10-1-2016

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Alisa Lalana

RFRA AND THE AFFORDABLE CARE ACT: DOES THE CONTRACEPTION MANDATE DISCRIMINATE AGAINST RELIGIOUS EMPLOYERS?

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I. INTRODUCTION

Little Sisters of the Poor Home for the Aged v. Burwell[1] is the most recent case to address the Affordable Care Act's (ACA) contraception mandate within the confines of the problematic Religious Freedom Restoration Act of 1993 (RFRA). Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*,[2] which limited the scope of the Constitution's Free Exercise Clause.[3] Prior to *Smith*, courts applied an expansive interpretation of the Free Exercise Clause, finding any law which substantially burdened a religious belief unconstitutional unless the government had a "compelling interest" and "no alternative forms of regulation could be used to advance that interest."[4] In *Smith*, the Supreme Court held that the Free Exercise

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1. 794 F.3d 1151 (10th Cir. 2015).

2. 494 U.S. 872 (1990).

3. Andrew Swindle, *Virgin Mary or Mary Magdalene: An Examination of the Contraceptive Mandate Cases and the Religious Freedom Restoration Act's Substantial Burden Standard*, 66 ALA. L. REV. 925, 929 (2015).

4. Micah Schwartzman et al., *The New Law of Religion: Hobby Lobby Rewrites Religious-Freedom Law in Ways That Ignore Everything That Came Before*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html; *see* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that an employer violated a Seventh-Day Adventist's ability to freely exercise her religion by firing her when she refused to work on Saturdays for religious reasons); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Wisconsin's compulsory public school attendance law violated members of the Amish faith's rights to freely exercise their religion by refusing to send their children, aged fourteen and fifteen, to public school after the completion of eighth grade).

Clause did not apply to neutral laws that were generally applicable to the public because any resulting religious burden would be incidental and unintentional.[5] Worried by this perceived reduction in constitutional protection, Congress attempted to restore pre-*Smith* levels of protection against religious discrimination. Consequently, RFRA established religious exemptions to any federal regulation (generally applicable or otherwise) imposing a "substantial burden" on religious beliefs where the government fails to prove it was (1) the least restrictive method of furthering a (2) compelling government interest.[6] Despite Congress's good intentions to restore religious liberty protections, the courts' interpretation of RFRA has exceeded the statute's intended reach. Courts have allowed RFRA to become a vehicle for religious groups to undermine federal laws and evade compliance with those laws by drastically lowering the threshold to raise a discrimination claim.[7] To monitor and invalidate discriminatory laws on the state level, several states have followed Congress's lead and enacted their own state versions of RFRA.[8] These state RFRAs generally follow the same framework as the federal law and therefore are at risk of the same over-reaching judicial interpretation.[9]

Since its enactment, the ACA's contraception mandate has given rise to a number of federal RFRA claims.[10] The mandate requires employers of over fifty full-time employees to provide comprehensive healthcare plans to their employees.[11] These plans must include methods of contraception such as Plan B (the "morning after pill").[12] *Little Sisters* addressed whether the statutory process for religious groups to opt out of this requirement imposed a "substantial burden," and whether the government failed to establish a

5. *Smith*, 494 U.S. at 878.

6. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012) [hereinafter RFRA].

7. *Id.*

8. *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. OF ST. LEGISLATORS (Sept. 3, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx [hereinafter *2015 State Religious Freedom Restoration Legislation*].

9. *Id.*

10. *Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit*, NAT'L WOMEN'S LAW CTR. (Oct. 27, 2015), http://www.nwlc.org/sites/default/files/pdfs/contraceptive_coverage_litigation_status_10-27-15.pdf ("Over 100 lawsuits have been filed in federal court challenging the Affordable Care Act's birth control coverage benefit.").

11. Swindle, *supra* note 3, at 927, 931.

12. *Id.*

compelling interest to justify that burden under the federal RFRA.[13] The opt-out process requires objecting religious organizations to notify Health and Human Services (HHS) of their faith-based inability to comply, which then shifts the responsibility to provide the required coverage to the third-party administrator (TPA)[14] or health insurer.[15]

The Tenth Circuit Court of Appeals reached a correct decision in deciding that the opt-out process built into the law did not substantially burden the Little Sisters' religious beliefs.[16] However, the Court of Appeals could only accomplish this by choosing to not follow the Supreme Court's logic in *Burwell v. Hobby Lobby Stores, Inc*.[17] This was a correct decision because *Hobby Lobby*'s interpretation of RFRA is unworkable: it greatly diminishes the threshold requirement to bring a RFRA claim by removing the court's ability to fully measure the substantiality of a burden. The better approach is to replace RFRA's "substantial burden" test and instead follow the reasonable accommodation framework used in employment law under Title VII. *Little Sisters* is a step in the right direction, but ultimately it will take amendments to both federal and state RFRAs to fully correct the problem.

Part II of this Note discusses the history of religious exemptions and the evolution of how courts have applied them. It focuses on Congress's motivation in creating RFRA and how the jurisprudence has developed—particularly after the enactment of the ACA. Part III then addresses the Tenth Circuit's decision in *Little Sisters* and discusses its departure from the Supreme Court's analysis in *Hobby Lobby*. It focuses on how the *Hobby Lobby* interpretation has made RFRA unworkable. Part IV then analyzes the needed changes to RFRA. It proposes the borrowing of "reasonable accommodation" analysis from Title VII used in employment law to determine the validity of a RFRA claim. Part V then addresses the further need to apply the proposed "reasonable accommodation" analysis from

13. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1159 (10th Cir. 2015).

14. *Id.* at 1165–66. (A TPA is a person or company hired by an employer to manage the company's insurance plans. The TPA's role can range from claim service provider, performing ministerial duties or processing claims, to administrator of claims for reimbursements from employees, having the discretion to make important plan decisions.).

15. *Id.*

16. *Id.* at 1195.

17. 134 S. Ct. 2751, 2778 (2014).

Part IV to state RFRA laws as well as the federal RFRA. Part VI concludes reiterating the need to apply Title VII framework to all RFRA laws.

II. HISTORICAL BACKGROUND OF FEDERAL PROTECTIONS AGAINST RELIGIOUS DISCRIMINATION

A. The Constitution and the Free Exercise Clause

Under the First Amendment's Free Exercise Clause, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[18] In *Employment Division v. Smith*, the Supreme Court limited the scope of the Free Exercise Clause by holding that it does not apply to religiously-neutral laws of general applicability.[19] There, two members of the Native American Church were fired from their jobs after testing positive for peyote, which they ingested during a church ceremony for sacramental purposes.[20] Subsequently, the state of Oregon denied those members' applications for unemployment benefits because testing positive for illegal drugs constituted "misconduct," which rendered them ineligible for benefits.[21]

The Supreme Court held that because the Oregon statute made no mention of religious practices, it was not an attempt to "regulate religious beliefs," but rather a neutral law of general applicability targeting drug use as a whole.[22] Therefore, the Court concluded there was no violation of the Free Exercise Clause and that strict scrutiny need not be applied.[23] Strict scrutiny involves analyzing whether a law is narrowly tailored—i.e., the least restrictive means possible—to achieve a compelling government interest.[24]

The *Smith* Court determined that although federal laws cannot directly interfere with religious beliefs and opinions, religious practices can be incidentally burdened.[25] It explained that allowing individuals to violate federal law to adhere to their religious beliefs would be akin to making professed religious doctrines "superior to

18. U.S. CONST. amend. I.
19. Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990).
20. *Id.* at 874.
21. *Id.*
22. *Id.* at 892.
23. *Id.*
24. *Id.* at 907–08.
25. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

the law of the land, and in effect permit every citizen to become a law unto himself."[26] The Court therefore held that the Oregon statute did not violate the Constitution, which "does not grant a right to religious exemptions from general legal obligations" when religious practices are incidentally burdened.[27] Rather, the Free Exercise Clause "provide[s] a shield against religious discrimination," only when a law is specifically directed at a religious practice.[28]

Three years after its decision in *Smith*, the Supreme Court reaffirmed and applied this interpretation of the Free Exercise Clause in *Church of Lukumi Babalu Aye v. City of Hialeah*.[29] There, a Santeria church, whose practices involved animal sacrifice, obtained the proper permits to establish a church in the City of Hialeah, Florida.[30] Shortly thereafter, the City called an emergency City Council meeting and passed an ordinance banning animal sacrifice.[31] The Court held that this was not a religiously-neutral ordinance and was clearly created to specifically prohibit the Church of Lukumi Babalu Aye's practices.[32] It looked to the minutes of the City Council meeting, which "evidence[d] significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice."[33] One councilmember in support of the ordinance even referred to Santeria devotees at the Church as being "in violation of everything this country stands for."[34]

Therefore, the Court applied strict scrutiny to establish whether the law violated the Free Exercise Clause.[35] To do this, it analyzed whether the City (1) had a compelling government interest that justified the burden on the Church, and (2) whether it was furthering that interest in the least restrictive way possible.[36] The Court then determined that the government interest to prevent animal sacrifice was not sufficiently compelling and thus found the ordinance

26. *Id.*
27. James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 297 (2013).
28. *Id.*
29. 508 U.S. 520 (1993).
30. *Id.* at 526.
31. *Id.* at 522, 526.
32. *Id.* at 526.
33. *Id.* at 541.
34. *Id.*
35. *Id.* at 522.
36. *Id.*

unconstitutional.[37]

B. The Religious Freedom Restoration Act of 1993 (RFRA)

Religious groups, Congress, and even secular civil liberties groups strongly opposed the Supreme Court's decision in *Smith*, fearing it created a loophole for Congress to pass discriminatory laws.[38] As a response, RFRA was immediately proposed as a way to reinstate the strict scrutiny analysis beyond laws that target religious practices, and restore its additional application to neutral laws of general applicability.[39]

Under RFRA, the first aspect of the court's role is to decide whether the challenged law substantially burdens a plaintiff's ability to freely exercise his or her sincerely held religious beliefs.[40] Although RFRA does not define a "substantial burden," it explicitly references the Supreme Court's framework for determining a burden under the Free Exercise Clause.[41] Specifically, in discussing the Free Exercise Clause, the Supreme Court has said that a substantial burden is imposed when a law conditions a "governmental benefit upon conduct that would violate [someone's] religious beliefs."[42] Once a plaintiff has established a substantial burden on religious exercise, the burden of proof shifts to the government to show that the law (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling governmental interest."[43]

C. Creation of State RFRAs

Originally, the federal RFRA was applicable to both federal and state laws.[44] However, in *City of Boerne v. Flores*,[45] the Supreme

37. *Id.* at 530.

38. *The ACLU and Freedom of Religion and Belief*, ACLU, https://www.aclu.org/aclu-and-freedom-religion-and-belief (last visited Mar. 14, 2016).

39. *Lukumi*, 508 U.S. at 530.

40. La. Coll. v. Sebelius, 38 F. Supp. 3d 766, 778 (W.D. La. 2014).

41. *Id.*

42. RFRA, *supra* note 6 (citing Navajo Nation v. U.S. Forest Serv. 535 F.3d 1058, 1062 (9th Cir. 2008)).

43. Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act.

44. *2015 State Religious Freedom Restoration Legislation*, *supra* note 8 (referencing City of Boerne v. Flores, 521 U.S. 507 (1997), in which the Court stated that RFRA no longer applies to the states).

45. 521 U.S. 507 (1997).

Court overturned RFRA as applied to state law on the ground that the federal government "can regulate its own actions" but "cannot interpret the substantive meaning of the Constitution."[46] Therefore, the Court held that applying a federal law like RFRA to the states exceeded Congress's constitutionally-granted authority.[47]

Subsequently, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[48] the Court confirmed that RFRA still applied to federal laws.[49] There, it granted an injunction for a religious group who received communion by drinking hoasca tea, which contained a hallucinogenic prohibited under Schedule 1 of the Controlled Substance Act (CSA).[50] In applying the strict scrutiny analysis required by RFRA, the Court found that the government failed to meet its burden of showing a compelling government interest; the Court therefore required a religious exemption to the CSA for the religious group.[51]

After the Supreme Court decided in *Boerne* that RFRA only applies to federal laws, many states reacted by creating their own religious freedom laws.[52] Currently, twenty-one states have their own state RFRAs,[53] and twelve additional states have plans to introduce similar legislation.[54] These laws are modeled after the federal RFRA and require the same substantial burden test.[55] However, some states have created even stricter requirements. Arkansas, for example, does not just require a compelling government interest to justify a state law as the federal RFRA does, but goes further to define a compelling interest as an interest of the "highest magnitude."[56]

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46. Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 308 (2012).

47. *City of Boerne*, 521 U.S at 536.

48. 546 U.S. 418 (2006).

49. *Id.* at 439.

50. *Id.*

51. *Id.*

52. *2015 State Religious Freedom Restoration Legislation*, *supra* note 8.

53. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATORS (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. Those states are: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *Id.*

54. *2015 State Religious Freedom Restoration Legislation*, *supra* note 8 ("Colorado, Georgia, Hawaii, Maine, Michigan, Montana, Nevada, North Carolina, South Dakota, Utah, West Virginia and Wyoming are looking to add a RFRA or similar law to their state's laws.").

55. *Id.*

56. Howard M. Friedman, *10 Things You Need to Know to Really Understand RFRA in Indiana and Arkansas*, WASH. POST (Apr. 1, 2015), https://www.washingtonpost.com/news/acts

D. The Affordable Care Act and Its Contraception Mandate

The ACA was created in 2010 as a combination of two separate pieces of legislation: the Patient Protection and Affordable Care Act[57] and the Health Care and Education Reconciliation Act of 2010.[58] The resulting ACA included a contraception mandate requiring employers of fifty or more full-time employees to provide health insurance plans that meet minimum standards of coverage. One of those minimum standards of coverage requires provision of preventative care for women without any cost to the insured.[59] The Health Resources and Services Administration (HRSA), charged with defining the specific preventative care standards, ultimately required coverage of all FDA-approved contraceptive methods and sterilization procedures, as well as patient education and counseling for women with reproductive capacity.[60]

In creating this contraception mandate, the legislative and executive branches attempted to improve women's health while significantly reducing healthcare costs.[61] Studies show that even "moderate co-pays can cause women with low and moderate incomes to forego contraceptive services," and in a 2009 survey, "twenty-three percent of women reported having difficulty affording birth control and twenty-four percent reported postponing a birth control or gynecological visit due to cost."[62] Because employer-provided healthcare coverage constituted fifty-nine percent of total healthcare coverage in 2012, the success of the ACA hinges on the government's ability to target these plans and acquire the support and willingness of employers.[63]

-of-faith/wp/2015/04/01/10-things-you-need-to-know-to-really-understand-rfra-in-indiana-and-arkansas.

57. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 120 (2010).

58. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010) (to be codified at 42 U.S.C. § 1305); Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (Aug. 27, 2014).

59. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1159 (10th Cir. 2015).

60. Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 785 (2015).

61. Evelyn M. Tenenbaum, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 ALB. L.J. SCI. & TECH. 539, 540–541 (2013); *Women's Preventive Services Guidelines*, HEALTH RES. SERVS. ADMIN., http://www.hrsa.gov/womensguidelines.

62. Tenenbaum, *supra* note 61, at 540–41.

63. Jeremy Thomas Harbaugh, *Recent Case Developments: Federal Appellate Court Holds That a For-Profit Corporation Can Challenge the Contraception Mandate Under the RFRA*, 39 AM. J.L. & MED. 692, 695 (2013) (citing CONG. BUDGET OFF., ESTIMATES FOR THE INSURANCE

E. Hobby Lobby*'s Interpretation of the ACA and RFRA*

In *Hobby Lobby*, the plaintiff owners of closely held corporations alleged that the ACA's requirement that they provide their employees with healthcare policies covering certain types of contraception substantially burdened their religious beliefs and thus violated RFRA.[64] After determining that a closely held corporation qualified as "person" under RFRA,[65] the Supreme Court held that plaintiffs were substantially burdened by the ACA's contraception mandate and thus the onus shifted to the government to prove that the statute was the least restrictive method of furthering a compelling government interest.[66]

The Court held that the government failed to prove the contraception mandate was the least restrictive means available to achieve its interest of providing affordable and comprehensive healthcare coverage to all Americans.[67] The majority felt that the government could have easily narrowed the statute to provide for-profit companies like Hobby Lobby with the same exemptions already offered to churches and religious non-profits.[68] Consequently, the Court held that the contraception mandate imposed an unjustified substantial burden, thus requiring a religious exemption.[69]

The main flaw in the *Hobby Lobby* decision is that the Court found it beyond its purview to address the magnitude of a religious burden, despite the fact that RFRA specifically requires courts to analyze whether a burden is "substantial."[70] It viewed the question of substantiality to be one of "religion and moral philosophy," which courts are not in a position to address.[71] Furthermore, the Court reiterated previous warnings that "'courts must not presume to

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COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, at tbl. 3 (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/43472-07-24-2012-CoverageEstimates.pdf.

64. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764 (2014).

65. *Id.* at 2679.

66. *See id.* at 2785–86 (Kennedy, J., concurring).

67. *Id.* at 2786.

68. *Id.*; *see Fact Sheet: Women's Preventive Services Coverage, Non-Profit Religious Organizations, and Closely-Held For-Profit Entities*, CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/womens-preven-02012013.html (last visited Oct. 20, 2015).

69. *Hobby Lobby*, 134 S. Ct. at 2785.

70. *Id.* at 2778; *see* RFRA, 42 U.S.C. § 2000bb (1993).

71. *Hobby Lobby*, 134 S. Ct. at 2778.

determine . . . the plausibility of a religious claim.'"[72] Although it has long been agreed that courts cannot address the plausibility of a religious belief, here, the Supreme Court incorrectly equated this analysis with measuring the magnitude of the burden.[73] Instead, it considered a RFRA claim to be established simply because the plaintiffs had a religious belief, and it then accepted their contention that the burden was substantial.[74]

The *Hobby Lobby* decision was controversial in part because it was seen as an attempt to "corporatize religious liberty," applying exemptions to private companies that were traditionally reserved for churches and non-profits.[75] Beyond this, however, the Court's interpretation of the substantial burden test creates even greater jurisprudential issues. It renders the term "substantial," as written in the statute, completely meaningless.[76]

By merging the analysis regarding the magnitude of the burden with analysis of the reasonableness of a religious belief—which federal courts are forbidden to undertake—the Court set an unworkable precedent and paved the way for conflicting case law.[77]

F. Post-Hobby Lobby *Changes to the ACA*

At the time of *Hobby Lobby*, the options available to a religious for-profit organization were either to simply comply with the regulation or pay a fine for non-compliance.[78] The Supreme Court then made its *Hobby Lobby* ruling, applying the existing opt-out for non-profits to for-profits.[79]

Shortly after making this decision, the Supreme Court heard a motion for a preliminary injunction in *Wheaton College v. Burwell*[80] and amended its interpretation of the existing opt-out process. Previously, organizations eligible to opt out were required to complete Employee Benefit Security Administration (EBSA) Form

72. *Id.* (citing Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969)).

73. *Id.* at 2798 (Ginsburg, J., dissenting).

74. *Id.*

75. Schwartzman et al., *supra* note 4.

76. *See Hobby Lobby*, 134 S. Ct. at 2792 (Ginsburg, J., dissenting).

77. *See id.*

78. *Id.* at 2775.

79. *Id.* at 2769–70.

80. 134 S. Ct. 2806 (2014).

700 and send copies to the health insurance company or TPA.[81] In *Wheaton College*, the court simplified the process, requiring only that:

> [i]f the applicant informs the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review.[82]

This required notification can be sent to HHS via letter or email and must, at a minimum, contain:

> (1) the name of the eligible organization and the basis on which it qualifies for an accommodation; (2) its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services, including any particular subset to which it objects; (3) the name and type of the group health plan; and (4) the name and contact information for any of the plan's TPAs and/or health insurance issuers.[83]

This requirement of notifying HHS is the provision at issue in *Little Sisters*.[84]

III. *LITTLE SISTERS OF THE POOR HOME FOR THE AGED*

A. Little Sisters of the Poor and Its RFRA Claim

In *Little Sisters*, three groups of plaintiffs filed suit against the government regarding the religious opt-out provision of the ACA: Little Sisters of the Poor, Southern Nazarene, and Reaching Souls.[85] Each group alleged that it was "substantially burdened" by the requirement to notify either HHS or its health insurance provider that

81. *Id.* at 2807.

82. *Id.*; *see also* Zubik v. Burwell, 135 S. Ct. 2924 (2015) (reiterating that notification to HHS is sufficient and plaintiffs need not complete form 700).

83. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1164 (10th Cir. 2015) (quoting Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (Aug. 27, 2014) (internal quotation marks omitted)).

84. *Id.* at 1160.

85. *Id.* at 1167–69.

it could not comply with the regulation for religious reasons.[86]

One group, the Little Sisters of the Poor, belongs to an order of Catholic nuns who devote their lives to caring for the elderly.[87] The organization provides health insurance to its employees through the Christian Brothers Employee Benefit Trust; the TPA for this organization is another Catholic organization, Christian Brothers Services.[88] Its health insurance plans have always excluded "coverage of sterilization, contraception, and abortifacients . . . in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral."[89] Little Sisters argued that the opt-out process included in the ACA still made it complicit in the provision of contraceptives and therefore imposed a "substantial burden." [90] This is because in accordance with its religious beliefs, it "cannot take actions that directly cause others to provide contraception or appear to participate in the Department's delivery scheme."[91]

The U.S. District Court for the District of Colorado originally denied Little Sisters an injunction. It held that the minor administrative task of notifying HHS and the TPA[92] of its request to opt out did not impose a "substantial burden" on the nuns' religious beliefs, and it contrasted Little Sisters' situation with that in *Hobby Lobby* where no opt-out accommodation scheme existed for private for-profit corporations.[93]

The second and third groups of plaintiffs also made legally similar claims to that of Little Sisters in that they argued complying with the opt-out process would violate their religious beliefs by making them morally complicit in the provision of contraception to their employees.[94] However, when their claims were originally

86. *Id.* at 1159.
87. *Id.* at 1167.
88. *Id.*
89. *Id.*
90. *See id.* at 1168.
91. *Id.*
92. At the time of the district's court decision, the Supreme Court had not yet heard *Wheaton College* and simplified the opt-out process. Little Sisters appealed to the Supreme Court and was granted an injunction that instead only required them to notify HHS of its religious objections. *Id.* at 1170.
93. Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225, 1237 (D. Colo. 2013).
94. *Little Sisters*, 794 F.3d at 1168; S. Nazarene Univ. v. Sebelius, 2013 U.S. Dist. LEXIS 179569, at *3 (W.D. Okla. Dec. 23, 2013); Reaching Souls Int'l, Inc. v. Sebelius, No. CIV-13-1092-D, 2013 U.S. Dist. LEXIS 178752, at *26 (W.D. Okla. Dec. 20, 2013).

heard, the U.S. District Court for the Western District of Oklahoma—referencing the Supreme Court's analysis in *Hobby Lobby*—granted injunctions, finding that the opt-out process *did* violate RFRA.[95] In both cases, the district court ruled that the plaintiffs were "substantially burdened" because the opt-out provision required them to "violate their belief that participating in or facilitating the accommodation [was] the moral equivalent of directly complying with the contraceptive mandate."[96]

B. The Tenth Circuit's Decision

The Tenth Circuit then consolidated the three plaintiffs' cases on appeal.[97] Because the RFRA analysis follows a burden-shifting framework,[98] the court first focused on whether the plaintiffs established a prima facie RFRA claim, which requires the plaintiff to establish "(1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion."[99] Based on this structure of analysis, the court first had to determine whether the plaintiffs were "substantially burdened."[100]

The court determined that the most important aspect of the analysis is not deciding whether a burden on the plaintiffs exists at all, but whether a burden is *substantial*.[101] Focusing on the need for a legal definition of "substantial," it pointed out that "[i]f plaintiffs could assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning."[102] Accordingly, it held that the ACA's process to opt out is "among the common and permissible methods of religious accommodation in a pluralist society, and does not constitute a *substantial* burden under RFRA."[103]

In so holding, the court dismissed the plaintiffs' claims that notifying HHS made them complicit with providing contraception

95. *See S. Nazarene Univ.*, 2013 U.S. Dist. LEXIS 179569, at *22–26; *Reaching Souls Int'l, Inc.*, 2013 U.S. Dist. LEXIS 178752, at *26.

96. *Reaching Souls Int'l, Inc.*, 2013 U.S. Dist. LEXIS 178752, at *26.

97. *Little Sisters*, 794 F.3d at 1151, 1169.

98. *Id.* at 1175.

99. *Id.* (quoting Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)).

100. *Id.*

101. *Id.* at 1176.

102. *Id.*

103. *Id.* at 1180–81; *see also* United States v. Friday, 525 F.3d 938, 960 (10th Cir. 2008) ("Law accommodates religion; it cannot wholly exempt religion from the reach of the law.").

and abortions, deciding that the plaintiffs' roles were not causal.[104] Rather, the federal government obligates providing contraception and preventive care coverage and the opt-out provision simply shifts the burden of complying with that law.[105] Furthermore, the requirements under the accommodation scheme are simply "*de minimis* administrative burdens,"[106] which are allowable under the pre-*Smith* standards restored by RFRA.[107] Because the court held there was no substantial burden, it did not need to apply strict scrutiny to determine whether the government had proved that a compelling interest was being furthered in the least restrictive way possible.[108]

C. The Tenth Circuit's Deviation from Hobby Lobby

Although the Tenth Circuit made many attempts to factually distinguish *Little Sisters* from *Hobby Lobby*,[109] the legal issues addressed remained the same, although they were applied in different ways. The court correctly acknowledged that the most recent religious discrimination cases decided by the Tenth Circuit and Supreme Court[110]—*Hobby Lobby*,[111] *Yellowbear v. Lampert*,[112] *Ahdulhaseehb v. Calbone*,[113] and *Holt v. Hobbs*[114]—differed from *Little Sisters* in that those cases involved laws of general applicability that included no religious accommodation.[115] By contrast, a religious accommodation not only existed but was the central issue of the plaintiffs' claims in *Little Sisters*.[116]

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104. *Little Sisters*, 794 F.3d at 1182–84.

105. *Id.* at 1182.

106. *Id.* at 1175.

107. *Id.* Upon its creation, it was determined that the ACA's religious accommodation scheme would require "that each of the estimated 122 organizations [would] spend approximately 50 minutes in preparation time and incur $0.54 mailing cost to satisfy [its] requirements." Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092, 51097 (Aug. 27, 2014) (to be codified at 29 C.F.R. pts. 2510, 2590, and 45 C.F.R. pt. 147).

108. *Little Sisters*, 794 F.3d at 1195.

109. *Id.* at 1160.

110. *Id.*; *see* 42 U.S.C. § 2000cc–1(a) (2012).

111. 134 S. Ct. 2751 (2014) (where a Muslim prisoner's request for a halal diet was denied).

112. 741 F.3d 48 (10th Cir. 2014).

113. 600 F.3d 1301 (10th Cir. 2010).

114. 135 S. Ct. 853 (2015) (where a Muslim prisoner was not allowed to grow a beard in compliance with his faith and even his requests for a compromise to grow a short beard were denied).

115. *Little Sisters*, 794 F.3d at 1171–72. Other than *Hobby Lobby*, these cases all involved claims for violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which requires the same showing of a "substantial burden" on a religious practice. 42 U.S.C. § 2000cc–1(a) (2012).

116. *Id.* at 1160.

Despite this important factual difference, all of these cases hinged on determining whether a "substantial burden" had been imposed.[117] While the Supreme Court has indicated that the existence of an accommodation scheme can lessen the burden on a plaintiff,[118] the basic structure of analysis to be taken in each of these cases remains the same. The real issue is the absence of a clear "substantial burden" framework to guide courts.

Furthermore, the plaintiffs in *Hobby Lobby* also argued that paying for a healthcare plan covering abortions and contraceptives made them complicit in acts that their religious beliefs disallowed.[119] The government (and Justice Ginsburg's dissent) unsuccessfully argued that this complicity connection was too attenuated and that "providing the coverage would not itself result in the destruction of an embryo."[120] In *Hobby Lobby*, however, the Supreme Court held that in making this argument, HHS and the dissent were asking the Court to analyze the reasonableness of the religious belief—which federal courts "have no business addressing"[121]—rather than the substantiality of the burden.[122]

The Tenth Circuit in *Little Sisters* relied on precisely the same attenuation argument regarding complicity as HHS and the dissent in *Hobby Lobby*, which the Court rejected.[123] The *Little Sisters* court, however, used that same argument to determine that a substantial burden *did not* exist and ultimately conclude that "[p]laintiffs d[id] not 'trigger' or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitle[d] plan participants and beneficiaries to coverage."[124] Furthermore, "[a]lthough Plaintiffs allege[d] the administrative tasks required to opt out of the Mandate ma[de] them complicit in the overall delivery scheme, opting out instead relieve[d] them from complicity."[125] But this is no different

117. *Holt*, 135 S. Ct. at 864; Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014); *Little Sisters*, 794 F.3d at 1178; *Yellowbear*, 741 F.3d at 55; *Ahdulhaseeb*, 600 F.3d at 1315–19.

118. *See Little Sisters*, 794 F.3d at 1160 (citing *Hobby Lobby*, 134 S. Ct. at 2759; *Yellowbear*, 741 F.3d at 56).

119. *See Hobby Lobby*, 134 S. Ct. at 2759 ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions . . . .").

120. *Id.* (quoting Brief for the Petitioners at 31–34, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354)); *id.* at 2799 (Ginsburg, J., dissenting).

121. *Id.* at 2778.

122. *Id.*

123. *Id.*; *Little Sisters*, 794 F.3d at 1178–80.

124. *Little Sisters*, 794 F.3d at 1173.

125. *Id.* at 1173–74.

than the dissent's rejected argument in *Hobby Lobby*—that the insurance plans provide contraception and abortions, not the employers providing the plan.[126]

It is true the employers in *Little Sisters* were in fact removed one step further from these actions than were the employers in *Hobby Lobby*. The *Hobby Lobby* employers sought an exemption from compliance with the actual contraception mandate, whereas the *Little Sisters* employers sought an exemption from the opt-out process. For this reason, the *Little Sisters* court logically argued that those plaintiffs suffered less of a burden.[127] The problem, however, is that the mere fact that the *Little Sisters* court addressed this argument goes directly against the reasoning in *Hobby Lobby*, where the court explained that analyzing this complicity argument constitutes a forbidden analysis of the reasonableness of a religious belief.[128]

IV. PROPOSED APPLICATION OF TITLE VII FRAMEWORK TO RFRA

A. Title VII and Reasonable Accommodation

In employment law, Title VII of the Civil Rights Act of 1964 governs the structure of analysis a court uses when an employee claims religious discrimination.[129] Just as the current RFRA framework requires, Title VII requires courts to make a two-pronged analysis.[130] Under both systems, the first prong requires that a plaintiff establish a prima facie case before the burden shifts to the government or employer to justify their actions.[131] A prima facie case for religious discrimination under Title VII is established when an employee shows that: (1) "he or she has a bona fide religious belief that conflicts with an employment requirement"; (2) "he or she informed the employer of this belief;" and (3) "he or she was disciplined for failure to comply with the conflicting employment requirement."[132]

126. *Cf. Hobby Lobby*, 134 S. Ct. at 2789 (Ginsburg, J., dissenting) ("I would conclude that the connection . . . is too attenuated to rank as substantial. The requirement carries no command that [Plaintiffs] purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies . . . to direct money into undifferentiated funds . . . under comprehensive health plans. Those plans . . . must [then] offer contraceptive coverage without cost sharing . . . .").

127. *See Little Sisters*, 794 F.3d at 1177–78.

128. *Id.*

129. 42 U.S.C. § 2000e-2(a)(1) (1991).

130. Baker v. Home Depot, 445 F.3d 541, 546 (2d Cir. 2006).

131. *Id.*

132. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 65–66 (1986) (quoting Turpen v. Mo.-

Once a prima facie claim is established, the second prong of analysis shifts the burden of proof to the employer to demonstrate that it offered a reasonable accommodation to the employee, or else prove that it "is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[133] There is no set requirement for what accommodation an employer must offer, so long as it is reasonable.[134] Additionally, an accommodation is found to cause "undue hardship" whenever "that accommodation results in 'more than a *de minimis* cost' to the employer."[135]

The Supreme Court's decision in *Hobby Lobby*, diminished the meaning of a "substantial burden" so much that the threshold question to establish a prima facie RFRA claim is no different than the requirement of a "bona fide religious belief" under Title VII. Yet under Title VII, a low threshold for a plaintiff to establish a prima facie claim is balanced out by a more difficult merits test for the plaintiff in the latter part of the analysis, where an employer's good faith attempt to make a reasonable accommodation is enough to justify its actions. If the Court is going to lower RFRA's threshold test and adopt the simple requirement of a "bona fide religious belief" that conflicts with the law, it must also raise the bar in the second prong of the analysis regarding the merits of the claim.

RFRA should be amended so that it no longer applies the current version of the "compelling interest test." Instead, once the burden shifts to the government to justify its actions, just as under Title VII, the court should look to whether the government made a good faith effort to accommodate the plaintiffs and their religious beliefs. In employment law, an accommodation does not have to be effective to be reasonable; it simply has to be a legitimate attempt to work and compromise with the employee.[136] If the accommodation causes undue hardship to the company, such accommodation is not required,

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Kan.-Tex. R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984)).

133. *Id.* at 63; *see* 42 U.S.C. § 2000e(j) (2012).

134. *Ansonia*, 479 U.S. at 68.

135. *Id.* at 67 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 n. 9 (1977) (emphasis in original)); *see* 118 Cong. Rec. 705–06 (1972).

136. *See Trans World*, 432 U.S. at 66–70. The court in *Trans World* held that an employer airline was not in violation of the Civil Rights Act of 1964 when it failed to give an employee Saturdays off to follow religious tenets. *Id.* The employer met with the employee to discuss alternatives, attempted to find someone to swap shifts, and tried to find the employee another job. *Id.* Making this legitimate attempt to work with the employee was found to be sufficient even though it did not allow the employee to properly conduct his religious observation. *Id.*

as that would cease to be "reasonable."[137] Analogizing RFRA claims to Title VII claims, undue hardship should be equated with an undermining of the government's compelling interest achieved by the law. An accommodation would be found unreasonable if it stops the government from achieving those motivating objectives.

B. Title VII as Applied to Little Sisters

If the Tenth Circuit had used this Title VII approach in *Little Sisters*, it would have first considered whether organizations had a "bona fide religious belief" that conflicted with the ACA's contraception mandate. The Little Sisters would have satisfied this first step of proving a prima facie claim, and the court would have then looked to whether the government could justify its actions. Within the Title VII framework, HHS would have to prove that it either offered a reasonable accommodation to religious organizations such as Little Sisters, or show that no accommodation could be made without undermining the purpose of the contraception mandate.

In *Little Sisters*, the government offered an accommodation in the form of an opt-out provision that would likely satisfy this standard. Under Title VII analysis, the accommodation must be *reasonable*; it need not necessarily be effective. Here, the government offered an opt-out provision to relieve religious organizations of the responsibility to provide healthcare coverage conflicting with their religious beliefs. The fact that this opt out is still not satisfactory to Little Sisters is not a crucial factor in this analytical framework. The important consideration is that the government made a legitimate attempt to resolve religious organizations' concerns. Therefore, using this Title VII-like analysis, the Tenth Circuit would have been able to logically come to the same conclusion—that the opt-out provision is not a violation of RFRA—while still working within the confines of the RFRA framework.

V. APPLICATION OF TITLE VII FRAMEWORK TO STATE RFRAS

A. Differences Between the Federal RFRA and State RFRAs

Applying the above-proposed changes to the federal RFRA is not enough to resolve the overall issue; the changes must also be applied to state RFRAs. Due to inherent differences in federal and

137. *Id.*

state laws, the existence of state RFRAs has even broader consequences than the federal RFRA. Already, one unforeseen consequence is that many social conservatives are now attempting to use state RFRAs as a way to evade non-discrimination laws and avoid providing services to members of the LGBT community and other minority groups.[138] It is in this context that the RFRAs of Indiana and Arkansas have recently garnered a great deal of media attention and opposition.[139] These two states have some of the most extreme language in their RFRAs, which are not necessarily indicative of the remaining nineteen existing laws, yet they represent a growing problem caused by the rise of state RFRAs.

Indiana Governor Mike Pence argued that Indiana's RFRA is an exact copy of the federal RFRA.[140] However, Senator Chuck Schumer, who authored the federal RFRA of 1993, strongly disagreed and commented that the two laws can be considered mirror images, "only if you're using a Funhouse mirror."[141] The important difference is that Indiana's RFRA applies even in cases where the government is not a party; it can therefore protect the discriminatory actions of private individuals.[142] Specifically, the law provides that after an individual suffers a substantial burden on religious beliefs, he or she may assert a RFRA violation as a claim or defense, "regardless of whether the state or any other governmental entity is a party to the proceeding."[143] This greatly expands the circumstances under which someone can claim religious freedom as a defense.[144]

Because of this addition to Indiana's RFRA, many religious groups are attempting to justify their actions and evade compliance with non-discrimination laws by alleging a burden on their religious beliefs.[145] For example, in arguing against same-sex marriages, those groups have contended that "facilitating or assisting individuals to

138. David Johnson and Katy Steinmetz, *This Map Shows Every State with Religious-Freedom Laws*, TIME (Apr. 2, 2015), http://time.com/3766173/religious-freedom-laws-map-timeline.

139. *Id.*

140. Mariano Castillo, *Five Things You Haven't Considered About Indiana's Religious Freedom Law*, CNN (Apr. 2, 2015, 6:51 AM), http://www.cnn.com/2015/04/01/politics/indiana-religion-law-text.

141. *Id.*

142. Garrett Epps, *What Makes Indiana's Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997.

143. IND. CODE § 34-13-9-9 (2015).

144. Castillo, *supra* note 140.

145. Friedman, *supra* note 56.

enter other kinds of marital relationships requires them to act in contravention of their religious beliefs."[146] Many worry that if this continues, states will use their respective RFRAs to combat non-discrimination laws and provide legal cover for stores that refuse to serve LGBT customers or employers who fire LBGT employees.[147] It is not a far stretch to predict that this problem could extend beyond the LGBT community to justify and protect actions of racial and gender discrimination.

Addressing the Indiana Senate Judiciary Committee, the ACLU outlined its opposition to the then proposed SB 568, Indiana's RFRA.[148] The ACLU cited numerous examples of discrimination justified under other states' similar RFRA laws:[149] First, a police officer in Oklahoma refused to attend or even assign another officer to attend a community relations event held at a mosque, claiming a moral dilemma and substantial burden on his religious beliefs.[150] Second, in several states, pharmacists used religious freedom as a defense for refusing to dispense contraception.[151] Furthermore, in Michigan, a school guidance counselor refused to help gay students, claiming a religious burden.[152] Finally, plaintiffs have challenged even commonplace regulations such as wearing a hardhat or providing a social security number as violations of religious liberties under some state RFRAs.[153]

Although not all state RFRAs include Indiana's drastic language, they do center around the federal RFRA's flawed substantial burden test.[154] Pennsylvania's RFRA, for example, not

146. *Id.*

147. Johnson & Steinmetz, *supra* note 138.

148. *SB 101 and SB 568—Indiana's "Religious Freedom Restoration Act" (RFRA): Hearing on SB 101 and SB 568 Before the Indiana Senate Judiciary Committee* (Ind. 2015) (statement of Jane Henegar, Executive Director, American Civil Liberties Union of Indiana), http://www.aclu-in.org/images/newsReleases/RFRA_testimony_w_edits_2-9-15.pdf.

149. *Id.*

150. *Id.* (citing Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014)).

151. *Id.* (citing Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST (Mar. 28, 2005), http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html).

152. *Id.* (citing Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011)).

153. *Id.* (citing Kalsi v. N.Y. City Transit Auth., 62 F. Supp. 2d 745 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) and Harris v. Bus., Transp. & Hous. Agency, No. C 07-0459 PJH, 2007 WL 1140667 (N.D. Cal. Apr. 17, 2007)).

154. *See* 71 PA. STAT. & CONS. STAT. ANN. § 2403 (West 2002); *see also* ARIZ. REV. STAT. ANN. § 41-1493.01 (2016) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both: (1) In furtherance of a compelling governmental interest. (2) The least restrictive means of furthering that compelling governmental interest."); KY. REV. STAT. ANN. § 446.350 (West 2013) ("The right to act or

only requires a "substantial burden," but unlike the federal RFRA goes on to define it as

> [a]n agency action which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) Significantly curtails a person's ability to express adherence to the person's religious faith; (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; [or] (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.[155]

Some states, such as Alabama, don't even require the burden imposed by a law to be substantial, thereby lowering the threshold requirement to bring a RFRA claim even further.[156] Therefore, the main differences between the federal and state RFRAs are that many states have gone beyond the federal RFRA in their laws and made it even easier for plaintiffs to win RFRA claims.

B. Benefits of Applying Title VII to State RFRAs

The main purpose of the above-proposed changes to RFRA is to balance out the two prongs of the analysis and eliminate the impossible-to-apply substantial burden test. Because many state RFRAs create an even greater imbalance between the prongs than exists in the federal RFRA, Title VII's application on the state level is arguably even more important.

These state RFRAs are all relatively new and therefore have not gone through the long sequence of judicial interpretation that the federal RFRA has. However, it is foreseeable that the same problems will eventually arise. The trends in amendments to state RFRAs seem to already mimic changes that have occurred over time to the federal RFRA. For example, the Indiana RFRA as initially written applied to both for-profit and non-profit religious organizations prior to the Supreme Court's decision in *Hobby Lobby*, which extended the federal RFRA's application to closely held corporations and

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refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.").

155. 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West 2002).

156. ALA. CONST. art. I, § 3.01.

individuals.[157]

Application of Title VII to the federal RFRA without further application to state RFRAs will not completely solve the problem. Because both types of RFRAs involve the same substantial burden requirement, the only way to address the overarching issue is to amend the RFRA framework across the board. This would require Congress to amend the federal RFRA in addition to state legislatures individually amending their own versions.

VI. CONCLUSION

Despite Congress's good intentions to restore protections against religious discrimination post-*Smith*, courts have analyzed the federal RFRA in a way that causes more harm than good. They have lowered the threshold for establishing a RFRA claim to the point that any burden would be considered substantial simply at a plaintiff's say-so. In a two-pronged framework, a low burden on a plaintiff in the first prong must be balanced out with a higher burden in the second. However, under the current interpretation of RFRA, the burden remains low for a plaintiff in both prongs. The second phase of analysis imposes a very high burden on the government to prove that the law was the least restrictive method of achieving a compelling government interest. This entire framework is far too plaintiff-friendly in that plaintiffs can rest entirely on the government's failure to meet its high burden of proof without having to prove anything about the actual burden they claim to suffer.

In *Little Sisters*, the Tenth Circuit finally showed a willingness to address this problem, but it was limited by the reasoning in existing case law. It could only make a proper ruling by deviating from the logic used in *Hobby Lobby*. Because of the flawed prior analysis, the only way to fully address this problem is to amend RFRA and create a new framework modeled after the reasonable accommodation analysis used in Title VII cases. This change would create needed balance between the two prongs of the test—the plaintiff's establishment of a prima facie claim and the defendant's justification for its actions—to simplify the analytical framework to allow for more consistent application of the statute.

Simply applying this proposed change to the federal RFRA however, will not properly address the overall issue. Because states

157. RFRA, *supra* note 6.

continue to enact their own state RFRAs, religious groups would still be able to easily evade compliance with crucial laws on the state level, particularly anti-discrimination laws. The underlying issue of religious groups using their beliefs as a means to avoid compliance with laws can therefore only be fully addressed if the above-proposed changes are applied on both the federal and state levels.