sue, allowing private parties to file their own claims.[159] It is easy to see how the government's purpose in enacting anti-discrimination statutes, to try to eradicate workplace discrimination, is, without further inquiry, a compelling interest. However, the least restrictive means test is a fact intensive inquiry. Applying RFRA to employment discrimination claims would create a huge burden on the government to intervene in order to satisfy this inquiry. The E.E.O.C. already has an incredible backlog of cases; requiring it to assert defenses to RFRA claims between private parties would stretch its resources even further, undermining its mission.

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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.").

[157] E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) ("the [ministerial] exception shelters certain employment decisions from the scrutiny of civil authorities so as to preserve the independence of religious institutions in performing their spiritual functions."); Redhead v. Conference of Seventh-Day Adventists, 440 F.Supp. 2d 211, 220 (E.D.N.Y. 2006). ("For the RFRA analysis in particular, the ministerial exception is necessary for a case-specific application of the compelling interest test.").

[158] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Filing a Charge of Discrimination*, https://www.E.E.O.C..gov/employees/charge.cfm.

[159] *Id.*

Assuming RFRA is available as a defense in suits between private parties, a typical claim might be as follows: a single, unmarried female employee of a Christian book store decides that she is ready to have children and begins to receive fertility treatments. The owner of the store has a sincerely held religious belief that it is a sin to have children out of wedlock. He believes that allowing her to take time off to go for fertility treatments substantially burdens this religious belief, since he has to pay other employees to cover for her.[160] Believing he has no alternative, he fires her. She brings a claim under Title VII, alleging that the termination was because of her sex. She can likely make out a *prima facie* case of sex discrimination: Under the *McDonnell-Douglas* framework, she can show that (1) she was a member of a protected class (female); (2) she was qualified for her position (she was working there); (3) she suffered an adverse employment action (she was fired); and (4) similarly situated employees who were not female were treated differently (men who wanted to take time off for medical treatments were probably not fired).[161] The book store, acting through its owner, would then assert an affirmative defense under RFRA. He could show that application of Title VII to him in this situation (requiring him to retain this employee) (1) substantially burdened (2) his sincerely held (3) religious belief.[162] Assuming he was successful, the court would then apply the Compelling Interest test. This is something the government, not the plaintiff, has to prove; the E.E.O.C. would have to intervene to make an argument that applying Title VII to this employer is not only a compelling interest, but that under the specific facts of the case, it is the least restrictive means of accomplishing that interest. This is absolutely unworkable. The current system for processing charges of discrimination already takes 2-3 years from filing to verdict; if the E.E.O.C. had to intervene every time an employer

[160] Part of the substantial burden analysis includes the cost to the employer of complying with the law. *See Hobby Lobby*, 134 S.Ct. at 2775-76.
[161] McDonnell Douglas Corp. v. Green, 411 U.S.792, 802 (1973).
[162] *See* Gonzales v. O Centro Espirito Beneficiente Uniao de Vegetal, 546 U.S. 418, 428 (2006).

asserted a RFRA defense it would take much longer. A RFRA defense would not be asserted in every discrimination claim, but any case which is not litigated by the E.E.O.C. in which the employer did assert a RFRA defense would then need to be addressed with E.E.O.C. resources. This would affect the E.E.O.C.'s ability to process all charges. The impact to the general public is just too great to allow such a process to occur. RFRA should not be available as a defense to discrimination claims, especially when suits are brought by private parties.

B. Penalties to Private Employers of Not Complying with Title VII are Mostly Equitable in Nature, Therefore They Do Not Create a Substantial Burden

If such a defense *is* allowed, a closely-held, for-profit employer must prove the first prong of the RFRA defense: application of a general law causes a substantial burden on the employer's free exercise of religion. In *Hobby Lobby*, this burden came in the form of substantial monetary penalties for failing to comply with the law that created the burden.[163] However, in employment discrimination claims, the traditional remedies for plaintiffs are equitable in nature.[164] This usually includes things like backpay, expenses, and reinstatement or front pay. Plaintiffs can receive compensatory and punitive damages for their discrimination claims, but there are significant caps on the amounts. For example, an employee of the largest class of employer would only get up to $300,000 for such damages in a Title VII claim.[165] In the above example, if it was found that the bookstore owner had in fact acted unlawfully in terminating the pregnant employee, he would likely only be responsible for her back wages, some front pay, and if the conduct was willful, a few thousand dollars in further damages. This is far from the millions at stake in *Hobby Lobby.*

[163] *Hobby Lobby*, 134 S.Ct. at 2775-76.
[164] 42 U.S.C. § 2000e-5; *See also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Remedies for Employment Discrimination*, https://www.E.E.O.C..gov/employees/remedies.cfm.
[165] *Id.*

The available remedies make it clear that complying with Title VII does not create a substantial financial burden on an employer. Unlike the potential penalties imposed under the ACA, paying one employee's backpay and even up to an additional $300,000 in compensatory damages could not amount to any significant damage for a multi-million dollar company like Hobby Lobby. If an anti-discrimination statute truly burdens a company's free exercise of religion, the financial burden of non-compliance will not be enough on its own to create a *substantial* burden on religion. Instead, courts should apply a ministerial exception type analysis to determine if forcing the relationship between the employer and the employee to continue would cause the substantial burden on the company's free exercise of religion, without further trammeling the rights of the employee.

C. In Religious Discrimination Cases, Allowing a RFRA Defense Would Require Courts to Engage in Unconstitutional Balancing of the Rights of Employees Against the Rights of Employers.

When an employee claims that his or her employer has engaged in unlawful discrimination under Title VII because of religion, that claim will require the employee to prove that the employer failed to accommodate his religious practices or that the terms and conditions of employment substantially burden the employee's free exercise of religion.[166] Allowing an employer to assert a RFRA defense under those circumstances would pit the employer's free exercise rights against the free exercise rights of the employee. A court cannot engage in choosing whose religion is more important by determining if RFRA trumps Title VII – that would surely implicate the Establishment Clause.

[166] *See* E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028, 2036 (2015) (explaining that the plaintiff has the burden to show that the challenged action was taken *because of* her religion, though the employer has the burden of proving otherwise).

Practically, a RFRA defense to a Title VII claim, on its face, means that the employee suffered an adverse employment action *because of* (a failure to participate in the employer's) religion. If the employee's conduct, or a law which protects such conduct, substantially burdens the employers' religion, it stands to reason that such conduct does not substantially burden the employee's religion. Therefore, if an employer takes action against the employee for that conduct, it would be because the employee's religion was not the same as the employer's. Title VII makes it unlawful to take an adverse action against an employee *because of* his religion. RFRA should not be available as a defense because, if successful, it would value the employer's religion over the employee's.

Further, consider a situation where the conduct is the result of the employee's religious beliefs or lack thereof, such as the employee in *Mathis* who covered up the religious message on his ID badge because he was an atheist.[167] Here, a RFRA defense would essentially force a court to choose between the employee's right to be free from religious discrimination in the workplace and the employer's right to be free from burdens on his free exercise by laws which force him to retain this employee. Choosing between one religion and another is a direct violation of the Establishment Clause. RFRA should clearly not be available as a defense in religious discrimination claims.

IV. Conclusion: A Ministerial Exception Like Analysis Should Be Used to Determine Whether a Closely-Held, For-Profit Company Can Meet the Substantial Burden Prong of the RFRA Compelling Interest Test.

Since Congress articulated the need to address rampant workplace discrimination through the passage of Title VII in 1964, employers have raised all kinds of creative defenses. Interference with the employer's First Amendment free exercise rights is just one of them. This

[167] Mathis v. Christian Heating and Air Conditioning, Inc., 158 F.Supp.3d 317, 320 (E.D. Penn. 2016).

is understandable; the freedom to contract and the concept of employment-at-will are two strongly rooted practices and beliefs for most business owners and employers. The preservation of the right to free exercise of religion, without substantial burden by the government, is also something extremely important to everyone in the United States. Under RFRA, no law, even a neutral law of general applicability, can substantially burden a person's free exercise of religion without showing that the law is the least restrictive means of furthering a compelling interest. There should be very narrow circumstances under which the free exercise right outweighs the right to be free from discrimination in the workplace. These would be the only possible circumstances under which a closely-held, for-profit corporation could raise a RFRA defense to an employment discrimination claim.

These narrow circumstances occur when two conditions are present. First, the government would have to be a party; in other words, the claim would need to be brought by the E.E.O.C. Second, the court would need to engage in a standard inquiry regarding whether or not the defendant sustains a substantial burden on its free exercise. This standard inquiry would be similar to the inquiry made when an organization wants to invoke the common law ministerial exception. In cases of a RFRA defense, it would be necessary to examine the nature of the relationship between employer and employee. If the relationship is one where it is the employee's responsibility to further a religious mission of the company, then a fact-intensive analysis, similar to that applied for the ministerial exception, should be applied to determine if, as a threshold matter, not discriminating against the employee is a substantial burden on the company. If, however, the relationship is not "ministerial," that is, it does not further a religious mission, then RFRA should not be allowed, whether the company qualifies as one that can claim the RFRA defense under *Hobby Lobby* or otherwise. This type of inquiry would not run afoul of

the establishment clause, because it is not a question of whether the practice of not discriminating against an employee involves a burden on a practice *central* to the employer's religion, but whether the *nature* of the relationship could burden religion in a substantial way.[168] It should be emphasized that not-for-profit religious organizations use labor to promote religion, while closely-held for profit companies use labor to make money.[169] This distinction should not be ignored when considering whether a company has a valid RFRA defense. Instead, the inquiry should focus on the "function of the position at issue."[170]

A hypothetical example can illustrate this theory. Suppose two female employees of Hobby Lobby are fired, both for dressing too provocatively. One employee is a cashier, and the other is the Vice President of Marketing. They both go to the E.E.O.C., which agrees to litigate the cases together, as an example of blatant discrimination because of sex. In response to the lawsuit, Hobby Lobby asserts a RFRA defense, arguing that allowing women to dress in a provocative manner in the workplace is a substantial burden on the company's sincerely held religious belief that women must dress modestly. They claim that the women's style of dress reflected poorly on the company's Christian image and alienated its customers, causing a loss of business, interference with their branding and marketing strategy, and confusion in the marketplace. In order to determine if forcing Hobby Lobby to allow these women to wear their clothing of choice is in fact a substantial burden, the court should engage in a fact specific inquiry to determine whether the dress of these employees actually has an impact on the

[168] *See* 137 CONG. REC. E3083-02 (September 18, 1991) (Statement of Hon. Glenn M. Anderson of California) (explaining that the court must not engage in inquiries into the "centrality" of a particular religious practice but that there must be some acceptable inquiry that allows for an analysis of how a neutral law interferes with free exercise. Quoting Justice O'Connor in dissent of the *Smith* decision, he says, "The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, . . . and one that courts are capable of making.").
[169] Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting) (explaining why the majority was wrong to extend the holding to for-profit corporations).
[170] E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000).

company's religion. The court should consider similar facts to those it would consider when determining whether the ministerial exception applies. In this hypothetical example, it is conceivable that the Vice President of Marketing for Hobby Lobby would be the person in charge of promoting the company's "Christian" image and mission. Dressing in a manner directly in conflict with that image in mission is plausibly a burden on the company's religion. However, the cashier's duties are arguably too attenuated from the mission of the company for her clothing to have any meaningful impact on the company's religious mission. She may interact with customers, but only in one store and only sometimes. Even if her style of dress suggests a clearly "un-christian" set of values, that single employee's actions cannot be imputed to the company as a whole. Though it may still not be enough to overcome the compelling interest in preserving a workplace free from discrimination, Hobby Lobby should only be able to assert the RFRA defense as to the Vice President of Marketing's discrimination claim, not the cashier's discrimination claim.

Importantly, if courts apply this analysis and do not find a substantial burden, that would act to bar the RFRA defense. If the courts do find a substantial burden, then the result would differ from the ministerial exception in one important way. Once a court finds that an employee is a "minister," that acts as a complete defense to a discrimination claim. Once a court finds that an employee's discrimination claim is a "substantial burden" on a closely-held, for profit corporation's sincerely held religious beliefs, then the court must proceed to the rest of the compelling interest test to determine if RFRA acts to bar the discrimination claim. RFRA itself is clear that if a neutral law of general applicability substantially burdens free exercise of religion, the government must justify the application of that law as the least restrictive means of furthering a compelling interest. The test suggested in this paper does not over-ride that requirement, it only

limits the circumstances under which it will be applied. This is extremely important to prevent abuse of the RFRA defense. Without such a threshold barrier, there is nothing to stop companies from asserting that a law substantially burdens their free exercise of religion, thereby forcing the government to unnecessarily assert compelling interests underlying many laws, perhaps resulting in the anarchy foreseen by Justice Scalia.[171]

This solution would prevent the government from excessively interfering with a company's sincere religious beliefs while protecting our nation's extremely important anti-discrimination statutes. Allowing RFRA as a defense without a threshold inquiry into the validity of its application under the circumstances has the potential to significantly erode employees' rights to be free from discrimination in the workplace. Substantial progress has been made since 1964, but we have a long way to go before workplace discrimination is eradicated.

The ministerial exception does not apply to excuse churches from anti-discrimination laws as applied to non-ministerial employees; applying a RFRA defense should be similarly limited. "Where no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law such as Title VII to the *religious employer* unless Congress so provides."[172] Congress has provided for an exception through RFRA, but it should be narrowly applied. Though it appears that through its holding in *Hobby Lobby*, the Supreme Court has opened the door for closely-held, for-profit corporations to use RFRA as a defense to claims of employment discrimination by the E.E.O.C., courts should heed the dissent's warning and limit these defenses by using a ministerial exception like analysis to address the substantial burden question. This threshold inquiry will limit the RFRA defense to the instances in which there really is a potential for unconstitutional burdens on the free exercise of religion, and

[171] Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 888 (1990).
[172] E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) (emphasis added).

prevent companies from abusing RFRA to undermine the purpose of the anti-discrimination statutes.