

SEDITIONOUS ACTS OF FAITH: GOD, GOVERNMENT, CONSCIENCE, AND BOILING FROGS

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INTRODUCTION

So, what *is* the best way to boil a frog? The exercise, often used as a metaphor for apathy or as a parable teaching the importance of vigilance, suggests that the best way to do so is to place the frog in a pot of comfortable, room temperature water and then to heat the pot gradually until it starts boiling. As the water slowly warms, his body adjusts to the change and he remains comfortable. The frog will not notice he is being boiled until it is too late. This method, apparently, is much preferred to placing the frog in a pot of already boiling water. In the latter case, the frog will recognize the sudden change of environment and attempt to escape, leaving the boiler without a frog to boil.¹

The legend of the boiling frog, in reality, is not true. Placing a frog in boiling water would have dire consequences for the frog—probably preventing it from making it out of the pot alive or, at the very least, unscathed. Likewise, the frog would most likely catch on to the slow-boil method and make attempts to flee while it still had a chance. That being said, and without concluding that frogs are more intelligent than people, the myth makes for a good illustration and is easily relatable to human activity.

In his private papers, Justice William O. Douglas makes a similar observation:

As nightfall does not come all at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness.²

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¹ Henna Inam, *Leadership and the Boiling Frog Experiment*, FORBES (Aug. 28, 2013, 5:25 AM), <http://www.forbes.com/sites/hennainam/2013/08/28/leadership-and-the-boiling-frog-experiment/#5f7c6be21831>.

² Letter from Justice William O. Douglas to The Young Lawyers Section of the Wash. State Bar Ass'n (Sept. 10, 1976), in *THE DOUGLAS LETTERS: SELECTIONS FROM THE*

Using the approach of nightfall as his change component, Justice Douglas notes that while the slow-moving progression through dusk provides a seemingly comfortable constant, there is nothing consistent about what approaches. Dark and light are polar opposites, and the inability or refusal to acknowledge what lies between the two is exactly what renders one incapable of combatting the dark when it finally does arrive.³

Justice Douglas's quote, or the fallacious frog-boiling exercise, can describe any number of slow-moving surreptitious transgressions, including the use by members of the legislative and executive branches of government, as well as the popular elite, to separate the population of religious faithful from their faith. How the judicial branch responds to such an attempt is critical. It is the subject of a controversy that occupied the courts and captured the public's attention throughout the course of Barack Obama's presidency—the Affordable Care Act, the subsequent contraceptive mandate imposed by the U.S. Department of Health and Human Services (“HHS Mandate” or “Mandate”), the conscience exceptions, and the response of the various religious communities. With over one hundred HHS Mandate lawsuits filed and litigated to various stages, the religious and legal communities—as well as the rest of the nation—awaited the outcome of this highly contested issue. Well, at least some did. The question this article addresses is why. Why is it acceptable to choose whose beliefs are worthy of protection and respect? And, why do some who would be expected to care seem ambivalent to the approaching darkness? Something about this situation suggests the answer lies in the metaphorical boiling of frogs.

In its application, the response to this question no doubt has implications regarding the court's handling of future issues of freedom of religion, how the public responds to the court's categorization of religious beliefs, and how parishioners practice their faith. This Article focuses on the HHS Mandate cases and highlights the all too often implied refusal to accept the sincerity of the collective plaintiffs' religious beliefs as worthy of judicial recognition. Part I of this Article reviews the pertinent provisions of the Affordable Care Act along with the comments filed in response to the Administration's multiple rule changes. It explains the different treatment between religious institutions, religiously-affiliated non-profit organizations and for-profit companies and demonstrates, through the various regulations, the constant struggle with compliance forced upon these religious institutions. Part II highlights the decisions wherein the lower courts denied the plaintiffs' requests for preliminary

PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 162 (Melvin I. Urofsky ed., 1987) [hereinafter THE DOUGLAS LETTERS].

³ *Id.* (“[I]n such twilight . . . we all must be most aware of change in the air . . . lest we become unwitting victims of the darkness.”).

or temporary relief pending review as well as the resulting Supreme Court opinions in the two paramount cases—*Burwell v. Hobby Lobby Stores, Inc.*⁴ and *Zubik v. Burwell*.⁵ Part III demonstrates how some of the particular judges’ findings in these cases that the HHS Mandate did not pose a substantial burden on the practice of the plaintiffs’ respective religions were essentially a determination that the plaintiffs’ religious beliefs, although sincere, were so outside the norm as to not be worthy of legal protection. Possible reasons for the judges’ findings will be explored, including examples of political, popular and societal message mixing. Part IV concludes that although the question of the sincerity of one’s religious belief may appear at first to be an ancillary non-issue, silent acceptance of an improper judging of that belief could ultimately render religious freedom protections meaningless.

I. THE PATIENT PROTECTION AND AFFORDABLE HEALTH CARE ACT

Shortly after one year in office, President Barack Obama signed the Patient Protection and Affordable Health Care Act (“Act”) into law.⁶ The Act states in relevant part:

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements

. . . .
(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.⁷

The Act does not define “preventive care and screenings,” and the U.S. Department of Health and Human Services (“HHS”) issued an interim final rule on July 19, 2010, which deferred until August 1, 2011, an explanation of what was to be included as “preventive care and screenings.”⁸ Just a few days earlier, however, on July 14, Secretary of HHS Kathleen Sebelius joined Michelle Obama and Jill Biden to discuss the new preventive health benefits.⁹ Only hours later, Planned

⁴ 134 S. Ct. 2751 (2014).

⁵ 136 S. Ct. 1557 (2016) (per curiam).

⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.) (2010).

⁷ 42 U.S.C. § 300gg-13(a)(4) (2012).

⁸ Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,728 (July 19, 2010) (to be codified at 45 C.F.R. pt. 147).

⁹ *Preventive Health Care Coverage Under Health Reform*, WHITE HOUSE (July 14, 2010), <https://www.whitehouse.gov/photos-and-video/video/preventive-health-care-coverage-under-health-reform#transcript>.

Parenthood released a statement in support of the regulations, but urged the Administration to include additional policies regarding contraceptive coverage.¹⁰ The statement warned that it would be “organizing a national effort to make sure that these additional guidelines meet the needs of women by ensuring those women’s annual visits and all forms of FDA-approved prescription contraception are also covered under the new health care reform law with no co-pays or out-of-pocket expenses.”¹¹ According to the statement, “more than 300 Planned Parenthood activists from across the country” would be arriving on Capitol Hill that week to lobby inclusion of “family planning, including women’s annual visits and FDA-approved prescription birth control.”¹²

Two of the organizations that submitted comments on the July 2010 Interim Final Rules were the United States Conference of Catholic Bishops (USCCB) and Planned Parenthood.¹³ The USCCB made both medical and moral arguments. It noted that pregnancy is not a disease and thus including contraceptives and abortifacients as preventive services under the Act would be a misnomer.¹⁴ Further, the USCCB argued that because “contraceptives and sterilization are morally problematic for many stakeholders,” insurers should not be mandated to provide them for their employees.¹⁵ In addressing the moral implications of requiring employers to provide such coverage, the USCCB stressed that this was, indeed, an issue of conscience:

Because any mandate for contraception and sterilization coverage under the rubric of “preventive services” would apply to a wide array of group health plans and health insurance issuers, it would pose an unprecedented threat to rights of conscience for religious employers

¹⁰ *Planned Parenthood Supports Initial White House Regulations on Preventive Care; Highlights Need for New Guidelines on Women’s Preventive Health to Include Family Planning*, PLANNED PARENTHOOD (May 14, 2014), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-supports-initial-white-house-regulations-preventive-care-highlights-need-new-33140.htm>.

¹¹ *Id.*

¹² *Id.*

¹³ Letter from U.S. Conference of Catholic Bishops to Office of Consumer Info. & Ins. Oversight, Dep’t of Health & Human Servs. 1 (Sept. 17, 2010), http://brendans-island.com/blogsources/2012_06_ConscienceFFF/Update/comments-to-hhs-on-preventive-services-2010-09.pdf [hereinafter USCCB Comments]; Letter from Planned Parenthood Fed’n of America, Inc. to Office of Consumer Info. & Ins. Oversight, Dep’t of Health & Human Servs. (Sept. 17, 2010), <http://savingmatters.dol.gov/ebsa/pdf/1210-AB44-0229.pdf> [hereinafter Planned Parenthood Comments].

¹⁴ USCCB Comments, *supra* note 13, at 3. The USCCB also argued that “most pregnancies, including unintended pregnancies, end in live birth rather than abortion, so it would be arbitrary to claim that preventing such pregnancies primarily prevents abortion rather than live birth.” *Id.* Furthermore, the USCCB also said that the rate of abortions for unintended pregnancies is higher if the woman became pregnant during the use of a contraceptive. *Id.*

¹⁵ *Id.* at 1.

and others who have moral or religious objections to these procedures. In this regard, the Administration's promise that Americans who like their current coverage will be able to keep it under health care reform would be a hollow pledge. Currently, such employers, as well as insurance issuers with moral and religious convictions on these matters, are completely free under federal law to purchase and offer health coverage that excludes these procedures. They would lose this freedom of conscience under a mandate for all plans to offer contraception and sterilization coverage.¹⁶

The USCCB concluded that this mandate would be a complete reversal of existing insurance practices within the marketplace.¹⁷

Planned Parenthood's comments on the July 2010 Interim Final Rules focused primarily on access and costs.¹⁸ The organization requested that HHS not only include all contraceptives approved by the Federal Food and Drug Administration ("FDA"), but also that it prohibit insurers from making health care providers pay for the elimination of cost-sharing and that it implement oversight mechanisms over the insurers.¹⁹ Although Planned Parenthood acknowledged the balance HHS appeared to be attempting to strike, it made no mention of religious conscience or its validity. Instead, it suggested that health plans—assumedly those that were religiously based or affiliated—would use the Act in an effort to limit coverage and deny women access to healthcare.²⁰

On August 3, 2011, HHS released a new set of Interim Final Rules requiring most health insurance plans to cover the cost of preventive services for women.²¹ The Health Resources and Services Administration

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 6. The USCCB explained:

No federal law has yet been construed to require private health plans to provide coverage of contraception and sterilization. Instead, federal law has thus far left insurance issuers, employers and enrollees to negotiate such coverage in accord with their personal preferences and their moral and religious commitments. The federal government has no reason now to take away this freedom.

Id.

¹⁸ See Planned Parenthood Comments, *supra* note 13 (arguing to expand coverage of preventive services under the ACA).

¹⁹ *Id.*

²⁰ See *id.* (arguing that "[w]hile we understand the Secretary's effort to strike the right balance between coverage requirements and giving health plans and issuers some flexibility in the design of their benefit plans, we are concerned about how health plans may use this flexibility to limit coverage.").

²¹ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,622–23 (Aug. 3, 2011) [hereinafter Group Health Plans] (to be codified at 45 C.F.R. pt. 147). These services were recommended by the Institute of Medicine ("IOM"). Press Release, Nat'l Acads. of Sci., Eng'g, & Med., IOM Report Recommends Eight Additional Preventive Health Servs. to Promote Women's Health (July 19, 2011),

(“HRSA”), a sub-body of HHS, defined “preventive care and screenings” to mean “[a]ll [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”²² In the August 2011 Interim Final Rules, HHS addressed the comments received regarding the religious objection to the Mandate.²³ In what could only be viewed as an effort to combat the suggestion of the USCCB, it was clear to note that “[m]ost commenters, including some religious organizations, recommended that HRSA Guidelines include contraceptive services for all women and that this requirement be binding on all group health plans and health insurance issuers with no religious exemption.”²⁴ Nevertheless, it did agree “to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions[,]” and gave HRSA additional authority to exempt religious employers from the preventive services guidelines for contraceptive coverage.²⁵ The now famous exemption defines a religious employer as one that: “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization.”²⁶

The USCCB’s comments to this new round of Interim Final Rules reiterated much of what was contained in its comments the previous year.²⁷ It expanded on its earlier concern that the Mandate was

<http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13181>. The IOM explained:

To reduce the rate of unintended pregnancies, which accounted for almost half of pregnancies in the U.S. in 2001, the report urges that HHS consider adding the full range of Food and Drug Administration-approved contraceptive methods as well as patient education and counseling for all women with reproductive capacity. Women with unintended pregnancies are more likely to receive delayed or no prenatal care and to smoke, consume alcohol, be depressed, and experience domestic violence during pregnancy. Unintended pregnancy also increases the risk of babies being born preterm or at a low birth weight, both of which raise their chances of health and developmental problems.

Id.

²² *Women’s Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women’s Health and Well-Being*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 19, 2016). If a group health plan does not provide this care to women, the insurer is required to pay a penalty tax of \$100 per day per employee that does not receive this coverage. 26 U.S.C. §§ 4980D(a)–(b) (2012).

²³ Group Health Plans, *supra* note 21, at 46,623.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Letter from U.S. Conference of Catholic Bishops to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs. 1 (Aug. 31, 2011),

“unprecedented in federal law and more radical than any state contraceptive mandate enacted to date.”²⁸ It also argued that both the mandate and the exemption worked to discriminate against people and organizations based upon their faith.²⁹ Regarding the mandate, it stated it was “a ‘religious gerrymander’ that targets Catholicism for special disfavor *sub silentio*” and prevented insurers, employers and employees the freedom to choose whether and how to cover contraceptives and sterilization.³⁰ As the USCCB argued, the mandate would force a minority of objectors into participating in contraceptive coverage:

[T]he class that suffers under the mandate is defined precisely by their beliefs in objecting to these “services.” Moral opposition to all artificial contraception and sterilization is a minority and unpopular belief, and its virtually exclusive association with the Catholic Church is no secret. Thus, although the mandate does not expressly target Catholicism, it does so implicitly by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics—whether employees, employers, or insurers.³¹

With regard to the proposed exemption, the USCCB noted that because of the wording and to whom the exemption was intended to apply, both secular organizations with a religious or moral objection and religious organizations that do not meet the very narrow definition of “religious employer” under the language of the exemption would be forced to provide or pay for contraceptive services against the tenets of their faith.³² In more elaborate terms, the USCCB stated:

The HHS exemption, applicable nationwide, forces all church institutions with an outreach-oriented mission to provide health coverage for items that the institutions themselves hold and teach to be immoral, in violation of their institutional identity and sincerely held beliefs. The HHS exemption would penalize church organizations that engage in public ministry or service, by forbidding them to practice what they preach. This represents an unprecedented intrusion by the federal government into the precincts of religion that, if unchecked here, will support ever more expansive and corrosive intrusion in the future.³³

The criteria to qualify for the exemption was so narrow, argued the USCCB, that “Jesus and the early Christian Church would not qualify”

<http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf> (arguing that the services covered under the Mandate “are not ‘health’ services, and they do not ‘prevent’ illness or disease.”).

²⁸ *Id.* at 1–2.

²⁹ *See id.* at 8 (explaining that the Mandate takes away the religious objectors’ option of not providing coverage for contraceptives).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 18–19.

³³ *Id.* at 19.

because their ministry was not confined to those who were already members of the Church.³⁴ Finally, it noted that maintaining such a narrow view of “religious employer” would pressure religiously-affiliated institutions to drop coverage instead of violating conscience.³⁵

Not surprisingly, Planned Parenthood’s comments were in stark contrast to those of the USCCB.³⁶ It disagreed completely with the suggested exemption and even scolded HHS by stating it was “disappointed” in HHS’s decision to exempt certain employers from having to provide coverage.³⁷ It requested that HHS not allow employers or insurers to refuse to provide insurance coverage for contraceptives or, at the very least, make the refusal as narrow as possible.³⁸ Planned Parenthood’s reasoning seemed to stem from the reality that there are many individuals who work for religious employers who do not share their employers’ religious views about contraception.³⁹ It even noted that a 2010 Hart Research Survey showed “77% of Catholic women voters, support the benefit that health plans cover prescription birth control at no cost”—the implication being that HHS should follow the consciences of those that do not follow their faith instead of those that do.⁴⁰

The religious objectors’ concerns appeared to have fallen on deaf ears. A January 20, 2012 statement by Secretary Sebelius confirmed that “[w]omen will not have to forego [free access to all FDA-approved forms of contraception] because of expensive co-pays or deductibles, or

³⁴ *Id.* The USCCB further explained that “the exemption is directly at odds with the parable of the Good Samaritan, in which Jesus teaches concern and assistance for those in need, regardless of faith differences.” *Id.*

³⁵ *Id.* at 19–20 (noting that such organizations would include “social service agencies, hospitals, colleges and universities” and it would also affect the student health plans at these “religiously-affiliated colleges and universities”). It lamented that it would “not be lost upon impressionable students that their religiously-affiliated school says one thing about the moral status of contraception and sterilization but practices quite another in providing coverage for those very [few] items.” *Id.* at 20 n.36.

³⁶ See *Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control*, PLANNED PARENTHOOD (Jan. 20, 2012), <http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-hhs-ensuring-access-affordable-birth-control> (agreeing with HHS’ decision to expand coverage and not expand the “refusal provision” under the ACA).

³⁷ *Victory for Women’s Health: HHS Announces That Birth Control Will Be Covered with No Co-Pays*, PLANNED PARENTHOOD (Aug. 1, 2011), <https://www.plannedparenthood.org/planned-parenthood-northern-new-england/newsroom/press-releases/hhs-announces-birth-control-will-be-covred-no-co-pays>.

³⁸ See *Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control*, *supra* note 36 (stating that Planned Parenthood opposed the provision granting a one year waiver, specifically opposing the current provision of waiving religious employers from the requirement to provide contraception to their employees).

³⁹ See *id.* (arguing that the religious convictions of an employer should not impose on their employees’ own religious convictions about the use of contraceptives).

⁴⁰ *Id.*

because an insurance plan doesn't include contraceptive services."⁴¹ The August 2011 Interim Final Rule remained the same with the exception of one change—nonprofit employers who, based upon their religious beliefs, did not at the time provide coverage were given one year to come into compliance with the new law.⁴² She concluded:

This decision was made after very careful consideration, including the important concerns some have raised about religious liberty. I believe this proposal strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services. The administration remains fully committed to its partnerships with faith-based organizations, which promote healthy communities and serve the common good. And this final rule will have no impact on the protections that existing conscience laws and regulations give to health care providers.⁴³

Approximately twelve days later, a White House staffer attempted to summarize and clarify Secretary Sebelius's statements.⁴⁴ She reported that abortion inducing drugs, like RU486, would not be covered by the Mandate.⁴⁵ This is an important intentional falsehood. Included within the approved methods of contraception under the FDA are diaphragms, oral contraceptive pills, emergency contraceptives like Plan B and ulipristal (the morning after and week after pill) and intrauterine devices.⁴⁶ Further, the Administration once again chose the actions of Catholics not following their faith over the consistent and unchanged tenets of the faith itself as the standard by which to base its decision that no significant harm would be done by requiring that these services be covered.⁴⁷ The staffer's statement bolstered the Administration's position requiring religious employers to provide contraceptive services by citing a study by the Guttmacher Institute, a group that has been

⁴¹ Press Release, Kathleen Sebelius, Sec'y, Dep't of Health & Human Servs., A Statement by U.S. Dep't of Health & Human Servs. Sec'y Kathleen Sebelius (Jan. 20, 2012), <http://www.fiercehealthcare.com/payer/a-statement-by-u-s-department-health-and-human-services-secretary-kathleen-sebelius>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Cecilia Muñoz, *Health Reform, Preventive Servs., and Religious Insts.*, WHITE HOUSE (Feb. 1, 2012, 6:35 PM), <https://www.whitehouse.gov/blog/2012/02/01/health-reform-preventive-services-and-religious-institutions> (listing groups exempted from the mandate, such as churches, health care providers, and individuals who do not want contraception).

⁴⁵ *Id.*

⁴⁶ *Birth Control Chart*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm522453.htm> (last updated Oct. 5, 2016).

⁴⁷ Johnathan V. Last, *Obamacare vs. The Catholics: The Administration's Breach of Faith*, WEEKLY STANDARD (Feb. 13, 2012), <http://www.weeklystandard.com/obamacare-vs.-the-catholics/article/620946> (commenting that some of the abortion-inducing procedures listed by the FDA are contrary to the Catholic faith).

referred to as the research wing of Planned Parenthood,⁴⁸ which found “most women, including [ninety-eight] percent of Catholic women, have used contraception.”⁴⁹ After reiterating that religious employers not subject to the exemption would have one year to fall in line, the statement suggested this mandate was a way of working with those who held conscience-based objections—particularly Catholics—by stating:

The Obama Administration is committed to both respecting the religious beliefs and increasing access to important preventive services. And as we move forward, our strong partnerships with religious organizations will continue. The Administration has provided substantial resources to Catholic organizations over the past three years, in addition to numerous non-financial partnerships to promote healthy communities and serve the common good. This work includes partnerships with Catholic social service agencies on local responsible fatherhood programs and international anti-hunger/food assistance programs. We look forward to continuing this important work.⁵⁰

In sum, the Administration’s idea of respecting religious beliefs included affording the religious one year to come to terms with violating their conscience.

Due in no small part to the continued outcry of these non-exempt organizations, the Administration tried again.⁵¹ On March 21, 2012, HHS released the advance notice of proposed rulemaking (“March 2012 ANPR”) on preventive services.⁵² The March 2012 ANPR provided that an accommodation would be made for “non-exempt[ed], non-profit religious organizations with religious objections” to the mandate.⁵³ Rather than force objecting religious organizations to provide employees with contraceptive coverage without cost sharing, an independent plan would do so.⁵⁴ According to HHS, this “would effectively exempt the religious organization from the requirement to cover contraceptive services.”⁵⁵

The accommodation offered by HHS drew criticism from the USCCB, among others. On May 15, 2012, the USCCB specified that the accommodation would be problematic for both outside-insured and self-

⁴⁸ Carole Novielli, *How ‘Independent’ is Guttmacher from Planned Parenthood?*, LIVEACTIONNEWS (Mar. 17, 2016, 3:49 PM), <http://liveactionnews.org/how-independent-is-guttmacher-from-planned-parenthood/>.

⁴⁹ Muñoz, *supra* note 44.

⁵⁰ *Id.*

⁵¹ *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (proposed Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147) (amending the prior regulations and broadening the exemption for religious based organizations).

⁵² *Id.*

⁵³ *Id.* at 16,503.

⁵⁴ *Id.*

⁵⁵ *Id.*

insured plans.⁵⁶ As for the outside-insured plans, the USCCB argued that “[c]onscientiously-objecting non-exempt ‘religious organizations’ [would] still be required to provide plans that channel contraceptives and sterilization procedures to their employees.”⁵⁷ As such, premiums would still be used to pay for the services, resulting in no real change or accommodation at all.⁵⁸ For self-insured plans, the USCCB found the accommodation to be equally problematic as the plan itself would either serve as a source of funding for or enable access to the very services the religious employer finds religiously objectionable.⁵⁹

Over the following three years, the HHS mandate language continued through a series of alterations.⁶⁰ Despite the multiple cases filed against the mandate challenging the refusal to accommodate the religious practices and beliefs of certain for-profit organizations,⁶¹ the Administration would not budge until forced by the Supreme Court.⁶² As such, without Supreme Court rulings, employers would have had to fit into one of three categories. First, the mandate would not apply if the healthcare plan was in existence on March 23, 2010.⁶³ Second, certain types of religious employers would be excluded.⁶⁴ Third, some non-profit

⁵⁶ See Letter from U.S. Conference of Catholic Bishops to Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs. 3 (May 15, 2012), <http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf>.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

⁵⁹ *Id.* at 12–13.

⁶⁰ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified 45 C.F.R. pts. 147, 148, 156); Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified 45 C.F.R. pt. 147); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (to be codified 45 C.F.R. pt. 147) [hereinafter Final Rules].

⁶¹ Press Release, The Becket Fund, U.S. Supreme Court to Hear Landmark *Hobby Lobby* Case (Nov. 26, 2013), www.becketfund.org/scotustakeshobbylobby.

⁶² See *Hobby Lobby*, 134 S. Ct. at 2785 (holding that the contraceptive mandate violates RFRA).

⁶³ See Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under, 75 Fed. Reg. 34,538, 34,540–41 (June 17, 2010) (to be codified at 45 C.F.R. 147) (discussing current health insurance coverage and the grandfathered health plans).

⁶⁴ Group Health Plans, *supra* note 21, at 46,626. The relevant sections state:

(B) . . . a “religious employer” is an organization that meets all of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.

organizations not otherwise qualifying for any other exemption, and otherwise meeting the requirements of the mandate, would be exempted if they had religious objections to the coverage of contraceptives in their health plans.⁶⁵ Nothing in the Act or its accompanying regulations would have relieved a for-profit organization from providing these “preventive care and screenings” for women.

In light of *Burwell v. Hobby Lobby Stores, Inc.*,⁶⁶ the Administration was forced to revisit the treatment of for-profit organizations. On the heels of the decision, on August 27, 2014, the Administration released both the Proposed Rules and the Interim Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act.⁶⁷ The August 2014 Rules amended the definition of eligible organization to include closely held for-profit entities with religious objections “to providing coverage for some or all of the contraceptive services otherwise required to be covered” by the HHS Mandate.⁶⁸ In essence, the 2014 Rules extended to closely-held for-profit organizations, the very same accommodation offered to non-profit religious institutions.⁶⁹ In addition to repeating many of its arguments regarding the exemption and the accommodation, the USCCB noted that the new 2014 Rules would make matters worse for closely-held for-profit corporations who have a religious objection to covering contraception, as the *Hobby Lobby* ruling resulted in exempting them from the Mandate.⁷⁰ The 2014 Rules would subject them to the Mandate once again, this time in the form of the accommodation.⁷¹

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Id.

⁶⁵ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

⁶⁶ See 134 S. Ct. at 2785 (holding the contraceptive Mandate a violation of RFRA).

⁶⁷ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014) (to be codified 45 C.F.R. 147) (proposed rules); Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014) (to be codified 45 C.F.R. 147) (interim final rules).

⁶⁸ Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 67, at 51,121.

⁶⁹ *Id.*

⁷⁰ See Letter from U.S. Conference of Catholic Bishops to Ctrs. For Medicare & Medicaid Servs., Dep’t of Health & Human Servs. 2–4 (Oct. 8, 2014), <http://www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-proposed-rule-on-for-profits-10-8.pdf> (explaining that for-profit organizations with religious objections are exempt under RFRA and the new proposed rules would “subject them to the mandate by means of the ‘accommodation.’”).

⁷¹ *Id.*

Planned Parenthood and other organizations signed on to a letter lamenting the *Hobby Lobby* decision, but made an effort to ensure that as many religiously-affiliated employers as possible would still be forced to provide contraceptives they found to be objectionable.⁷² It argued that any for-profit entity wanting to qualify for the accommodation should prove, among other things, that all of its “equity holders” have a “shared religious purpose” and unanimously agree to operate the entity in conformity with their religious beliefs.⁷³ It then urged the Administration to require such an entity to follow a two-step process in order to receive the accommodation.⁷⁴ While one of the steps would consist of a corporation taking the required steps to assert the accommodation, the far more onerous step would mandate that each equity holder in the organization “certify—under penalty of perjury—that . . . [he or she has a] religious objection to the entity covering contraception in its employer-sponsored plan.”⁷⁵ Planned Parenthood explained that “[c]ertification from each equity holder articulating religious objection to covering contraception is necessary to ensure that any corporate action to exclude contraceptive coverage is based on the shared, sincere religious beliefs [of] all equity holders.”⁷⁶

On July 14, 2015, the Administration issued its Final Rules on Coverage of Certain Preventive Services Under the Affordable Care Act.⁷⁷ It clarified the definition of those for-profit organizations that would qualify for the accommodation.⁷⁸ The accommodation requirements with regard to the non-profit religious institutions

⁷² See Letter from Planned Parenthood Federation of America, et al., to Marilyn Tavenner, Administrator, Ctrs. for Medicare & Medicaid Servs., 2–3 (Oct. 21, 2014), <https://www.washingtonpost.com/blogs/wonkblog/files/2014/10/Womens-Health-comments.pdf> [hereinafter Letter to Tavenner] (stating that HHS would work to ensure the accommodation would only be extended to companies that meet the *Hobby Lobby* standard of closely held companies).

⁷³ *Id.* at 5. Such a requirement would effectively limit the types of qualifying companies to those that are owned by a small number of individuals. See *Help & Resources, Entities*, IRS.GOV, <https://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/entities/entities-5> (providing a definition of closely-held corporations) (last updated Jan. 1, 2016).

⁷⁴ Letter to Tavenner, *supra* note 72, at 8.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015) (to be codified at 45 C.F.R. pt. 147).

⁷⁸ *Id.* at 41,324. See also Dep’t of Health & Human Servs. Final Rule, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (to be codified at 45 C.F.R. pt. 147) (providing a four-element test, including nonprofit status, for determining which entities are religious employers).

remained unchanged.⁷⁹ Consequently, after approximately five years of proposed and interim rules, comments of interested parties and over one-hundred filed causes of action, the majority of organizations and institutions who expressed that paying for or providing contraceptive coverage would violate their sincerely held religious beliefs, would still be forced to violate their conscience. This is all the more troubling in light of a long list of companies and entities that are exempt from the Mandate for what appears to be no religious reason whatsoever.⁸⁰

One final point should be noted before continuing. While this Article addresses what seems to be a two-party fight between the Administration and Planned Parenthood on one side and the Catholic Church on the other, there are several additional faith denominations and numerous religious and non-religious alike who have supported the arguments made by the USCCB throughout this controversy.⁸¹ This Article focuses on the Catholic Church because, as has been evidenced thus far in the government press releases, notices, and rule-making procedures, the Obama Administration and Planned Parenthood specifically called the Catholic faith out by name and either intentionally misrepresented its tenets and parishioners or latched on to practices of those not following the faith.⁸² That being noted, the Catholic Church and practicing Catholics around the country and world have been appreciative of the support received from those who believe the government has neither the right nor the authority to dictate whether and how one exercises his conscience.⁸³

⁷⁹ The July 2015 Final Rules finalized the August 2014 interim final regulations objected to by the USCCB. Coverage of Certain Preventive Services Under the Affordable Care Act, *supra* note 77, at 41,318–19.

⁸⁰ Press Release, The Becket Fund, Breaking: Little Sister Gives Landmark Statement Following SCOTUS Hearing (Mar. 23, 2016), <http://www.becketfund.org/mother-lorraine-supreme-court-statement>; Matt Hadro, *Visa, Chevron, and Pepsi are Exempt from the HHS Mandate—But the Little Sisters Aren't*, CATHOLIC NEWS AGENCY (Feb. 18, 2016), <http://www.catholicnewsagency.com/news/visa-chevron-and-pepsi-are-exempt-from-the-hhs-mandate-but-not-the-little-sisters-38414> (last visited Oct. 14, 2016) (noting that one-third of Americans are exempt, including Exxon, Pepsi Bottling, Chevron, Visa, New York City, and the United States Military because their health plans are grandfathered in). *See also* 42 U.S.C. § 18011 (permitting group health plans with individuals enrolled as of March 23, 2010 to not change their plans, though subject to some code provisions).

⁸¹ *See, e.g.*, Ben Johnson, *Evangelicals Respond to Catholic Lawsuits: “We Are All Catholic Now,”* LIFESITENEWS (May 22, 2012, 4:09 PM), <https://www.lifesitenews.com/news/evangelicals-respond-to-catholic-lawsuits-we-are-all-catholic-now> (quoting Concerned Women for America president who stated in solidarity, “We are all Catholic now.”).

⁸² *See supra* notes 17, 27–40, 47–50 and accompanying text.

⁸³ *See Johnson, supra* note 81 (stating that faith-based organizations from various denominations of Christianity have condemned the HHS Mandate for its hindrance to religious liberties); *see also* Keith Fournier, *Catholic Resistance Must Be the Response to the*

II. DETERMINING SUBSTANTIAL BURDENS, DISREGARDING SINCERE BELIEFS

The first case challenging the HHS Mandate came soon after the August 2011 Interim Final Rules.⁸⁴ Belmont Abbey College sued to prevent the Administration from forcing it to provide against its conscience contraceptives contained within the government's list of preventive services.⁸⁵ Others followed suit and sought preliminary injunctions to prevent the Administration from forcing them to comply with the Mandate while the cases made their way through the courts.⁸⁶ As such, many of the cases reported in the district and circuit courts are analyses of the plaintiff's entitlement to such injunctions.⁸⁷ After the standard for obtaining a preliminary injunction⁸⁸ rendered many of the plaintiffs unsuccessful,⁸⁹ the Supreme Court's *Hobby Lobby* decision highlighted the entanglement of sincerity and substantiality that had plagued the lower courts.⁹⁰ While *Hobby Lobby* presented itself as a win for the religious employers and paved the way for the *Zubik* compromise, the *Zubik* Court implicated a growing intolerance for sincere religious

Unjust HHS Edict to Violate Conscience, CATHOLIC ONLINE (Feb. 7, 2012), <http://www.catholic.org/news/national/story.php?id=44578> (discussing the Pope Benedict XVI's recent comments on the new HHS Mandate).

⁸⁴ *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 32 (D.D.C. 2012); Press Release, The Becket Fund, Belmont Abbey Coll. Sues the Fed. Gov't Over New Obamacare Mandate (Nov. 10, 2011), <http://www.becketfund.org/belmont-abbey-college/>.

⁸⁵ *Belmont Abbey*, 878 F. Supp. at 32.

⁸⁶ *See, e.g.*, *Grace Schs. v. Burwell*, 801 F.3d 788, 824 (7th Cir. 2015) (granting plaintiff's motion for preliminary injunction), *vacated*, 136 S. Ct. 2011 (2016); *Christian & Missionary All. Found., Inc. v. Burwell*, No. 2:14-cv-580-FtM-29CM, 2015 WL 437631, *9 (M.D. Fla. Feb. 3, 2015) (granting in part and denying in part plaintiff's motion for preliminary injunction). *See generally HHS Mandate Information Central*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral> (last visited Sept. 28, 2016) (listing cases filed in response to the HHS Mandate).

⁸⁷ *See, e.g.*, *Ave Maria Univ. v. Burwell*, 63 F. Supp. 3d 1363, 1368 (M.D. Fla. 2014) (granting injunction to prevent Mandate from being enforced on the date the appellant's insurance plan year began); *Colo. Christian Univ. v. Sebelius*, 51 F. Supp. 3d 1052, 1063–64 (D. Colo. 2014) (demonstrating CCU's substantial likelihood of success on the merits of its RFRA claim).

⁸⁸ To receive a grant for a preliminary injunction, the moving party must show the following: “(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc).

⁸⁹ *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 389 (3d Cir. 2013) (holding that plaintiff failed to show a likelihood of success on the merits of its RFRA and Free Exercise Clause claims because corporations cannot exercise religion).

⁹⁰ *See Hobby Lobby*, 134 S. Ct. at 2777–78 (noting that HHS's argument improperly focuses on whether a religious claim under RFRA is reasonable rather than whether the HHS mandate is a burden on those beliefs, a “question that the federal courts have no business addressing . . .”).

beliefs as a threshold matter in Religious Freedom Restoration Act (“RFRA”) cases.⁹¹

Over eighty cases were filed in the lead up to the *Hobby Lobby* Supreme Court decision.⁹² Approximately fifty of these cases involved plaintiffs who were for-profit corporations or individuals who owned a majority interest in such organizations.⁹³ Most were denied preliminary injunctions that would have allowed the companies to avoid complying with the mandate while each respective case continued through the legal process.⁹⁴ The religions of the named plaintiffs in these cases include both Catholics and Christians of other denominations whose religious beliefs were in contradiction to the use of various contraceptives, abortifacients, and sterilization procedures.⁹⁵

Plaintiffs claimed discrimination under the First Amendment and RFRA.⁹⁶ The Tenth Circuit was the first appellate court to weigh in, affirming the district court ruling which denied Hobby Lobby Stores, Inc. a preliminary injunction because, according to the court, it could not demonstrate a substantial likelihood of success on the merits.⁹⁷ The 2013 *Hobby Lobby* decision was relied upon by the other courts in denying relief.⁹⁸ Therefore, the focus of the propriety of the lower courts’ decisions

⁹¹ In *Zubik*, the Court refused to make a finding on whether there was a substantial burden, instead remanding the case with instructions to find a compromise between religious exercise and federal contraceptive coverage requirements. *Zubik*, 136 S. Ct. at 1560. See also *Hobby Lobby*, 134 S. Ct. at 2774 (finding that Congress presumed the courts would not have trouble deciding the sincerity of asserted religious beliefs).

⁹² Press Release, The Becket Fund, U.S. Supreme Court to Hear Landmark *Hobby Lobby* Case (Nov. 26, 2013) www.becketfund.org/scotustakeshobbylobby (asserting that there were eighty-four lawsuits against the HHS Mandate).

⁹³ See, e.g., *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013) (for-profit corporation); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013) (same). See generally *HHS Mandate Information Central*, THE BECKET FUND, <http://www.becketfund.org/hhsinformationcentral#tab3> (listing lawsuits filed by for-profit entities in response to the HHS Mandate) (last visited Oct. 18, 2016).

⁹⁴ See *supra*, note 88–89 and accompanying text.

⁹⁵ See, e.g., *Eden Foods*, 2013 WL 1190001, at *2 (“[Plaintiff] asserts he cannot compartmentalize his conscience or his religious beliefs from his daily work and actions as Chairman, President, and sole shareholder of Eden Foods. Plaintiffs share a common mission of conducting their business operations with integrity and consistent with the teachings, mission, and values of the Catholic Church.”) (internal citations omitted).

⁹⁶ See, e.g., *Gilardi v. Sebelius*, 926 F. Supp. 2d 273, 276 (D.D.C. 2013) (stating that compliance with the Mandate would require violation of sincere religious beliefs); *Eden Foods*, 2013 WL 1190001, at *2 (claiming that plaintiff cannot separate his faith from his work as President of his company).

⁹⁷ See *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (holding that there was no substantial likelihood that court would extend RFRA to include conduct by third party healthcare providers as a substantial burden on plaintiff’s religious beliefs).

⁹⁸ See *supra* notes 88–89 and accompanying text.

will derive, in large part, from the Western District of Oklahoma's *Hobby Lobby* ruling.

The plaintiffs in *Hobby Lobby* were two companies (Hobby Lobby Stores, Inc. and Mardel), owned by the Green family (the "Greens").⁹⁹ The Greens sued on their own behalf and as the owners of Hobby Lobby Stores, Inc. and Mardel.¹⁰⁰ The two issues before the court were whether the preventive services provision was constitutional and not violative of the Free Exercise Clause of the First Amendment and whether the provision violated RFRA.¹⁰¹ The court addressed these issues as applied to both the corporation and the individual plaintiffs and denied the injunction sought because plaintiffs failed to prove a substantial likelihood of success on the merits.¹⁰²

With regard to the companies, the court found they "do not have constitutional free exercise rights as corporations and . . . therefore cannot show a likelihood of success as to any constitutional claims . . ." ¹⁰³ The determination under RFRA was slightly more difficult for the court as the statutory scheme's definition of person had not been thoroughly vetted by the courts.¹⁰⁴ Finding that the corporations were not persons under RFRA, the court stated:

General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters . . . which is not the province of a general business corporation.¹⁰⁵

The individual plaintiffs' claims were a more difficult determination by the court. Noting that the Greens were clearly persons within the context of both the First Amendment and RFRA, the court nevertheless found the Greens could not prove the likelihood of success on the merits of either claim with regard to the Free Exercise claim.¹⁰⁶ The Court concluded that the regulations were neutral and of general applicability,

⁹⁹ *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012).

¹⁰⁰ *Id.* at 1283.

¹⁰¹ *Id.* at 1283, 1285.

¹⁰² *Id.* at 1296.

¹⁰³ *Id.* at 1288.

¹⁰⁴ *See id.* at 1291–92 (holding that cases establishing that companies are persons who can exercise religion were limited to secular business corporations).

¹⁰⁵ *Id.* at 1291 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 1416 (1978)).

¹⁰⁶ *Id.* at 1296.

and with regard to the RFRA claim, the regulations did not pose a substantial burden on their practice of religion.¹⁰⁷

RFRA states that the government may “not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”¹⁰⁸ There is one exception to this general rule: The government must demonstrate that the burden imposed “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”¹⁰⁹

In order to establish a prima facie claim under RFRA, a plaintiff must prove “(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion.”¹¹⁰ Upon establishment of these three elements by the plaintiff, “the burden shifts to the government to demonstrate that ‘application of the burden’ to the claimant ‘is in furtherance of a compelling governmental interest’ and ‘is the least restrictive means of furthering that compelling governmental interest.’”¹¹¹ Acknowledging that the second and the third elements were not at issue in the case, the district court stressed:

[I]t is not the province of the court to tell the plaintiffs what their religious beliefs are, i.e. whether their beliefs about abortion should be understood to extend to how they run their corporations or the like, or to decide whether such beliefs are fundamental to their belief system or peripheral to it.¹¹²

Nevertheless, the court reaffirmed that “RFRA’s provisions do not apply to *any* burden on religious exercise, but rather to a ‘substantial’ burden on that exercise.”¹¹³ It then went on to define “‘substantial burden’ on religious exercise” as “one that bears in some relatively direct manner on” that exercise, that in some circumstances, it may “be based on compulsion that is indirect,” but that “the degree to which the challenged government action operates directly and primarily on the individual’s religious exercise is a significant factor to be evaluated in determining whether a ‘substantial burden’ is present.”¹¹⁴

Having set forth what appears to be a fair and thorough analytical framework for determining substantial burdens on the exercise of religion, and having just determined that corporations lack standing to

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. § 2000bb-1(a) (2012).

¹⁰⁹ *Id.* at § 2000bb-1(b).

¹¹⁰ *Hobby Lobby*, 870 F. Supp. 2d at 1292 (quoting *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001)).

¹¹¹ *Id.* (quoting *Kikumura*, 242 F.3d at 961–62).

¹¹² *Id.* at 1293.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1294.

complain about the regulations, the court then foreclosed the Greens from ever succeeding on an individual basis by reassigning the burden to the very corporations it had just discarded.¹¹⁵ In essence, the court found the Greens lacked the ability to satisfy the “directness” requirement because the regulation did not mandate that they, as individuals, do anything at all:

The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners. Further, the particular “burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby’s] plan, subsidize *someone else’s* participation in an activity that is condemned by plaintiff’s religion.” Such an indirect and attenuated relationship appears unlikely to establish the necessary “substantial burden.”¹¹⁶

To further explain the substantiality requirement as it applied to cases like *Hobby Lobby*, the court noted: “[W]hen 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.”¹¹⁷

On appeal, the Tenth Circuit, sitting en banc, reversed the district court’s ruling that the HHS Mandate did not pose a substantial burden on the Green’s exercise of religion under RFRA.¹¹⁸ The court discussed the connection between one’s sincerely held religious beliefs and whether complying with the government’s order would create a substantial burden on the exercise of those beliefs.¹¹⁹ It disagreed with the Administration’s proposition that “one does not have a RFRA claim if the act of [the] alleged government coercion somehow depends on the independent actions of third parties,” and instead found:

This position is fundamentally flawed because it advances an understanding of “substantial burden” that presumes “substantial” requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs. In isolation, the term “substantial burden” could encompass either definition, but for the reasons

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting *O’Brien v. U.S. Dep’t of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012)) (citations omitted).

¹¹⁷ *Id.* at 1295. The court went on to state that “Hobby Lobby and Mardel employ over 13,500 people and ‘welcome[] employees of all faiths or no faith.’ Many of those employees are likely to have different religious views. Moreover, the employees’ rights being affected are of constitutional dimension—related to matters of procreation, marriage, contraception, and abortion.” at 1296 (citations omitted).

¹¹⁸ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1121–22 (10th Cir. 2013) (en banc).

¹¹⁹ *Id.* at 1137.

explained below, the latter interpretation prevails. Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.¹²⁰

According to the court, "the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs."¹²¹ The court continued that it had no reason to question the sincerity of Hobby Lobby and Mardel's religious beliefs.¹²² It then found that because the Mandate placed "substantial pressure" on them to violate their sincere religious beliefs, their exercise of religion was substantially burdened under RFRA.¹²³ The Administration appealed.¹²⁴

The *Hobby Lobby* decision at the Supreme Court level highlights the tension between the differing ideological approaches to how the entanglement of sincerity and substantiality is to be adjudicated. While both the majority and the dissent appear to agree on the framework for analyzing such claims,¹²⁵ not only do they differ greatly on the appropriate result of such analysis, but both suggest the other has not used the agreed upon framework correctly.¹²⁶ The issue statements of the majority and the dissent are clear indications of this difference. Writing for the majority, Justice Alito framed the issue as whether RFRA permits HHS to "demand that . . . closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."¹²⁷ Justice Ginsburg, writing for the dissent, believed the ruling of the Court to be based entirely—and erroneously—on the determination that the

¹²⁰ *Id.*

¹²¹ *Id.* at 1139 (citing *United States v. Lee*, 455 U.S. 252, 256–57 (1982)).

¹²² *Id.* at 1140, 1140 n.15 (reasoning that the belief "that life begins at conception" and the idea of "[m]oral culpability for enabling a third party's supposedly immoral act" are assertions "familiar in modern religious discourse.").

¹²³ *Id.* (stating that the corporations would incur a \$100 fine per day per employee whose plan does not cover the required contraceptives).

¹²⁴ Petition for Writ of Certiorari, *Sebelius v. Hobby Lobby Stores, Inc.*, 2013 WL 5290575 (2013) (No. 13-354).

¹²⁵ See *Hobby Lobby*, 134 S. Ct. at 2767 (stating that RFRA protects persons from government action that substantially burdens their free exercise of religion unless the government can show that its action is the least burdensome way to promote a compelling government interest); *accord id.* at 2793 (Ginsburg, J., dissenting).

¹²⁶ Compare *id.* at 2759–60 (majority opinion) (holding that RFRA protects religiously dissenting for-profit corporations from the HHS Mandate), with *id.* at 2793 (Ginsburg, J., dissenting) (averring that the majority erred in assuming that corporations were persons).

¹²⁷ *Id.* at 2759 (majority opinion). The majority takes more effort to describe the plaintiffs and their circumstances, conveying a more sympathetic view than the dissent. But see *id.* at 2793 (Ginsburg, J., dissenting) (describing plaintiffs only as "for-profit corporations").

companies' religious beliefs were sincerely held. Justice Ginsburg wrote, "[i]n a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."¹²⁸ The importance placed upon the question of sincerity by each opinion is representative of the respect afforded to the religious belief, and, in turn, whether the burden placed upon the corporation would be justifiably substantial. Justice Alito uses sincerity as a starting point, Justice Ginsburg uses it as an end point.

The contrast between the framing of the issue statements required both the majority and the dissent to explain their respective understandings of substantiality and how it operates within the RFRA analysis.¹²⁹ Despite a spirited and somewhat scathing disagreement with the majority's determination that the petitioners were, in fact, "persons" within the meaning of RFRA and were therefore able to hold sincere religious beliefs,¹³⁰ the dissent launched a two-fold attack upon its substantial burden analysis. Justice Ginsburg explicitly stated she "agree[d] with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held."¹³¹ However, with

¹²⁸ *Id.* at 2787 (Ginsburg, J., dissenting).

¹²⁹ *See id.* at 2775–77 (majority opinion) (holding that the monetary penalties for non-compliance with the mandate constituted a substantial burden on the companies' exercise of religion); *see also id.* at 2797–99 (Ginsburg, J., dissenting) (arguing that the attenuated connection between the plaintiffs' sincerely held beliefs and the HHS mandate extends RFRA's substantial burden analysis beyond Congress' original intent).

¹³⁰ *Id.* at 2768. The majority and dissent disagreed regarding whether a for-profit corporation could sincerely hold a religious belief. Justice Alito noted the erroneous nature of HHS's "conten[tion] that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation." *Id.* at 2774. While it may be more difficult to invoke a religious identity upon a large, publicly traded corporation, the entities before the Court were closely held corporations whose disputes, even if based upon a difference of opinion regarding religious doctrine, could be determined by the applicable state corporate law. *Id.* at 2774–75. Justice Alito offered an example of a potential religious dispute—one where the owners of a company might differ as to whether to close the store on the Sabbath. State corporate laws, he wrote, provide a ready means for resolving such conflicts. *Id.* at 2775. The dissent, however, believed a for-profit corporation should not be considered a "person" and therefore could not be capable of exercising religion. *Id.* at 2794–97 (Ginsburg, J., dissenting). Justice Ginsburg wrote that while "religious organizations exist to foster the interests of persons subscribing to the same religious faith" and "exist to serve a community of believers, for-profit corporations do neither." *Id.* at 2795–96. Furthermore, according to Justice Ginsburg, allowing for-profit corporations to mount successful RFRA claims will have an exponentially deleterious effect on the validity of the process itself, which will "invite[] for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith." *Id.* at 2797.

¹³¹ *Id.* at 2798 (Ginsburg, J., dissenting). In contrast, Justice Alito stated the following:

regard to whether the HHS Mandate placed a substantial burden upon the exercise of that sincerely held religious belief, Justice Ginsburg argued that (1) the majority had not engaged in the proper analysis to determine the issue, and (2) if it had, it should have determined that the Mandate was not a substantial burden.¹³²

Turning to her first observation, Justice Ginsburg argued that the Court based its finding of a substantial burden almost entirely on the Greens' and the Hahns' belief that providing coverage for the stated contraceptives was immoral.¹³³ This, she continued, was an improper analysis because:

[T]hose beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that plaintiffs' beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that plaintiffs' religious exercise is substantially burdened," an inquiry the court must undertake.¹³⁴

Determining that the Court had not undertaken the necessary inquiry in the present case, Justice Ginsburg concluded the "decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."¹³⁵

Finding the Court's majority opinion lacking in any substantial burden analysis, Justice Ginsburg then explained how she would have ruled on the issue. She found "the connection between the families' religious objections and the contraceptive coverage requirement [] too attenuated to rank as substantial. The requirement carri[ed] no command that [the companies] purchase or provide the contraceptives they find objectionable."¹³⁶ The company subject to the Mandate is required only to "direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans," and the

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

Id. at 2775 (majority opinion) (internal citations omitted).

¹³² *Id.* at 2799 (Ginsburg, J., dissenting).

¹³³ *See id.* at 2798 (claiming the majority relied heavily on the corporation owners' sincere religious belief that providing contraceptive coverage would mean engaging in the destruction of embryos, while barely considering whether the HHS Mandate was substantially burdensome).

¹³⁴ *Id.* (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)) (first alteration added).

¹³⁵ *Id.* at 2799.

¹³⁶ *Id.*

decision as to whether to use the contraceptives in question is made by the employee.¹³⁷ Therefore, it seems the employer need not be offended by whether those services are used, how they are used, or how often their plans are paying for services they find morally questionable. Inherent within that analysis is the implicit determination that the belief—although sincere—is just not important enough to protect. Justice Ginsburg’s suggestion, on its face, demonstrates her view that she is in a position to tell people whether and to what extent they should accept a faith teaching. In other words, paying for someone else’s contraception should not be a burden—let alone a substantial one—because believing contraception is immoral is just plain silly. As such, she alone gets to determine whether violating one’s faith is acceptable or not.

Not surprisingly, Justice Ginsburg’s characterization of the majority opinion is inaccurate. While Justice Alito connected the substantial burden suffered by the Hahns and the Greens to their stated sincerely held religious beliefs, the Court found a substantial burden based on the economic consequences at stake:

It is true that the plaintiffs could avoid . . . assessments by dropping insurance coverage altogether and thus forc[e] their employees to obtain health insurance on one of the exchanges established under [the] ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges . . . [the] penalties would amount to roughly \$26 million for Hobby Lobby, \$1.8 million for Conestoga, and \$800,000 for Mardel.¹³⁸

In analyzing the arguments made by HHS and adopted by the dissent, Justice Alito acknowledged that the want of connection between “provid[ing] health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg” and the eventual “destruction of an embryo” was based less on a genuine concern regarding the so-called attenuated circumstance and more so on the lack of buy-in that this type of sincere religious belief could be reasonable.¹³⁹ Rather than engage in a substantial burden analysis, “the principal dissent in effect [told] the plaintiffs that their beliefs [were] flawed.”¹⁴⁰

¹³⁷ *Id.*

¹³⁸ *Id.* at 2775–76 (majority opinion).

¹³⁹ *Id.* at 2776.

¹⁴⁰ *Id.* at 2778. As an example of the Court’s long-standing tradition of avoiding reasonableness inquiries, Justice Alito explained the Court’s decision in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). *Burwell*, 134 S. Ct. at 2778. In *Thomas*, a Jehovah’s Witness who objected on religious grounds to participating in the manufacture of turrets for tanks was fired. *Thomas*, 450 U.S. at 710. While he had previously worked for the company making sheet steel for a variety of industrial uses, he believed helping to manufacture steel used to make weapons was fundamentally different

Justice Alito affirmed that it was not for the Court “to say that [a] religious belief[] [is] mistaken or insubstantial.”¹⁴¹ Instead, the Court was faced with the “narrow function” of determining whether that belief is sincere.¹⁴² As such, the substantial burden requirement to any RFRA claim cannot be used by the Court as a backdoor attempt to judge the sincerity of one’s religious belief.¹⁴³

Approximately two years after the *Hobby Lobby* decision, the Supreme Court decided *Zubik v. Burwell*.¹⁴⁴ It was a short decision vacating the decisions of the lower courts in light of the supplemental briefs submitted by the parties agreeing to work out a compromise.¹⁴⁵ The Court had requested the parties brief whether contraceptive coverage could be provided to employees through the existing insurance company without notice from the employers.¹⁴⁶ Both parties agreed this would be feasible.¹⁴⁷ Content with the compromise, the Court stated that it expressed no view as to the merits of the case, particularly “whether [the employers’] religious exercises ha[d] been substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [were] the least restrictive means of serving that interest.”¹⁴⁸

from helping to make the weapons themselves. *Id.* Affirming the worker’s right to exercise that belief, the Court found it was “not for us to say that the line he drew was an unreasonable one.” *Id.* at 715.

¹⁴¹ *Burwell*, 134 S. Ct. at 2779.

¹⁴² *Id.* (“[O]ur ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’” (quoting *Thomas*, 450 U.S. at 716)).

¹⁴³ The unspoken determination that the Hahns’ and Greens’ religious belief is flawed is evident in other areas of HHS’s arguments. In explaining why the mandate was not the least restrictive means of achieving the government’s interest, Justice Alito suggested that HHS would never, on its own, accept its standards as being too burdensome under any scenario:

It is HHS’s apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS’s view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

Id. at 2783.

¹⁴⁴ 136 S. Ct. at 1560.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1559–60.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1560.

Despite what appeared to be a unanimous decision deciding nothing, Justice Sotomayor felt compelled to write a separate concurring opinion in which Justice Ginsburg joined.¹⁴⁹ In it, she made very clear that:

The opinion does not . . . endorse the [employers'] position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through a "separate policy with a separate enrollment process." Such separate contraceptive-only policies do not currently exist, and the Government has laid out a number of legal and practical obstacles to their creation. Requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would "impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate."¹⁵⁰

In other words, Justice Sotomayor was not in agreement with the compromise and would rather have denied the employers the ability to exercise their conscience. Because the Court is currently riding a 4-4 split on these issues,¹⁵¹ Justice Sotomayor cut her losses and decided that it would be best to fight this fight if and when she has more ammunition.

The accuracy of the Court's substantial burden analysis has been the subject of particular discussion since the *Hobby Lobby* decision was released.¹⁵² It has been argued that Justice Alito attacked the

¹⁴⁹ *Id.* at 1561 (Sotomayor, J., concurring).

¹⁵⁰ *Id.* (internal citations omitted).

¹⁵¹ Adam Liptak, *Justices, Seeking Compromise, Return Contraception Case to Lower Courts*, N.Y. TIMES (May 16, 2016), http://www.nytimes.com/2016/05/17/us/supreme-court-contraception-religious-groups.html?_r=0.

¹⁵² See Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2014 CATO SUP. CT. REV. 35, 46 (2014) (asserting that the Court in *Hobby Lobby* should have focused on the cost of compliance with the burden under RFRA, not on the cost of noncompliance); Michael A. Helfand, *Identifying Substantial Burdens*, 85 GEO. WASH. L. REV. (forthcoming 2017) (manuscript at 5), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728952 (discussing the substantial burden arguments being made by non-profit organizations even after the ruling in *Hobby Lobby*, and that closely held for-profit organizations are making the substantial burden argument as well); Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. (forthcoming Jan. 2017) (manuscript at 5-7, 9) (arguing that the Court's RFRA analysis improperly precludes inquiry into whether the challenged action substantially burdens the claimant's religious exercise); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 177-78 (2015) (discussing the mistakes of *Hobby Lobby* case and the application of strict scrutiny).

substantial burden problem from the wrong position.¹⁵³ Justice Alito found the cost of noncompliance, which would manifest itself in steep monetary fines, to be a substantial burden. Others have argued that the correct analysis does not focus on the cost of noncompliance but, instead, on the cost of compliance.¹⁵⁴ This would be consistent with the Tenth Circuit's reasoning that the focus is "on the coercion the claimant feels to violate his beliefs."¹⁵⁵ Noncompliance does not require a compromise in beliefs. It may cost something steep, but it does not leave the claimant feeling as though he has betrayed his faith. Compliance, on the other hand, does just that.

These criticisms are important points to be proffered and considered in future RFRA cases where the substantial burden analysis is necessary. However, determining which way to analyze the burden does not address the problem that there are a growing number of lawmakers and judicial officers who appear to believe they have the ability to determine a burden is not substantial because they don't agree with the complainant's sincere religious belief.¹⁵⁶ It is the very fact that the sincere belief is considered insignificant that gives them the ability to find no substantial burden exists. The substantial burden question must be divorced from the issue of whether a sincere religious belief exists. The following sections explore why that may not be likely to happen again.

III. THE ENTANGLEMENT OF SINCERITY AND SUBSTANTIALITY—THE NEED TO RESPECT CONSCIENCE AND WHY IT MAY SEEM SILLY

One could argue that the substantiality of the burden on the exercise of religion is tied to, and possibly dependent upon, the sincerity of the plaintiff's beliefs with regard to that religion or religious practice. "The test has never required claimants to prove their religious beliefs are true, only that they are religious in nature and sincerely held."¹⁵⁷ Furthermore, judges are not to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants'

¹⁵³ See Epstein, *supra* note 152, at 46 (asserting the need for courts to weigh the burden of compliance with noncompliance, in addition to the purpose served by the regulation).

¹⁵⁴ *Id.*

¹⁵⁵ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1139 (10th Cir. 2013).

¹⁵⁶ See *supra* Part II.

¹⁵⁷ Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 108 (2008).

interpretations of [a particular denomination's] creeds.”¹⁵⁸ The plaintiff must, however, demonstrate that the beliefs are in fact sincere.¹⁵⁹

In *Hobby Lobby*, *Zubik*, and the other Mandate cases, the opinion writers were careful to note that it was not a question of the sincerity of the plaintiffs' beliefs.¹⁶⁰ This was not the case with the lower court decisions in these cases.¹⁶¹ In *Hobby Lobby*, for instance, the district court found that the HHS mandate did not substantially burden the Greens' religious exercise.¹⁶² In doing so, it made a value judgment on the sincerity of the plaintiffs' beliefs. That the district court found against the Greens, especially in light of the fact that these beliefs and practices are centuries-old, well-documented tenets and principles of the Catholic and Christian faiths,¹⁶³ speaks volumes about the importance of religion in everyday life and the value that secular society, and even those that claim to be religious, place on the practice of their respective faiths.

One could posit any number of reasons why a judge might believe that forcing an organization to provide birth control and abortifacients against its faith would not substantially burden the exercise of one's religious beliefs. What appears to be happening with greater frequency is that certain members of the courts have based their determination of a lack of substantiality on their conclusions that plaintiffs lack sincerity with regard to their beliefs.¹⁶⁴ While this is not a stated reason, and it may not even be a conscious determination on the part of those reviewing these claims, a lack of clarity as to the sincerity of the Catholic-Christian belief regarding contraceptives, abortifacients, and even abortion, has led to this misapplication of the substantiality

¹⁵⁸ *Id.* (alteration in original).

¹⁵⁹ *See, e.g.*, *Sample v. Lappin*, 479 F. Supp. 2d 120, 124 (D.D.C. 2007) (finding the plaintiff's evidence sufficient because the prisoner had a sincere religious belief that a denial of his request for wine during certain prayers and observances, contrary to his Jewish faith, violated RFRA); *United States v. Quaintance*, 608 F.3d 717, 722, 724 (10th Cir. 2010) (determining that the evidence was insufficient to establish that the defendants had a sincere religious belief that marijuana was a deity and sacrament and that therefore, their prosecution for conspiracy and possession with intent to distribute marijuana was not a violation of RFRA).

¹⁶⁰ *See, e.g.*, *Zubik*, 136 S. Ct. at 1557, 1560 (holding that the Court's decision did not extend to considering the sincerity of the petitioners' belief); *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751, 2774 (explaining that sincerity of respondent's beliefs was not a factor because it was not in dispute).

¹⁶¹ *See, e.g.*, *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 441–42 (3d Cir. 2015); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293–96 (W.D. Okla. 2012).

¹⁶² *Hobby Lobby*, 870 F. Supp. 2d at 1296.

¹⁶³ *The Pill*, PUB. BROAD. SERV., http://www.pbs.org/wgbh/amex/pill/peopleevets/e_church.html (last visited Sept. 21, 2016).

¹⁶⁴ *Sample*, 479 F. Supp. 2d at 123.

requirement. To demonstrate this confusion, one only need look to the inconsistencies between the time-honored traditions and teachings of the Catholic Church and the actions of many popular, high-ranking politicians and influential celebrities. The more numerous than acceptable examples of the latter group's misunderstanding and misrepresentation of the Catholic faith is present and readily available.¹⁶⁵ What has become perpetual access to consistent misinformation has, in turn, led to almost justifiable doubt on the part of the judiciary with regard to whether one's sincere beliefs are worthy of legal protection.

However, while the judicial branch is charged with objectivity and impartiality in its decisionmaking, it would be naïve to assume that its opinions were based purely on a blind ignorance of faith principles. The truth is easily attainable. Whether one wants to attain it is an entirely different question.

The Catechism of the Catholic Church is unwavering on the issue of abortion and contraception. With regard to abortion, the Catechism provides that “[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.”¹⁶⁶ Further, it states that “the Church has affirmed the moral evil of every procured abortion” since the first century, and that abortion, “willed either as an ends or a means, is gravely contrary to the moral law.”¹⁶⁷ The penalty attached to formal cooperation in an abortion—a “grave offense” and a “crime against human life”—is excommunication.¹⁶⁸ The Catechism makes clear that “[t]he inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation . . .”¹⁶⁹ Finally, it emphasizes the vital duty to protect unborn life as fully human life: “[s]ince it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.”¹⁷⁰

On matters of contraception, the Catechism states: “[E]very action which, whether in anticipation of the conjugal act, or in its

¹⁶⁵ See *infra* notes 174–211 and accompanying text.

¹⁶⁶ LIBERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH § 2270, at 547 (2d ed. 2016).

¹⁶⁷ *Id.* at § 2271, at 547–48.

¹⁶⁸ *Id.* at § 2272, at 548. “The Church does not thereby intend to restrict the scope of mercy. Rather, she makes clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well as to the parents and the whole of society.” *Id.*

¹⁶⁹ *Id.* at § 2273, at 548 (emphasis omitted).

¹⁷⁰ *Id.* at § 2274, at 549.

accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible' is intrinsically evil[.]”¹⁷¹ Furthermore, “[t]he regulation of births represents one of the aspects of responsible fatherhood and motherhood. Legitimate intentions on the part of the spouses do not justify recourse to morally unacceptable means (for example, direct sterilization or contraception).”¹⁷²

Despite the clear, specific teachings of the Catholic Church, some very prominent Catholics promote a different message. One need only to look to the latest two presidential election cycles to see multiple examples of inconsistency between Catholic teaching and Catholic behavior. On September 5, 2012, Sister Simone Campbell was a featured speaker at the Democratic National Convention.¹⁷³ Sister Simone is the organizer of the “Nuns on the Bus” tour that was developed to protest the federal budget proposal by Paul Ryan.¹⁷⁴ Speaking specifically about the Affordable Care Act, Sister Simone stated that “[w]e all share responsibility to ensure that this vital health care reform law is properly implemented and that all governors expand Medicaid coverage so no more [women] die from lack of care. This is part of my pro-life stance and the right thing to do.”¹⁷⁵ Despite touting her pro-life stance, Sister Simone mentioned nothing about the HHS mandate or how, as proposed at the time of her speech, it would require religious institutions to provide birth control and abortifacients. She did not mention anything about abortion, which the Democratic Party endorsed in its platform earlier in the week. And, she made no note of the fact that pro-life democrats had a right to be acknowledged in the party platform (the Party refused to expand the platform to acknowledge Democrats for Life in America). Recently, at the 2016 Democratic National Convention, Sister Simone suggested abortion is sometimes the right choice but, again, made no mention of the Catholic Church’s teaching on the act.¹⁷⁶

The 2012 vice-presidential candidates had their share of misrepresentative moments during the campaign as well. Both republican Paul Ryan and democrat Joe Biden publicly acknowledge the

¹⁷¹ *Id.* at § 2370, at 570.

¹⁷² *Id.* at § 2399, at 576.

¹⁷³ *See*, Interview with Sister Simone, Democratic Nat’l Convention, in Phila., Pa. (July 29, 2016), http://www.democracynow.org/2016/7/29/nuns_on_the_bus_at_the.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; Interview with Sister Simone, Exec. Dir., Roman Catholic Soc. Justice Org., Nuns on the Bus at the DNC: Sister Simone Campbell on Abortion Rights, Wealth Gap, Kaine in Honduras (July, 29, 2016), http://www.democracynow.org/2016/7/29/nuns_on_the_bus_at_the.

¹⁷⁶ *See*, Interview with Sister Simone, *supra* note 173.

importance of and adherence to their Catholic faith in not only their personal lives but also in their political decision-making.¹⁷⁷ Neither, however, accurately conveyed Church teaching on the subject of abortion and contraception.

In the vice-presidential debate and on the campaign trail, Paul Ryan stated that as a Catholic he believes in life as a principle and that life begins at conception.¹⁷⁸ However, at that same debate, he acknowledged that he signed on to a presidential ticket with a candidate and political ideology inconsistent with Catholic teaching.¹⁷⁹ When pressured on the inconsistency between the principle of life and the ticket's platform on abortion, he had no answer other than to reiterate what would be the policy of the Romney Administration.¹⁸⁰ It was, to say the least, a rather squirm-worthy moment for Ryan.

One week before the general election, Vice President Joe Biden said the following in a campaign ad targeting Catholic voters:

As a practicing Catholic like many of you, I was raised in a household where there was absolutely no distinction between the values my mom and dad drilled into us and what I learned from the nuns and priests who educated me. We call it Catholic social doctrine: "Whatever you do to the least of these, you do for me."¹⁸¹

He said that President Obama "shares those values."¹⁸² But the Vice President said nothing about the HHS mandate and the fact that it, at the time of the ad, required Catholic institutions to fund contraceptives and abortifacients. He said nothing about his "abortion on demand" political stance and voting record. At the end of the ad, the Vice-President alerted viewers to a campaign website which was created to demonstrate the President's allegiance with the Catholic voice and voter.¹⁸³ Not only was the ad inconsistent with the Vice-President's interpretation of Catholicism, his misrepresentation of Catholic doctrine was so egregious that the bishop of Colorado Springs called for Biden to not receive Communion in the Catholic Church.¹⁸⁴ Biden has since been

¹⁷⁷ Deborah Charles, *Catholics Ryan, Biden Disagree Over Abortion Rights*, REUTERS (Oct. 12, 2012, 9:04 AM), <http://news.trust.org/item/20121012052500-h3esg>.

¹⁷⁸ *October 11, 2012 Debate Transcript*, COMM'N ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=october-11-2012-the-biden-romney-vice-presidential-debate> (last visited Oct. 22, 2016).

¹⁷⁹ See *supra* notes 166–72 and accompanying text.

¹⁸⁰ See *October 11, 2012 Debate Transcript*, *supra* note 178.

¹⁸¹ BarackObama.com, *Vice President Joe Biden: Catholics for Obama*, at 0:00–00:18, YOUTUBE (Oct. 29, 2012), <https://www.youtube.com/watch?v=qP5H64VYBpc>.

¹⁸² *Id.* at 00:18–00:22.

¹⁸³ *Id.* at 1:56–2:18.

¹⁸⁴ R. Cort Kirkwood, *Bishop to Biden: No Communion in Colorado Springs Diocese*, NEW AM. (Oct. 15, 2012), <http://www.thenewamerican.com/culture/faith-and-morals/item/13207-bishop-to-biden-no-communion-in-colorado-springs-diocese>.

prohibited from speaking in Catholic schools or receiving Communion in both the Dioceses of Colorado Springs and Wilmington.¹⁸⁵

In February 2012, Secretary Sebelius, who identifies as Catholic, testified before the House Energy and Commerce Committee.¹⁸⁶ While explaining the HHS Mandate, Secretary Sebelius stated that “[t]he reduction in a number of pregnancies compensates for the cost of contraception.”¹⁸⁷ So, to interpret that testimony, by not having as many babies born, health care costs would go down. In other words, it is cheaper to pay for contraception and abortifacients than to pay healthcare costs for babies and, as they age, adults.¹⁸⁸

Tim Kaine, the 2016 Democratic vice-presidential nominee and a Catholic, has stated that he personally opposes abortion but supports it politically.¹⁸⁹ He did not indicate any conflict with his role as Hillary Clinton’s running mate.

Probably the most injurious display of the misapplication of the Catholic faith by a “practicing Catholic” is Melinda Gates and her quest to provide birth control to the world. In July of 2012, Gates launched a 4.6 billion dollar initiative to provide contraceptives and “family planning services” to women around the world.¹⁹⁰ Gates, who is Catholic, has said that this initiative is consistent with her commitment to

¹⁸⁵ *Id.*; Brian Lilley, *You Gotta Have Faith: Joe Biden’s Nomination as Barack Obama’s Running Mate Casts a Shadow Over the Democrat’s Campaign*, MERCATORNET (Aug. 27, 2008), http://www.mercatornet.com/articles/view/you_gotta_have_faith/3664.

¹⁸⁶ U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/asl/testify/2012/testimony.html#February> (last visited Oct. 24, 2015); Julia Duin, *Sebelius in Trouble with Catholic Church*, WASH. TIMES (Mar. 24, 2009), <http://www.washingtontimes.com/news/2009/mar/24/catholic-church-to-pressure-hhs-nominee-on-abortion/>.

¹⁸⁷ Andrew Bair, *Sebelius: Fewer Babies Born Will Save Health Care Costs*, LIFENEWS.COM (Mar. 1, 2012, 8:04 PM), <http://www.lifenews.com/2012/03/01/sebelius-fewer-babies-born-will-save-health-care-costs/>.

¹⁸⁸ Sarah Ditung, *Contraception Is Cheap Compared to the Cost of an Unplanned Pregnancy*, GUARDIAN (Sept. 11, 2012, 2:08 PM), <http://www.businessinsider.com/contraception-is-cheap-compared-to-the-cost-of-an-unplanned-pregnancy-2012-9>. This is troubling because “[a]s a means of cutting costs under [the Affordable Care Act], the Secretary of HHS has the authority to mandate coverage of anything he or she adds to a ‘preventive services’ list.” Contraception has been added to the list. Bair, *supra* note 187. Thus, “[b]ecause the list is fluid and left solely to the whim of the Administration,” abortion could ostensibly be added—forcing employers to pay for abortions as well. *Id.* How that squares with the Hyde Amendment is yet to be determined. See generally Hyde Amendment, Pub. L. No. 103–112, § 509, 107 Stat. 1082, 1113 (1993) (prohibiting federally funded abortion in cases other than incest, rape, or when it is necessary to save the mother’s life).

¹⁸⁹ Tim Kaine, *a Catholic VP? Bishops Voice Their Concern*, CATHOLIC NEWS AGENCY (July 26, 2016, 4:36 PM), <http://www.catholicnewsagency.com/news/tim-kaine-a-catholic-vp-bishops-voice-their-concerns-76280/>.

¹⁹⁰ Joanna Moorhead, *Melinda Gates Challenges Vatican by Vowing to Improve Contraception*, at 00:03, GUARDIAN (July 11, 2012, 7:59 PM), <https://www.theguardian.com/world/2012/jul/11/melinda-gates-challenges-vatican-contraception>.

Catholicism and that she hopes her efforts will change the Catholic Church's stance on contraception, and inevitably on abortion.¹⁹¹ She also noted that she believes her initiative is consistent with Catholic Social Justice teaching, stating, "What I am trying to emphasize is the social justice piece of our mission, and that's really where my roots come from."¹⁹² When asked about the controversy among Catholics, she replied that "I believe in not letting women die. To me, that's more important than arguing about [the proper] method of contraceptive. So, yes I wrestle with it."¹⁹³ She said that she and her husband had originally focused on family planning when the Gates Foundation was first established eighteen years prior.¹⁹⁴ However, after learning that childhood mortality was the primary issue and that women would need to be sure their children would survive childhood before choosing to have fewer children, they shifted their priority to providing vaccines.¹⁹⁵ She noted, however, that once she and her husband saw "that was happening, [they] could take family planning back on."¹⁹⁶

The focus was on sub-Saharan Africa and South Asia where infant mortality rates are high and contraception use is low:

Africa's the one place really in the world, for the most part, that contraceptives haven't been available and it's really been a crime. . . .

If you see what's happened in other countries that have had contraceptives, they use them first of all and the birth rates go down.

The question is could it have come down even more quickly?¹⁹⁷

Gates has claimed: "This [initiative] will be my lifetime's work at the foundation."¹⁹⁸

Reading this misrepresentation of the Catholic faith could render one speechless. Obianuju Ekeocha, Nigerian biomedical scientist and practicing Catholic who has been living and working in Canterbury, England for years, provides insight into the ignorance of Gates's statements and mission.¹⁹⁹ Dr. Ekeocha wrote, in an open letter to Gates:

Growing up in a remote town in Africa, I have always known that a new life is welcomed with much mirth and joy. In fact we have a

¹⁹¹ *Id.* at 4:32–4:44.

¹⁹² *Id.* at 2:34–2:50.

¹⁹³ *Id.* at 3:29–3:47.

¹⁹⁴ *Id.* (accompanying article).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Stephanie Smith, *Melinda Gates Responds to Contraception Program Controversy*, CNN (July 6, 2012, 5:33 PM), <http://www.cnn.com/2012/07/06/health/melinda-gates-contraception/>.

¹⁹⁸ *Id.*

¹⁹⁹ Obianuju Ekeocha, *Nigerian Woman Writes to Melinda Gates: We Don't Need Your Contraception*, CATHOLIC ONLINE (Aug. 20, 2012), <http://www.catholic.org/news/national/story.php?id=47264>.

special “clarion” call (or song) in our village reserved for births and another special one for marriages.

The first day of every baby’s life is celebrated by the entire village with dancing (real dancing!) and clapping and singing—a sort of “Gloria in excelsis Deo.”

All I can say with certainty is that we, as a society, LOVE and welcome babies.

With all the challenges and difficulties of Africa, people complain and lament their problems openly. I have grown up in this environment and I have heard women (just as much as men) complain about all sorts of things. But I have NEVER heard a woman complain about her baby (born or unborn).²⁰⁰

The culture has changed dramatically over the last generation. The mixed messages from self-proclaimed “practicing Catholics” are echoed by many within the Church who believe they are “practicing” their faith in an appropriate manner as well.²⁰¹ There is no doubt that continued misrepresentation has had a detrimental effect on what people believe sound Church doctrine to be.

A recent American Values Survey sheds light on the deep cultural schism that exists with regard to what people inside and outside of the Catholic Church know about the principles of the Catholic faith.²⁰² According to the survey, 60% of Catholics identify mainly as “social justice” Catholics while 31% of Catholics identify mainly as “right to life” Catholics.²⁰³ Among Catholics who attend church weekly, 51% believe the church should focus more on social justice and helping the poor, while only 36% believe the church should focus more on abortion and right to life issues.²⁰⁴ When choosing a candidate for political office, social justice Catholics were more likely to vote for a candidate with a pro-abortion record and platform (60% vs. 37%); Right to life Catholics were more likely to vote for a candidate with a pro-life record and platform (67% vs. 27%).²⁰⁵ On the influence of Church teaching, 81% of Catholics feel that dissent from Church teaching on sex, contraception and reproduction is not incompatible with being a “Good Catholic.”²⁰⁶ This belief is held by 76% of church-

²⁰⁰ *Id.*

²⁰¹ See Trent Horn, *The Inconsistency of “Personally Opposed but Still Pro-Choice,”* CATHOLIC ANSWERS (July 25, 2016).

²⁰² Robert P. Jones et. al., *The 2012 American Values Survey: How Catholics and the Religiously Unaffiliated Will Shape the 2012 Election and Beyond*, PUB. RELIGION RESEARCH INST. (Oct. 23, 2012), <http://www.prrri.org/wp-content/uploads/2012/10/AVS-2012-Pre-election-Report-for-Web.compressed.pdf>.

²⁰³ *Id.* at 54.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 26 (referring to percentage more likely to vote for Governor Mitt Romney or President Barack Obama, respectively).

²⁰⁶ *Id.*

goers and 93% of non-frequent church-goers.²⁰⁷ Despite these high numbers on the acceptance of dissent regarding Church teachings, 63% agree the Church influences their beliefs about right and wrong on these topics.²⁰⁸ That number is 79% for frequent church-goers and 47% of non-frequent church-goers.²⁰⁹ Finally, when it comes to abortion and the use of emergency contraception, 10% of church-going Catholic women report having had an abortion while 8% have used emergency contraception.²¹⁰ These numbers are larger among younger women.²¹¹

The problem is threefold and it is represented by three distinct groups of people. There are those that know the tenets of their faith and fight the public deterioration of it. Others are uninformed and presume that what they are being told is true, no matter the source. The third, most dangerous group exists to misrepresent the truth for their own purposes. They have, over time, massaged into the culture falsehoods regarding what it means to live out one's faith. If those that claim to practice their faith are not adhering to its principles, and still others make it their goal to intentionally destroy the truth, it becomes easy to understand how slow-moving changes can go unnoticed. Without a consistent understanding of religious doctrines, others, including legislators and judges, could be convinced to not take seriously the argument that a particular government mandate could substantially burden someone's sincere religious belief. After all, if so many who claim to hold to that particular faith tradition do not believe it is worthy of preserving, how important to the overall religion must it be? The result is that the belief, while sincere, is considered a small and insignificant fringe aspect of the faith. Once the belief is viewed as *de minimus*, it is easy to find insubstantial any burden that would be placed upon a person for violating it. This inability to see the gravity of the burden is compounded when the decision maker sees that sincere belief as silly. The more out of the norm it appears, the sillier it becomes. But religion at its core has never been about norms—and it shouldn't start being so now.

²⁰⁷ Mary Rice Hasson & Michele M. Hill, *What Catholic Women Think About Faith, Conscience, and Contraception* 14 WOMEN FAITH AND CULTURE PROJECT (2012), http://whatcatholicwomenthink.com/What_Catholic_Women_Think_Contraception-Aug_2012.pdf (asserting that one-third of church-going Catholic women say using artificial birth control methods, also known as contraceptives, is "morally acceptable").

²⁰⁸ *Id.* at 3.

²⁰⁹ *Id.* at 12.

²¹⁰ *Id.* at 13.

²¹¹ *Id.*

CONCLUSION

This Article began with a discussion of boiling frogs and approaching darkness. It is a serious matter and the stakes couldn't be higher. While the HHS Mandate cases may be trickling out of the nation's consciousness, another government requirement will arise soon enough. The sincerity of the plaintiff's belief in his, her, or its religion or religious practices will continue to be an ever-changing, ever-intertwined component of the substantial burden placed on the exercise of that religion or religious practice. What the judges determine in future cases will be a reflection of this country's changing attitudes on the importance of practicing and recognizing the practice of religion. The courts' decisions are in the people's hands. There will always be someone ready, willing, and able to turn that pot of water on. It is up to us, therefore, to decide whether we want to boil.