

The Satanic Temple, Scott Walker, and Contraception: A Partial Account of *Hobby Lobby*'s Implications for State Law

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INTRODUCTION

Reaction to the Supreme Court's opinion in *Hobby Lobby*¹ was swift and extreme from almost all quarters. Beyond the predictable legal blogs, newspaper articles, and talking heads on TV, there were more unusual responses from across the political spectrum. Members of The Satanic Temple, a religious group² focused on "personal autonomy, individual freedom, and ethical action," announced that they would henceforth be objecting to so-called "informed consent" statutes in the abortion services context.³ To make good on that promise, they made available an online form for anyone, Satanist or otherwise, who wanted to claim a religious exemption from being required to comply with such statutes.⁴ Wisconsin Governor Scott Walker's Administration, on the other hand, announced that it would no longer be enforcing Wisconsin's contraceptive equity law because it was "preempted" by the Supreme Court's decision.⁵

But as is so often the case with extremes, neither interpretation of the case comes close to the mark. The confusion about the reach and scope of *Hobby Lobby* is of tremendous significance as state legislatures, courts, administrative agencies, and citizens begin to grapple with its consequences,

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

² See, e.g., *FAQ, THE SATANIC TEMPLE*, <http://perma.cc/LW8S-NR57> (responding to the prompt "If you do not believe in the supernatural how is TST a religion?" with the answer "The idea that religion belongs to supernaturalists is ignorant, backward, and offensive In fact, Satanism provides us all that a religion should, without a compulsory attachment to untenable items of faith-based belief: It provides a narrative structure by which we contextualize our lives and works. It provides a body of symbolism and religious practice—a sense of identity, culture, community and shared values.").

³ These statutes usually include waiting periods, provision of particular information, and compelled speech by the doctor, and sometimes also include mandatory ultrasounds or other procedures. See *infra* Part III.A.1.

⁴ Press Release, The Satanic Temple, Satanists Leverage Hobby Lobby Ruling in Support of Pro-Choice Initiative (July 28, 2014), <http://perma.cc/XA5C-K2N2>.

⁵ Brian Sikma, *Wis. Won't Enforce State Contraception Mandate*, MEDIA TRACKERS (July 21, 2014), <http://perma.cc/T49Z-7WY7>.

particularly in jurisdictions where state laws governing religious objections are modeled on or interpreted to be coextensive with federal precedent. These questions are live and in flux. Even as the Department of Health and Human Services and Department of Labor have begun issuing proposed and interim regulations governing the accommodations process for entities that object to the Affordable Care Act's contraceptive coverage requirement, some of the not-for-profit plaintiffs claiming violations under the Religious Freedom Restoration Act have made clear that no accommodation will satisfy their concerns (and it is no far stretch to imagine the same may be true for some of the objecting for-profit businesses as well).

In this article, I demonstrate that Scott Walker's Administration and The Satanic Temple have more in common than it might superficially appear. In fact, there are three common threads that tie their seemingly diametrical efforts together. First, both Scott Walker's Administration and The Satanic Temple read *Hobby Lobby* too broadly. Rather than creating an era of religious exemptions on demand, *Hobby Lobby* should be read to have a limited impact on state and federal law, even as persuasive authority. Second, both Scott Walker's Administration and The Satanic Temple fail to appreciate the continuing relevance and impact of many other state and federal laws that continue to provide protection for reproductive rights, including contraceptive access. Third, Scott Walker's administration and The Satanic Temple share a common strategy of attempting to use claims of religious objection to regulation affecting women's reproductive rights as a tool for political mobilization of their respective—and antithetical—political communities. In this, however, they are closer to the mark: *Hobby Lobby* does open up new possibilities for claims of exemption. Politically conservative exemptions have been well-represented in the social, political, and legal discourse around the *Hobby Lobby* fallout. But what has been less appreciated is that however open the regime is for culturally conservative religious objections, it is equally open for progressive religious objections as well.

In tracing these three common threads between Scott Walker and The Satanic Temple, the purpose of this article is both analytic and descriptive. Analytically, it seeks to unearth the serious point behind The Satanic Temple's seemingly facetious accommodation campaign: conservatives do not have a monopoly on accommodation. Progressives, too, can look to religious objection claims under RFRA as a means of effecting change in the legal system. For these efforts to be effective, however, we have to be clear—descriptively—about what *Hobby Lobby* does and does not do.

This article explores these questions in four parts. In Part I, it provides a brief refresher on RFRA, *Hobby Lobby*, and *Wheaton College*. In Part II, it uses the lens of the Walker Administration's inaccurate understanding of preemption and RFRA to map the overlapping regulatory regimes requiring insurance coverage of contraceptives and analyze the implications of the *Hobby Lobby* decision. In doing so, it demonstrates that state-mandated contraceptive coverage continues in force even for religious organizations and for-profit entities that might be eligible for a religious accommodation from

the ACA's contraceptive coverage requirement. In Part III, using the lens of The Satanic Temple's "exemption" form, it outlines the obstacles to DIY exemption or accommodation efforts. In Part IV, it explores the ways in which the religious exemption regime may be deployed in favor of normatively disparate goals, focusing on how such objections might operate when levied against state limitations on the exercise of reproductive rights and access to reproductive health care.

I. THE ESSENTIAL DOCTRINE:
RFRA, *HOBBY LOBBY* AND *WHEATON COLLEGE*

In the study and practice of religious free exercise rights, permission to do something the law prohibits or to refrain from doing something the law requires is often referred to interchangeably as an exemption or an accommodation, although the former suggests the permission to simply refrain from following the law, while the latter suggests a workaround or alternative process of some kind.⁶

This article focuses on free exercise rights mostly under the aegis of the Religious Freedom Restoration Act (RFRA). RFRA is a federal statute that prohibits the government from imposing a "substantial[] burden" on a "person's exercise of religion" unless the government can demonstrate that the "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁷ This is the statute that was at issue in the *Hobby Lobby*⁸ case and the *Wheaton College*⁹ order, both of which are outlined below.¹⁰ Some states also have state versions of RFRA, which are discussed *infra* in more detail in Part II.B.2.

⁶ As an example, under the Affordable Care Act's implementing regulations governing the provision of contraceptive coverage, houses of worship are exempted entirely. 45 C.F.R. § 147.131(a) (2014) (providing exemption from contraceptive coverage requirement for "religious employers," defined as an employer that "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended"); 26 U.S.C.A. § 6033(a)(3)(A)(i) (2014) (referring to "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," and which are not required to submit tax returns under the Code). Religious non-profit organizations, on the other hand, are offered an accommodation. 45 C.F.R. § 147.131(b)(2)-(3) (2013) (amended 2014).

⁷ 42 U.S.C.A. § 2000bb-1.

⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁹ *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

¹⁰ Ironically, when RFRA was initially introduced into Congress, it was strongly opposed by the United States Catholic Conference because the Conference feared women would use the statute to claim a religious right to abortion care. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 236 (1994). At the time the bill was introduced the Supreme Court was about to hear *Planned Parenthood v. Casey*, and many believed that the Court was about to overturn *Roe* and make abortion illegal in the country once again. *Id.* at 237. If that happened, the thinking went, RFRA would be a dangerous tool in the hands of women who would claim that they had the right to a religious exemption from the abortion ban. *Id.* at 236. This opposition actually held up the passage of RFRA

To briefly reiterate what has been articulated many times in other fora, the contraceptive coverage requirement (CCR) contained in the implementing regulations of the Affordable Care Act (ACA) requires that all new insurance plans cover preventative services, including contraception, with no cost-sharing.¹¹ There are several categories of businesses that are exempted from providing insurance coverage entirely, including companies with fewer than fifty employees¹² and companies with grandfathered health plans.¹³ Houses of worship are specifically exempted from the contraceptive coverage requirement only.¹⁴ In the implementing regulations, the relevant Departments established an accommodation for religious non-profit organizations,¹⁵ which required them to fill out a specified form and send it to their insurance company or third-party administrator,¹⁶ at which point the

for some time. Eventually, however, the Court decided *Casey* without overturning *Roe*, and anti-abortion opposition to RFRA was mollified by the attachment of a proviso “clarifying” that RFRA was not intended to affect a woman’s right to abortion one way or the other. *Id.* at 237-38; HOUSE COMM. ON THE JUDICIARY, RELIGIOUS FREEDOM RESTORATION ACT OF 1993, H.R. REP. NO. 103-88, at 8 (1st Sess. 1993); SENATE COMM. ON THE JUDICIARY, RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 103-111, at 12 (1st Sess. 1993). The pendulum has clearly swung the other way, with socially and politically conservative religious organizations and individuals using RFRA as a sword, rather than a shield, in order to limit access to reproductive health care.

¹¹ 42 U.S.C. § 300gg-13(a)(4) (2012); Kara Loewentheil, *When Free Exercise is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 *DRAKE L. REV.* 433, 445 (2014) (discussing mechanics of the contraceptive coverage requirement).

¹² Businesses with fewer than fifty employees are exempted from the ACA altogether but must offer the same contraceptive coverage if they choose to offer health insurance. 26 U.S.C. §§ 4980H(a), (c)(2) (2012) (defining “large employer”); 42 U.S.C. § 300gg-13(a) (2012) (requiring contraceptive coverage for every offered plan without regard to employer size).

¹³ This is a category that is shrinking by the day and will ultimately effectively cease to exist. 45 C.F.R. §§ 147.140(a)(1), (g) (2010).

¹⁴ Houses of worship are institutions like a church, mosque, or synagogue. 45 C.F.R. § 147.131(a) (2014) (providing exemption from contraceptive coverage requirement for “religious employers,” defined as an employer that “is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended”); 26 U.S.C.A. § 6033(a)(3)(A)(i) (2014) (referring to “churches, their integrated auxiliaries, and conventions or associations of churches,” as well as “the exclusively religious activities of any religious order,” which are not required to submit tax returns under the Code); Loewentheil, *supra* note 11, at 446.

¹⁵ 45 C.F.R. § 147.131(b)(2)-(3) (2013) (amended 2014).

¹⁶ There is no single definition of third-party administrator (TPA) in federal law, but many states have their own definitions. *See, e.g.*, N.J. STAT. ANN. § 17B:27B-1 (2014) (“‘Third party administrator’ means a person or entity that: processes claims and pays claims on behalf of a benefits payer without the assumption of financial risk for the payment of health or dental benefits. Third party administrator shall include: (1) an entity not licensed as an insurer that is not an affiliate or subsidiary of an insurer, that processes claims on behalf of a benefits payer; (2) an entity that is a subsidiary or affiliate of an insurer that processes claims on behalf of the insurer; and (3) an entity that is a subsidiary or affiliate of an insurer that only processes claims on behalf of benefits payers other than insurers. Third party administrator shall not include an employee, affiliate or subsidiary of a benefits payer formed for the purpose of processing and paying claims solely on behalf of the benefits payer, nor shall it include a collection agency or bureau or pharmacy benefits manager.”). The Bureau of Labor Statistics also published one federal definition of “third-party administrator” for the purposes of its data collection: “An individual or firm hired by an employer to handle claims processing, pay providers, and manage other functions related to the operation of health insurance. The TPA is not the policy-

insurance company or third-party administrator would be required to provide the payment for contraceptive services directly to the participants and beneficiaries, at no cost to the objecting organization or the plan's beneficiaries.¹⁷ Both the general CCR and the accommodation were greeted with both acclaim and dismay, and over 100 lawsuits were quickly filed by both for-profit companies and non-profit organizations.¹⁸ Some of these suits challenged the exclusion of for-profit entities from the accommodation process, while others challenged the accommodation process itself.

In June 2014 the Supreme Court issued its opinion in the consolidated cases of *Hobby Lobby v. Sebelius*¹⁹ and *Conestoga Woods v. Burwell*.²⁰ The plaintiffs in the two cases were the equity-holders of for-profit entities who objected to covering four forms of contraception: two hormonal forms of emergency contraception and the two IUDs available on the American market.²¹ The Court's opinion held that RFRA required that the plaintiffs be exempted from compliance with the CCR.²² The opinion, however, expressly affirmed that the impact of an accommodation on third parties was properly part of the RFRA analysis:

It is certainly true that in applying RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (applying RLUIPA). That consideration will often inform

holder or the insurer." *Definitions of Health Insurance Terms*, BUREAU OF LABOR STATISTICS, <http://perma.cc/W8LL-DQB6>.

¹⁷ Third-party administrators were also allowed to claim credits on the federal exchanges to make up the costs. See 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, 558–59 (2013); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456-01, 8463 (Feb. 6, 2013) ("The issuer providing the coverage (or an affiliated issuer) would receive an additional adjustment in the user fees that otherwise would be charged by an FFE in an amount that would offset a reasonable charge by the third party administrator for performing this service.").

¹⁸ See *Challenges to the Federal Contraceptive Coverage Rule*, AMERICAN CIVIL LIBERTIES UNION (Sept. 4, 2014), <http://perma.cc/T5PR-YA62>.

¹⁹ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 82 U.S.L.W. 3139 (Nov. 26, 2013) (No. 13-354), aff'd, 134 S. Ct. 2751 (2014).

²⁰ *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013), cert. granted, 82 U.S.L.W. 3324 (Nov. 26, 2013) (No. 13-356), rev'd, 134 S. Ct. 2751 (2014).

²¹ Brief for Petitioner at 9, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354). IUDs can be used as emergency contraception, meaning they are inserted shortly after unprotected intercourse and left in the uterus for any duration up to the time limit of the product, although this is rarely done in the United States where hormonal emergency contraception is available over the counter. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 966 n.78 (2007) (discussing benefit of over-the-counter emergency contraception in light of the fact that other forms of contraception, like an IUD, require a prescription); see also *Copper-T IUD as Emergency Contraception*, THE EMERGENCY CONTRACEPTION WEBSITE, <http://perma.cc/FN2V-73V6> (discussing use of IUD as emergency contraception).

²² *Hobby Lobby*, 134 S. Ct. at 2759–60.

the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest.²³

Justice Kennedy's concurrence echoed and expanded upon this point.²⁴

Further, the Court stressed repeatedly that in this case, the existing accommodation for non-profit religious organizations could be easily and efficiently extended to for-profit corporations, such that their employees and dependents would have the same access to contraception as other women under the law.²⁵ Justice Kennedy's concurrence also strongly suggested that his joining of the majority opinion took as its premise that there would be no impact on women's access to contraception because the existing non-profit accommodation could simply be set up to allow for-profit businesses to take advantage of it as well.²⁶

Nevertheless, three days later the Court issued an order in *Wheaton College v. Burwell*.²⁷ The plaintiff, a Christian college, objected to the non-profit religious organization accommodation on the grounds that filling out the required form "triggered" the provision of the contraceptive coverage (by setting in motion the chain of communications and actions that would lead to the insurer or third-party administrator providing payment for contraceptive services) and made the College complicit just as if it had provided the coverage itself.²⁸ Despite having trumpeted the existing accommodation as a desirable solution to the RFRA claims of for-profit entities that objected to providing coverage, the Court issued an order granting a temporary injunction to prevent the government from requiring Wheaton College to comply with the regulations. Instead, the Court ruled, the government could require only that Wheaton College notify the government, and the government could take it upon itself to inform the relevant insurance companies or third-party administrators if it chose to do so.²⁹

The Court failed to address the obvious question of why any entity that objected to filling out the required form notifying its insurance company would not object to the functional equivalent of notifying the government so the government could notify the insurance company instead. And indeed, not long afterwards, in court filings in several cases brought by non-profit relig-

²³ *Id.* at 2781 n.37.

²⁴ *Id.* at 2786 (Kennedy, J., concurring); see also Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Employee Burdens*, 39 HARV. J.L. & GENDER (forthcoming Jan. 2015).

²⁵ *Hobby Lobby*, 134 S. Ct. at 2759 ("In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage . . . HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar objections."); see also *id.* at 2786 (Kennedy, J., concurring) ("That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs.").

²⁶ *Id.* at 2786; see also Gedicks, *One Cheer for Hobby Lobby*, *supra* note 24.

²⁷ *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014).

²⁸ *Id.* at 2808 (Sotomayor, J., dissenting).

²⁹ *Id.* at 2807.

ious organizations challenging the accommodation, objecting plaintiffs indicated that essentially no accommodation would be acceptable if it required an insurance issuer or third-party administrator with whom the organization contracts to provide insurance coverage for contraception for the organization's employees regardless of who pays for it.³⁰ In other words, at least some of the non-profit religious organizations challenging the CCR (and one presumes some of the for-profit businesses as well) will not be satisfied with anything less than a full exemption from the law, which would presumably leave women covered by their insurance plans without contraceptive coverage at all.

Meanwhile, in the wake of *Hobby Lobby*, HHS began developing new regulations to govern the accommodation process. In August 2014, the government released two sets of regulations. One, a final interim regulation,³¹ provided a new process for the accommodation open to non-profit religious organizations. The regulation allows such organizations to submit written notice directly to the government only, after which HHS will collaborate with the Department of Labor (DOL) to ensure that the objecting organization's insurance carrier or third-party administrator provided the contraceptive coverage itself directly to the affected beneficiaries.³² The other, a proposed regulation, suggested making the same process available to for-profit entities, and solicited input from the public on how to define which for-profit entities should be allowed to take advantage of the accommodation.³³

As of this writing, the ultimate regulations governing the accommodation process are unknown, as is the outcome of the many cases still winding their way through the courts—particularly what courts will do with the objectors, whether non-profit or for-profit, who object to any accommodation and argue that RFRA requires that they be allowed a full exemption from any coverage of any kind of contraception. Preliminary injunctions have been granted in a number of district court cases in which plaintiffs made this argument.³⁴ Thus far the Circuit Courts to address the question have held for

³⁰ See, e.g., Brief for Plaintiffs-Appellants at 26–27, *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Feb. 28, 2014), <http://perma.cc/YD9D-QAS7>; Letter from Plaintiffs-Appellants' counsel to Mark Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit (July 8, 2014), <http://perma.cc/SNQ8-KJT2>; *Ave Maria University v. Burwell*, No. 2:13-cv-630-JSM-CM (M.D. Fla. Oct. 28, 2014), 2014 WL 5471048 (order enjoining the interim final regulations).

³¹ A final interim regulation is one that takes effect immediately but is not final. HHS indicated it would accept comments on this regulation for sixty days and then would subsequently issue a final regulation. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092 (Aug. 27, 2014), <http://perma.cc/PQ77-BLB4>.

³² *Id.* at 51,094–95.

³³ Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118 (proposed Aug. 27, 2014), <http://perma.cc/5X5F-CXBD>. For an analysis of the appropriate regulatory definition, see Letter from Katherine Franke et al. to Ctrs. for Medicare and Medicaid Servs. (Oct. 21, 2014), <http://perma.cc/X3J6-R9W2>.

³⁴ See, e.g., *Ave Maria University v. Burwell*, No. 2:13-cv-630-JSM-CM, 2014 WL 5471048 (M.D. Fla. Oct. 28, 2014) (order enjoining the interim final regulations); *Catholic Diocese of Beaumont v. Sebelius*, 10 F. Supp. 3d 725 (E.D. Tex. 2014); *Catholic Benefits*

the government,³⁵ but briefs have already been filed with the Supreme Court in one of the cases,³⁶ with more likely on their way up. It seems likely that the Supreme Court will ultimately have to decide future iterations of these cases, involving either other forms of accommodation, or claims to a total exemption, or both. Meanwhile, RFRA objections to contraceptive coverage are arising from new angles, as a Missouri lawmaker has sued the federal government, arguing that the access to contraception provided to his daughters through their family insurance plan violates his and his wife's free exercise rights.³⁷

But even without knowing the outcome of those processes, there are lessons to be learned from the reactions to *Hobby Lobby* and *Wheaton College* from across the political spectrum, as the next two Sections show.

II. ERROR ON THE RIGHT: HOW SCOTT WALKER'S ADMINISTRATION GOT IT WRONG

In this Part, I demonstrate that Scott Walker's Administration made a common, but erroneous error, in assuming that *Hobby Lobby* and the *Wheaton College* order mean that objecting individuals or entities are essentially entitled to religious accommodations on demand, at least in the context of contraceptive insurance coverage, and that states are therefore without power to enforce existing laws guaranteeing contraceptive equity. In fact, in addition to the federal accommodation process for objectors to the ACA, a network of state laws still exist guaranteeing access, with the potential to fill any gaps that RFRA exemptions may leave behind. This Part maps contraceptive equity laws and religious exemption laws to provide a geography of these interstices.

Ass'n LCA v. Sebelius, No. CIV-14-240-R, 2014 WL 2522357 (W.D. Okla. June 14, 2014); Brandt v. Burwell, No. 14-cv-0681, 2014 WL 2808910 (W.D. Pa. June 20, 2014); Archdiocese of St. Louis v. Burwell, No. 4:13-CV-2300-JAR, 2014 WL 2945859 (E.D. Mo., June 30, 2014). For a current updated list of the status of the various cases, see *Challenges to the Federal Contraceptive Coverage Rule*, ACLU (Nov. 17, 2011), <https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule>; *HHS Mandate Information Central*, BECKETT FUND (Dec 9, 2014), <http://www.becketfund.org/hhsinformationcentral/>.

³⁵ See, e.g., *Priests for Life et al. v. U.S. Dep't of Health and Hum. Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (rejecting claim by non-profit religious organizations that the revised accommodation process violates their RFRA and First Amendment rights). The Sixth Circuit in *Mich. Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014) and the Seventh Circuit in *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014) have reached the same conclusion.

³⁶ *Petition for Writ of Certiorari, Roman Catholic Archbishop v. Burwell*, 134 S. Ct. 1760 (2014) (No. 13-5368); *Petition for Writ of Certiorari, Univ. of Notre Dame v. Burwell*, No. 14-392 (Oct. 3, 2014), 2014 WL 4978601.

³⁷ *Wieland v. U.S. Dept. of Health and Human Servs.*, No. 13-03528 (8th Cir. filed Nov. 21, 2013).

A. *A Geography of State Contraceptive Equity and Religious Exemption Laws*

Before the mid-1990s, many health insurance plans did not cover contraceptives at all, even when covering other prescription drugs. But then Viagra hit the market in 1996, and insurance companies added it to their prescription benefit plans. This was just the leverage that contraceptive equity advocates needed to get the legislatures and the public concerned about contraceptive coverage insurance.³⁸ Rather than appear to be demanding a “new” entitlement, advocates were now merely asking for equality, or parity—always a more sympathetic position.³⁹ This framing was successful, and since 1998 almost 30 states have passed bills requiring some (variable) level of contraceptive coverage by insurance plans that offer prescription coverage.⁴⁰ The provisions of these laws can differ dramatically, however—not only in what they require, but in what, if any, exceptions they allow.

To a large extent, the passage of the Affordable Care Act and its contraceptive coverage requirement made contraceptive equity statutes redundant. *But not entirely*. After *Hobby Lobby* we know that the government cannot enforce the contraceptive coverage requirement directly against non-profit religious organizations and some for-profit entities. But that holding only protects them from enforcement of the ACA itself, because RFRA only applies to federal law.⁴¹ Under state contraceptive equity statutes, these organizations and for-profit businesses may have an independent obligation to provide contraceptive insurance coverage, even in states whose statutes have a religious exemption or where there is a state RFRA under which claims could be brought. In addition, it remains unclear whether for- or non-profit entities that demand a total exemption from the ACA will be allowed to escape any contraceptive coverage requirements under federal law, leaving their employees with only state law coverage, if any.

This Part therefore maps the geography of state contraceptive equity statutes and state religious exemption provisions (whether in the contraceptive equity statutes or freestanding) in order to provide an overview of the

³⁸ See, e.g., Chad Brooker, *Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives*, 12 U. MD. L.J. RACE RELIG. GENDER & CLASS 169, 171 (2012); Janice Lee, *A Quick Fix Solution for the Morning After: An Alternative Approach to Mandatory Contraception Coverage*, 9 GEO. J.L. & PUB. POL'Y 189, 190–92 (2010); Ayelet S. Lebovicz, “Cover My Pills”: *Contraceptive Equity and Religious Liberty in Catholic Charities v. Dinallo*, 16 CARDOZO J.L. & GENDER 267, 270–71 (2010); Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 746–47 (2005).

³⁹ Contraceptive access has always been about women's equality on a fundamental level—here I simply mean to suggest it became more legible in the public discourse and in the legislatures as an equality issue when there was an obvious comparator, even though that comparator was only superficially similar and fundamentally inapposite.

⁴⁰ Rachel Bisi & Patrick Horan, *Access to Contraception*, 14 GEO. J. GENDER & L. 245, 272 (2013).

⁴¹ *City of Boerne v. Flores*, 521 U.S. 507, 533–36 (1997).

ways in which contraceptive equity laws may still require that religious organizations or religiously-motivated for-profit businesses provide contraceptive coverage in their insurance policies regardless of whether they qualify for, seek, or obtain a religious exemption from the federal CCR.

1. *Contraceptive Equity Statutes*

As of November 2014, between 28 and 31 states⁴² have contraceptive equity laws or interpretations of one kind or another⁴³ on the books. As a

⁴² See generally *infra* Tables, 1, 2. ARIZ. REV. STAT. ANN. §§ 20-826(Y), 20-1057.08, 20-1402(L), 20-1404(U), 20-2329(A) (2014); ARK. CODE ANN. §§ 23-79-1101 to 1104 (2005); CAL. INS. CODE § 10123.196 (2000); CAL. HEALTH & SAFETY CODE § 1367.25 (2003); COLO. REV. STAT. § 10-16-104(3) (2014); CONN. GEN. STAT. ANN. § 38a-503e (2014); DEL. CODE ANN. tit. 18, § 3559 (2001); GA. CODE ANN. § 33-24-59.6 (2014); HAW. REV. STAT. § 431:10A-116.6 (2014); ILL. COMP. STAT. ANN. 5/356z.4 (2007); IOWA CODE ANN. § 514C.19 (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J, 2756, 2847-G, 4247 (2014); MD. CODE ANN., INS. § 15-826 (1998); MASS. GEN. LAWS ch. 175, § 47W, ch. 176A, § 8W, ch. 176B, § 4W, ch. 176G, § 40 (2014); MICH. CIV. RTS. COMM'N, DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006); MO. REV. STAT. § 376.1199 (2012); 51 Mont. Op. Att'y Gen. No. 16 (Mar. 28, 2006); NEV. REV. STAT. ANN. §§ 689A.0415, 689A.0417, 689B.0376-77, 695C.1694-95, 695B.1916, 695B.1918 (2014); N.H. REV. STAT. ANN. §§ 420-A:17-c, 420-B:8-gg (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014); N.M. STAT. ANN. §§ 59A-22-42, 59A-46-44 (2014); N.Y. INS. L. §§ 4303(cc), 4322(b)(25) (2014); N.C. GEN. STAT. ANN. § 58-3-178 (2014); OHIO REV. CODE ANN. § 1751.01(A)(7) (2014); OR. REV. STAT. ANN. § 743A.066 (2007); R.I. GEN. LAWS ANN. §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2014); TEX. INS. CODE ANN. § 1369.104 (2014); VT. STAT. ANN. tit. 8, § 4099c (2014); VA. CODE ANN. §§ 2.2-2818(B)(5), 32.1-325, 38.2-3407.4:2 (2014); WASH. ADMIN. CODE § 284-43-822 (2014); W. VA. CODE ANN. § 33-16E-4 (2005); WIS. STAT. ANN. §§ 609.805 (2010), 632.895(17) (2012).

⁴³ The number varies because the status of contraceptive equity requirements in Ohio is not clear. The Ohio statute requires coverage of “voluntary family planning” but does not mention contraception specifically and is not included in my round-up of CE laws. OHIO REV. CODE ANN. § 1751.01(A)(7) (2013). Meanwhile, two states have laws that purport to be CE laws but actually do not require such coverage. While Texas’s original 2001 CE law required coverage, TEX. INS. CODE ANN. ART. 21.52L (2005), *repealed by* Acts 2003, ch. 1274, § 26(a)(17), it was gutted by a law passed in 2003 that allows insurers to issue plans that do not include state-mandated health benefits, including contraceptive coverage, and allows employers to select these plans. TEX. INS. CODE ANN. art. 3.80 (2005). As a result, Texas has a contraceptive equity statute, but policy trackers do not consider it to be an effective mandate. Virginia’s statute is similar. VA. CODE ANN. § 38.2-3407.4:2(A) (2014). In discussing the provisions of the various statutes throughout this article I consider Ohio to be a state with a CE law but Texas and Virginia to be states that do not have a CE law.

I also include Michigan and Montana in this count, which do not have contraceptive equity laws *per se* but do have legal requirements of contraceptive equity based on interpretations of their state non-discrimination laws. See MICH. CIV. RTS. COMM'N DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006) (holding that employer’s exclusion of prescription contraceptives from a health plan that covers other prescription drugs violates the Elliott-Larsen Civil Rights Act); 51 MONT. OP. ATTY. GEN. No. 16 (Mar. 28, 2006) (holding that the Montana unisex insurance law and the Montana Human Rights Act require contraceptive equity). In these two states, the contraceptive equity requirement is a legal obligation for employers, rather than for insurance companies (which are the entities targeted by stand-alone contraceptive equity laws).

When I use the term “contraceptive equity laws” in this article then, I am generally referring to all state contraceptive equity guarantees, whether independent statutes or interpretations

preliminary note, the reader should remember that most state contraceptive equity statutes do not require coverage of contraceptives with no cost-sharing, and so while they are a vast improvement over no guarantee of contraceptive coverage, they are not as comprehensive as the full-force requirements of the federal requirements.⁴⁴

The majority of state contraceptive equity laws, in twenty-five states, require coverage of all FDA-approved contraceptives⁴⁵ (some of the states in this category actually have broader provisions that do not mention FDA approval, but since prescription contraceptives cannot be prescribed unless they have been approved by the FDA, the effect is the same). Two exclude emergency contraception.⁴⁶ Most of these laws apply directly to the insurance company, rather than to the employer, but two laws may apply to the employer as well.⁴⁷

Several of the laws specify that they do not provide coverage for drugs intended to terminate a pregnancy or cause an abortion.⁴⁸ While this might

of existing discrimination laws. I differentiate between these categories in the text where necessary.

⁴⁴ California's contraceptive equity law as recently amended does require no cost-sharing. CAL. HEALTH & SAFETY CODE § 1367.25 (2003), amended by the Contraceptive Equity Act of 2014, 2014 Cal. Legis. Serv. Ch. 576 (S.B. 1053). In addition, there is some argument that in certain states, like Wisconsin, where the contraceptive equity statute requires equity between contraception and other preventative prescription drugs and services that contraception should be required under the state contraceptive equity law with no cost-sharing, since other preventative services are now available with cost-sharing under the ACA. WIS. STAT. ANN. § 632.895(17)(c) (2014). Finally, it is possible to imagine sex equality challenges based on state sex discrimination laws to ensure access without cost-sharing under state contraceptive equity laws.

⁴⁵ ARIZ. REV. STAT. ANN. §§ 20-826(Y)(1) (2014), 20-1057.08(A)(1) (2012), 20-1402(L)(1) (2012), 20-1404(U)(1) (2014), 20-2329(A)(1) (2012); CAL. HEALTH & SAFETY CODE § 1367.25 (2003), amended by The Contraceptive Equity Act of 2014, 2014 Cal. Legis. Serv. Ch. 576 (S.B. 1053); CONN. GEN. STAT. ANN. § 38a-503e(a)(1) (2012); DEL. CODE ANN. tit. 18, § 3559(a) (2001); GA. CODE ANN. § 33-24-59.6(c) (2014); HAW. REV. STAT. § 431:10A-116.6(d) (2014); 215 ILL. COMP. STAT. ANN. 5 / 356z.4(a) (2007); IOWA CODE ANN. § 514C.19(1)(a) (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J, 2756, 2847-G, 4247 (2014); MD. CODE ANN., INS. § 15-826 (1998); MASS. GEN. LAWS ch. 175, § 47W(b), ch. 176A, § 8W(b), ch. 176B, § 4W(b), ch. 176G, § 4O(b) (2014); MICH. CIV. RTS. COMM'N DECLARATORY RULING (Aug. 21, 2006), at 8; MO. REV. STAT. § 376.1199(4) (2012); 51 MONT. OP. ATT'Y GEN. No. 16 (Mar. 28, 2006); NEV. REV. STAT. ANN. §§ 689A.0415(1) (1999), 689B.0376(1) (1999), 695C.1694(1) (2001), 695B.1916(1) (1999); N.H. REV. STAT. §§ 420-A:17-c, 420-B:8-gg (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014); N.M. STAT. ANN. §§ 59A-22-42, 59A-46-44 (2014); N.Y. INS. LAW §§ 4303(cc), 4322(b)(25) (2014); OR. REV. STAT. ANN. § 743A.066(3) (2007); R.I. GEN. LAWS ANN. §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2014); VT. STAT. ANN. tit. 8, § 4099c(a) (2014); WASH. ADMIN. CODE § 284-43-822(2)(f) (2014); W. VA. CODE ANN. § 33-16E-4(a) (2005); WIS. STAT. ANN. § 632.895(17)(a) (2012).

⁴⁶ ARK. CODE ANN. § 23-79-1103(b) (2005); N.C. GEN. STAT. ANN. § 58-3-178(c)(4)(b) (1999).

⁴⁷ See MICH. CIV. RTS. COMM'N, DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006); 51 MONT. OP. ATT'Y GEN. No. 16 (Mar. 28, 2006).

⁴⁸ See ARK. CODE ANN. § 23-79-1103(b) (2005) (insurance companies not required to provide coverage for an abortion or abortifacient); COLO. REV. STAT. ANN. § 25-3-110(1)(a) (2009) (definition of emergency contraception excludes "RU-486, mifepristone, or any other drug or device that induces a medical abortion"); ILL. COMP. STAT. ANN. 5/356z.4(c) (2007)

seem unremarkable, since contraception is not abortion, the ongoing effort to conflate the two makes these statutes more complicated than they might appear. Some of these statutes do not specify methods but merely specify that they do not require coverage of “an abortifacient,”⁴⁹ or “drugs that induce medical abortion,”⁵⁰ or drugs or devices “intended to terminate a pregnancy,”⁵¹ or that they only cover drugs that “prevent conception,”⁵² or simply that they do not require coverage of “abortion.”⁵³ The problem is that the ongoing conflation of contraception and abortion, particularly when it comes to emergency contraception, which some anti-abortion advocates and religious leaders argue is an abortion,⁵⁴ leaves these statutes vulnerable to erroneous interpretations that would allow insurers and employers not to cover emergency contraception or intra-uterine devices—or potentially even hormonal contraception at all. Despite the fact that this would be scientifically unfounded, courts have been surprisingly amenable to deeming this contested area an unexaminable terrain of religious belief.⁵⁵

This matters because emergency contraception differs in kind from other forms of contraception—not because it is an “abortifacient,” which

(insurance companies not required to cover services related to an abortion); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(1), 2756(1), 2847-G(1), 4247(1) (2014) (“This section may not be construed to apply to prescription drugs or devices that are designed to terminate a pregnancy.”); MO. REV. STAT. § 376.1199 (4) (2012) (“‘contraceptive’ . . . shall exclude all drugs and devices that are intended to induce an abortion”); N.C. GEN. STAT. ANN. § 58-3-178(c)(4)(a) (1999) (RU-486 or any equivalent drug product not included); R.I. GEN. LAWS ANN. §§ 27-18-57(a), 27-19-48(a), 27-20-43(a), 27-41-59(a) (2014) (coverage for RU-486 not required).

⁴⁹ See ARK. CODE ANN. § 23-79-1103(b) (2005); R.I. GEN. LAWS ANN. §§ 27-18-57(a), 27-19-48(a), 27-20-43(a), 27-41-59(a) (2014).

⁵⁰ See COLO. REV. STAT. § 25-3-110(1)(a) (2009).

⁵¹ See ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(1), 2756(1), 2847-G(1), 4247(1) (2014); MO. REV. STAT. § 376.1199(4) (2012). Rhode Island’s statute does not require coverage of drugs that terminate pregnancy but does not mention devices. R.I. GEN. LAWS ANN. §§ 27-18-57(a), 27-19-48(a), 27-20-43(a), 27-41-59(a) (2014).

⁵² See IOWA CODE ANN. § 514C.19(1)(a) (2014).

⁵³ See ILL. COMP. STAT. ANN. § 5/356z.4(c) (2007).

⁵⁴ See, e.g., American Life League, *Chapter 97 – Introduction: The Abortion-Contraception Connection*, ETERNAL WORD TELEVISION NETWORK, <http://perma.cc/9JSL-SV5J>; Janet Smith, *The Connection Between Contraception and Abortion*, ONE MORE SOUL, <http://perma.cc/PKW5-JKZF>; Patrick Craine, *Contraception Linked to Massive Rise in Abortion Rate*, LIFE SITE, <http://perma.cc/GFG3-9PYS>.

⁵⁵ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014); *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dept. of Health and Hum. Servs.*, 756 F.3d 1339, 1346 (11th Cir. 2014) (“[T]he United States does not dispute that were the Network to facilitate access to contraception, sterilization, or abortifacients, the Network would violate its religious beliefs, betray its identity, and contradict its public teaching.”); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 390 n.1 (3d Cir. 2013), *cert. granted sub nom. Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013) *and rev’d and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (“Whether a fertilized egg, being acted upon by a drug or device, is aborted after implantation or is never implanted at all is not pertinent to the Hahns’ belief that a human life comes into being at conception and therefore the destruction of that entity is the taking of a human life. That belief is the point of this case, and the government is in no position to say anything meaningful about the Hahns’ perspective on when life begins.”).

the scientific evidence shows it is not,⁵⁶ but because it is the only kind of contraception that can be used after unprotected intercourse. IUDs, which can be used as emergency contraception but are rarely so used in the United States, are also important because they are long-lasting reversible contraceptive methods with very high protection rates and almost no possibility of user error, but they are prohibitively expensive for many women.⁵⁷ A final issue, of course, is that if the definition of “abortion” can be based on religious belief, there is nothing to stop a religious employer from choosing to define “abortion” for the purposes of a religious exemption clause as anything that prevents conception, which would broaden the potential conflation and allow it to swallow the protection of contraceptive equity statutes whole. This would also set a concerning precedent for how courts should evaluate requests for accommodations or exemptions that involve religious beliefs that conflict directly with the medical or scientific understanding that underpins a given law.

2. *State Religious Exemptions Law*

There are two ways, broadly speaking, in which contraceptive equity statutes may be susceptible to religious exemptions that remove women from the statute’s protections. The first is when the statute mandating contraceptive coverage includes a religious exemption. The second is when a stand-alone state Religious Freedom Restoration Act or so-called “conscience clause” statute provides a general right to religious exemptions that can be claimed against any state law, policy, or rule, including a contraceptive equity statute through litigation. I address each here in turn to sketch the network of applicable laws before turning to an analysis of how these overlapping regimes work together in practice.

a. *Within Contraceptive Equity Laws*

A substantial minority of state contraceptive equity statutes contain no religious exemption whatsoever in the text of the statute,⁵⁸ but many do.⁵⁹

⁵⁶ Brief for Physicians for Reproductive Health et al. as Amici Curiae Supporting Defendants-Appellees at 9–17, *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (2013) (No. 13-1144), 2013 WL 1792349 (discussing the scientific evidence that confirms that the FDA-approved forms of emergency contraception are not abortifacients).

⁵⁷ See INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 105 (2011), <http://perma.cc/AXH4-QT7K> (long-term hormonal contraceptives have the highest up-front cost and require a doctor to administer them, which puts them out of reach for many women).

⁵⁸ See COLO. REV. STAT. § 10-16-104(3) (2014); GA. CODE ANN. § 33-24-59.6 (2014); 215 ILL. COMP. STAT. 5/356z.4 (2007); IOWA CODE ANN. § 514C.19 (2014); 51 MONT. OP. ATT’Y GEN. No. 16 (Mar. 28, 2006); N.H. REV. STAT. ANN. §§ 420-A:17-c, 420-B:8-gg (2014); OHIO REV. CODE ANN. § 1751.01(A)(7) (2014); VT. STAT. ANN. tit. 8, § 4099c (2014); WASH. ADMIN. CODE § 284-43-822 (2014); WIS. STAT. ANN. §§ 609.805 (2010), 632.895(17) (2012).

⁵⁹ See ARIZ. REV. STAT. ANN. §§ 20-826(Z), 20-1057.08(B), 20-1402(M), 20-1404(V), 20-2329(B) (2014); ARK. CODE ANN. § 23-79-1104(b)(3) (2005); CAL. INS. CODE

Those that do contain exemptions vary in their terms. Most statutes that contain built-in religious exemptions allow them only for non-profit religious organizations and their associated educational, health care, or other service providers.⁶⁰ Michigan's non-discrimination law, for example, as interpreted to require contraceptive equity, allows exemptions for religious non-profit organizations but specifies that "certain entities, while owned or operated by a religious organization, will not qualify for an exemption if they provide services to the general public."⁶¹

Several, however, are written in more general terms, often without any definition, leaving open the possibility that a for-profit business might be able to bring a claim for an exemption if it can prove that its objection to providing contraceptive coverage is religiously motivated⁶² in a way that comports with the statute's terms. In one state, the statute self-evidently applies beyond religious organizations: Missouri's exemption applies to any "person or entity" objecting to contraceptive coverage.⁶³ In two other states, the language is less clear, but potentially open to troublingly broad claims. Arizona, for instance, allows an exemption for not only a religious non-profit organization that qualifies under the IRS criteria often used in these statutes (and used in the federal regulations implementing the contraceptive

§ 10123.196(d) (2000); CAL. HEALTH & SAFETY CODE, § 1367.25(b) (2003); CONN. GEN. STAT. ANN. § 38a-503e(b) (2012); DEL. CODE ANN. tit. 18, § 3559(d) (2014); HAW. REV. STAT. § 431:10A-116.7(b) (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(2), 2756(2), 2847-G(2), 4247(2) (2014); MD. CODE ANN., INS. § 15-826(c)(1) (2014); MASS. GEN. LAWS ch. 175, § 47W(c), ch. 176A, § 8W(c), ch. 176B, § 4W(c), ch. 176G, § 4O(c) (2014); MICH. CIV. RTS. COMM'N, DECLARATORY RULING (Aug. 21, 2006) at 7; MO. REV. STAT. § 376.1199(4) (2012); NEV. REV. STAT. ANN. §§ 689A.0415(5), 689B.0376(5), 695C.1694(5), 695B.1916(5), 695B.1918(5) (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014); N.M. STAT. ANN. §§ 59A-22-42(D), 59A-46-44(D) (2014); N.Y. INS. L. § 4303(cc)(1) (2014); N.C. GEN. STAT. ANN. § 58-3-178(e) (1999); OR. REV. STAT. ANN. § 743A.066(4) (2007); R.I. GEN. LAWS ANN. § 27-18-57(b)-(c) (2014); W. VA. CODE ANN. § 33-16E-2(5) (2005).

⁶⁰ See ARK. CODE ANN. § 23-79-1102(3) (2005); CAL. INS. CODE §§ 10123.196(d) (2000); CAL. HEALTH & SAFETY CODE 1367.25(b) (2003); CONN. GEN. STAT. ANN. § 38a-530e (2012); DEL. CODE ANN. tit. 18, § 3559(d) (2001) (Delaware's statute refers simply to "religious employer" without defining the term, but subsequently refers to such employers as "religious organizations," suggesting that the statute intends to reach non-profit organizations rather than for-profit businesses); HAW. REV. STAT. § 431:10A-116.7(b) (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(2), 2756(2), 2847-G(2), 4247(2) (2014); MD. CODE ANN., INS. § 15-826(c)(1) (2014) (scope of religious organization not defined); MASS. GEN. LAWS ch. 175, § 47W(c), ch. 176A, § 8W(c), ch. 176B, § 4W(c), ch. 176G, § 4O(c) (2014); MICH. CIV. RTS. COMM'N, DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006) at 7; NEV. REV. STAT. ANN. §§ 689A.0415(5), 689B.0376(5), 695C.1694(5), 695B.1916(5), 695B.1918(5) (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014); N.Y. INS. L. § 4303(cc)(1) (2014); N.C. GEN. STAT. ANN. § 58-3-178(e) (1999); OR. REV. STAT. ANN. § 743A.066(4) (2007); R.I. GEN. LAWS ANN. § 27-18-57(b)-(c) (2014); W. VA. CODE ANN. § 33-16E-2(5) (2005).

⁶¹ MICH. CIV. RTS. COMM'N, DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006), at 7.

⁶² See ARIZ. REV. STAT. ANN. §§ 20-826(Z), 20-1057.08(B), 20-1402(M), 20-1404(V), 20-2329(B) (2014); MO. REV. STAT. § 376.1199(4) (2012); N.M. STAT. ANN. §§ 59A-22-42(D), 59A-46-44(D) (2014).

⁶³ MO. REV. STAT. § 376.1199(4) (2012).

coverage requirement of the Affordable Care Act⁶⁴), but also for “an entity whose articles of incorporation clearly state that it is a religiously motivated organization and whose religious beliefs are central to the organization’s operating principles.”⁶⁵ New Mexico’s statute refers to a “religious entity” but without defining that term.⁶⁶ Without a definition, any entity could claim to be a “religious entity” at any time and for any reason, without necessarily being required to offer any kind of proof that it was founded or operated in accordance with any religious principles.

But contraceptive equity statutes also sometimes contain guarantees of rights that would help ensure coverage, rather than restrict it. First, many of the statutes with religious exemptions contain an exception to the exemption, which requires even objecting employers to cover contraception if it is needed for non-contraceptive or “medical”⁶⁷ reasons other than preventing pregnancy⁶⁸ (these exemptions also often include contraception that is necessary for preserving the life or health of the woman).⁶⁹ Second, a few of the statutes include a provision requiring that employees of organizations that

⁶⁴ 26 U.S.C.A. § 6033(a)(3)(A)(i), (iii) (2014); 45 C.F.R. § 147.131(a) (2014).

⁶⁵ ARIZ. REV. STAT. §§ 20-826(Z), 20-1057.08(B), 20-1402(M), 20-1404(V), 20-2329(B) (2014).

⁶⁶ N.M. STAT. ANN. §§ 59A-22-42(D), 59A-46-44(C) (2014).

⁶⁷ I put “medical” here in quotation marks to highlight the implication that preventing pregnancy is not a “medical” reason for taking contraception, even though pregnancy, and especially delivery of a child, involve increased risks to a woman’s health compared to not being pregnant (or to having a first trimester abortion for that matter). Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae in Support of the Government at 13, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (discussing health risks associated with pregnancy, especially pregnancies that are too frequent or closely spaced). Needless to say, contraception taken for purposes other than preventing pregnancy may nevertheless prevent pregnancy, creating an interesting conundrum for an objecting employer and for us as legal scholars. Does the intent of the use of the contraception matter when it comes to whether or not the contraception is religiously objectionable? Even if the intent is non-contraceptive, if the contraceptive acts as a contraceptive does the intent matter? Fundamentally, these exceptions make most sense either (1) as a form of recognition of third-party harms, or (2) as a signal that regulation of non-procreative sex is the real concern. As to (1), we might reason that the implicit value system here is that increased cost of contraception that might lead to unintended pregnancy and its associated medical risks and dangers is an acceptable price to pay for allowing religious exemptions, but increased cost of contraception that might lead to non-pregnancy related risks and dangers is not an acceptable price. As to (2), in that case it is the intent that matters in determining the acceptable costs of allowing religious exemptions. And, of course, (1) may actually just be an expression of (2), one level removed.

⁶⁸ ARIZ. REV. STAT. §§ 20-826(Z), 20-1057.08(C), 20-1402(M), 20-1404(V), 20-2329(B) (2014); CAL. INS. CODE § 10123.196(e) (2000); CAL. HEALTH & SAFETY CODE § 1367.25(c) (2003); CONN. GEN. STAT. ANN. § 38a-503e(d) (2012); HAW. REV. STAT. § 431:10A-116.7(d) (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(2), 2756(2), 2847-G(2), 4247(2) (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014) (New Jersey’s provision may be partial, in that it may only apply to hospital corporations, not all religious employers); N.C. GEN. STAT. ANN. § 58-3-178(e) (2014); W. VA. CODE ANN. § 33-16E-7(b) (2005).

⁶⁹ CAL. INS. CODE § 10123.196(e) (2000); CAL. HEALTH & SAFETY CODE § 1367.25(c) (2003); HAW. REV. STAT. § 431:10A-116.7(d) (2014); ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(2), 2756(2), 2847-G(2), 4247(2) (2014); N.J. STAT. ANN. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-19.15, 26:2J-4.30, 52:14-17.29j (2014); N.C. GEN. STAT. § 58-3-178(e) (1999); W. VA. CODE § 33-16E-7(b) (2005).

opt out of providing contraceptive coverage for religious reasons must be given the opportunity to purchase contraceptive coverage themselves at the group plan rate.⁷⁰ These provisions ensure that women are more likely to obtain at least affordable—if not cost-free—general access to contraception even if their employers object, at least for contraception that is “medically indicated.” In addition, many of the statutes require particular notice procedures if a religious exemption is invoked, to ensure that beneficiaries are aware of their coverage and their rights.⁷¹

b. External to Contraceptive Equity Laws

In addition to religious exemptions included in contraceptive equity laws themselves, several states with contraceptive equity laws also have state equivalents of the federal Religious Freedom Restoration Act (called collectively “state RFRAs” in this article).⁷² Some of these state RFRAs are actually broader than the federal RFRA,⁷³ although one is narrower in its protection than its federal counterpart.⁷⁴ State RFRAs are not the only source of free exercise protection in states with contraceptive equity statutes of course—there are also state constitutional free exercise clauses, some of which are construed more broadly than the current federal standard⁷⁵ (the

⁷⁰ HAW. REV. STAT. § 431:10A-116.7(e) (2014); MO. REV. STAT. ANN. § 376.1199(6)(3) (2012) (but statute does not specify whether members of group health plans may get coverage at a discount from the same insurer, or through a rider elsewhere); N.Y. INS. L. § 4303(cc)(2)(A) (2014); W. VA. CODE § 33-16E-7(c) (2005).

⁷¹ These states include Arizona, California, Delaware, Hawai‘i, Maine, Maryland, New Jersey, New York, and Rhode Island. See *State Policies in Brief: Insurance Coverage of Contraceptives*, GUTTMACHER INSTITUTE (Nov. 1, 2014), <http://perma.cc/P3N2-N2AQ>.

⁷² ARIZ. REV. STAT. ANN. §§ 41-1493-1493.02 (2014); CONN. GEN. STAT. ANN. § 52-571b (2012); 775 ILL. COMP. STAT. ANN. 35/15 (1998); MO. REV. STAT. ANN. § 1.302 (2003); N.M. STAT. ANN. § 28-22-3 (2000); R.I. GEN. LAWS § 42-80.1-3 (1993).

⁷³ CONN. GEN. STAT. ANN. § 52-571b (1993) (only requires a burden, not a substantial burden); N.M. STAT. ANN. § 28-22-3 (2000) (uses “restrict” instead of “burden” language, but relationship between federal and state RFRA is unclear. See *State v. Bent*, 328 P.3d 677, 685 (N.M. Ct. App. 2013)).

⁷⁴ MO. REV. STAT. ANN. § 1.302 (2003) (“unduly restrictive considering the relevant circumstances” rather than “least restrictive means”). See James A. Hanson, *Missouri’s Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853, 875, 896 (2004).

⁷⁵ See *Rupert v. City of Portland*, 605 A.2d 63, 65–66 (Me. 1992) (Maine Constitution appears to offer potentially broader protection than the First Amendment of U.S. Constitution); *Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994) (rejecting *Smith* and applying *Sherbert* and *Yoder* standards in interpreting state free exercise provision); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 198–99 (Mich. 1995) (discussing Michigan’s tradition of applying strict scrutiny to state burdens on religious freedom); *Reid v. Kenowa Hills Pub. Schs.*, 680 N.W.2d 62, 68 (Mich. App. 2004) (applying strict scrutiny to free exercise claim under Michigan Constitution); *People v. DeJonge*, 501 N.W.2d 127, 134 n.27 (Mich. App. 1993) (discussing criticisms of *Smith* though declining to explore extent of state protection); *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640, 647 (Mont. 1993); *St. John’s Lutheran Church v. State Compensation Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992) (both courts interpret Montana Constitution as in line with pre-*Smith* federal case law); *Rourke v. New York State Dep’t of Correctional Servs.*, 603 N.Y.S.2d 647, 649–50 (N.Y. Sup. Ct. 1993), *aff’d* 201 A.D.2d 179 (3d Dep’t 1994) (noting that the court is “mindful” of *Smith* but that it cannot ignore New York’s long history and commitment to individual liberties

rest are deemed coextensive,⁷⁶ or the state supreme court has never addressed the question). It is worth noting that in two states, California and New York, contraceptive equity statutes have withstood religious objection challenges under state religious free exercise protections.⁷⁷

Apart from general free exercise protections under state constitutions or RFRA-like statutes, many states with contraceptive equity laws also have “conscience clause”⁷⁸ laws that allow health care providers to refrain from participating, to various degrees, in care to which they have a religious and/or conscientious objection. The terms of these laws vary. Many states have conscience clauses specifically addressed at abortion services,⁷⁹ while others cover contraception, either explicitly⁸⁰ or via a general allowance for health care refusals.⁸¹ The law in Illinois is particularly broad, prohibiting:

any person, public or private institution, or public official to discriminate against any person in any manner, including but not limited to, licensing, hiring, promotion, transfer, staff appointment, hospital, managed care entity, or any other privileges, because of such person’s conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in

beyond those afforded by the federal Constitution); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (applying strict scrutiny to correctional facility’s hair length policy); *Hunt v. Hunt*, 648 A.2d 843, 853 (Vt. 1994) (Vermont Constitution protects religious freedom to same extent as federal RFRA); *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009) (reaffirming that state constitution provides greater protection for religion exercise than the federal Constitution does); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992) (state constitution provides greater protection for religious exercise than federal Constitution); *State v. Miller*, 549 N.W.2d 235, 239–41 (Wis. 1996) (applying strict scrutiny to religious exercise claim under Wisconsin Constitution’s freedom of conscience provision, noting that analysis is not constrained by federal free exercise jurisprudence).

⁷⁶ See, e.g., *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 953 P.2d 1315, 1345 (Haw. 1998).

⁷⁷ See *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Sup. Ct.*, 85 P.3d 67 (Cal. 2004).

⁷⁸ The term for these clauses is a contested one. Advocates for reproductive rights refer to them as “refusal clauses” while advocates for the clauses call them “conscience clauses.” I use both interchangeably here to avoid weighting the deck.

⁷⁹ These states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawai’i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Washington, and Wisconsin. See *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (Nov. 1, 2014), <http://perma.cc/ZUS7-P8CA>.

⁸⁰ ARIZ. REV. STAT. § 36-2154(B) (2009); ARK. CODE ANN. § 20-16-304(5) (2005); COLO. REV. STAT. § 25-6-102(9) (2010); 745 ILL. COMP. STAT. 70/3, 70/5 (2008) (unlawful to discriminate against any person because of the person’s refusal to participate in any health care service contrary to his or her conscience, with “health care” defined as including “any phase of patient care . . . in connection with the use or procurement of contraceptives”); ME. REV. STAT. tit. 22, § 1903(4) (2014) (applies to refusals to “provide family planning services”); MO. REV. STAT. § 191.724(3) (2012).

⁸¹ See CAL. BUS. & PROF. CODE § 733(b)(3) (2014); WASH. REV. CODE ANN. § 48.43.065 (2014).

any way in any particular form of health care services contrary to his or her conscience.⁸²

These laws, which apply to health care providers, would not generally make exemptions available to the insurer or the employer, who are the actors actually covered by most state contraceptive equity laws. But they may frustrate the ability of women in certain states to get access to information about contraception and contraceptive services. And in some states with particularly broad “conscience clauses,” like Illinois, such laws might be susceptible to invocation by employers or insurance companies despite a contraceptive equity law.⁸³

B. How Hobby Lobby Changes the State Contraceptive Equity and Religious Exemption Landscapes

Contraceptive equity laws were crucial tools for expanding access to contraceptive coverage in the pre-ACA era. But now that the ACA and the CCR exist, it might seem that contraceptive equity laws are no longer necessary. Appearances, however, are deceiving in this regard. In fact contraceptive equity laws continue to be important guarantors of contraceptive coverage in several ways. In this Part, I briefly outline the current state of play with regard to the CCR and exemptions, before exploring where contraceptive equity statutes will continue to have a role to play.

1. Hobby Lobby’s Direct Impact—or Lack Thereof—on State Law

As of this writing, *Hobby Lobby* has a direct impact on state contraceptive equity laws for both for-profit and non-profit entities, whether they make use of the Administration’s accommodation process or fit into the total exemption for houses of worship. Eventually, when the for-profit entity regulations are finalized, for-profit and non-profit entities may be given access to the same accommodation process, in which case the distinction between them as types of entities would cease to matter for these questions.⁸⁴

⁸² 745 ILL. COMP. STAT. ANN. 70/5 (2008).

⁸³ 745 ILL. COMP. STAT. 70/11.3 (1998).

⁸⁴ There is one last area in which new or amended state contraceptive equity laws may be useful for ensuring broad coverage going forward. The ACA does require coverage of all forms of FDA-approved contraceptives at no cost to the insured, but it allows insurance companies to engage in “reasonable medical management techniques” in deciding how to instrumentalize that coverage. See *Frequently Asked Questions about Affordable Care Act Implementation Part XII*, U.S. DEP’T OF LABOR (Feb. 20, 2013), <http://perma.cc/Q2S3-WX4B>. This form of “discretion” allows insurers to require prior authorization by the insurance company before coverage will be granted, or to require “step therapy,” which requires enrollees to try using cheaper methods of a given treatment and only grants access to more expensive methods if an enrollee has experienced failure or contraindications, regardless of what the enrollee prefers or her medical provider recommends. Erin Armstrong, *Medical Management and Access to Contraception*, NATIONAL HEALTH LAW PROGRAM (May 1, 2013), <http://perma.cc/3NFY-KF8Q>. Such medical management techniques can delay access or leave an enrollee with inadequate care—for instance, requiring her to use birth control pills rather than a long-acting reversible

a. *For-Profit Entities*

First, in the present and immediate future, state contraceptive equality laws continue to apply to for-profit entities (that do not self-insure) even when such an entity has received a RFRA exemption from a federal court, or is declining to comply with the CCR on the assumption that the federal government will not enforce the CCR against objecting businesses while the accommodation process is being resolved. Eventually the Administration will promulgate a final regulation governing the accommodation process for for-profit entities, but in the meantime, for-profit entities that have been deemed exempt from—or are not complying with—the CCR under RFRA are still liable to enforcement suits by state regulatory agencies for violation of state contraceptive equity laws.

Once the regulations extending the accommodation process to for-profit entities are in place, assuming the accommodation actually works to ensure access (which is not yet certain), state contraceptive equity laws will have less impact on for-profit entities taking advantage of the accommodation.⁸⁵ While such laws would theoretically still apply, it may be less likely that a state regulatory body would seek to enforce a state contraceptive equity law if the affected women are actually getting coverage under the federal accommodation process. On the other hand, we have yet to see how and whether the for-profit accommodation—or the religious non-profit organization accommodation for that matter—will actually operate post-*Wheaton College*. The government's new accommodation process, which requires HHS to work with DOL and the objecting party's insurance company or third-party administrator,⁸⁶ is more cumbersome and requires more coordinated action than the original form of the accommodation, and thus provides more opportunities for women's coverage to fall through the cracks or suffer delays. To the extent that the accommodation proves unwieldy or ineffective, state con-

contraceptive like an IUD (which women vastly prefer when price is not an issue), because the pills are cheaper. See Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 *CONTRACEPTION* 360, 362 & tbls.1, 2 (2007). While most contraceptive equity laws do not speak to this problem, California recently became the first state to amend its contraceptive equity law to limit the kind of medical management techniques insurers in the state are allowed to use when providing coverage for contraception. 2014 Cal. Legis. Serv. Ch. 576 (S.B. 1053).

⁸⁵ But not none. The new California contraceptive equity law, for instance, prohibits certain forms of medical management of contraceptive insurance coverage that can have a large impact on beneficiaries. See *supra* note 42. In addition, the Affordable Care Act regulations only apply to coverage for women, but state contraceptive equity laws could apply to coverage for men as well (for instance, for vasectomies, condoms, or contraceptive counseling—or future contraceptive methods that can be used by men).

⁸⁶ This is the current process outlined in the interim final regulations for religious non-profit organizations and it is likely reasonable to expect the same process will be available for some for-profit entities eventually since there is no principled difference between the two types of entities with regard to this aspect of the accommodation process. See Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,096–97 (Aug. 27, 2014), <http://perma.cc/BA9K-WWE5> (describing process through which HHS will work with DOL and insurers or third party administrators).

traceptive equity laws have an important role to play in the states where they exist to ensure continuous access to contraceptive coverage.

There is also the possibility that courts will eventually allow full exemptions from the law (even though that would be a grave misreading of RFRA, which does not allow religious exemptions that place undue burdens on third parties).⁸⁷ Some of the plaintiffs in the ACA cases are already essentially demanding just such a result.⁸⁸ If such a total exemption is ever granted, state contraceptive equity laws will be important sources of protection for women in some states, particularly when they require that coverage be offered directly to individuals at group plan rates when their employer is exempt from compliance with the law.

Even with the accommodation in place, state contraceptive equity laws continue to apply to grandfathered insurance plans, which are not subject to the ACA's preventative service care requirements (although they can, of course, choose to provide coverage for contraception, and many do).⁸⁹ The number of grandfathered insurance plans is decreasing, but a significant number of plans are still grandfathered in. As of 2013, 36% of people who received health care coverage through their jobs were enrolled in a grandfathered health plan, and the rate was higher among workers in small companies (1-99 employees), where the rate was 49%.⁹⁰ This does not count the number of individuals with privately-purchased insurance that is grandfathered under the ACA.⁹¹ While these numbers will continue to decrease over time, they remain significant for now—and this applies to both for-profit corporations and non-profit religious organizations.⁹²

⁸⁷ See Loewentheil, *supra* note 11; Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

⁸⁸ Louise Radnofsky, *Religious Employers to Go Ahead with Contraception Lawsuits*, WALL ST. J. (Sept. 9, 2014), <http://online.wsj.com/articles/religious-employers-to-go-ahead-with-contraception-lawsuits-1410274141>, <http://perma.cc/M8SN-8NPA>. See, e.g., Brief for Plaintiffs-Appellants at 26–27, *Priests for Life v. U.S. Dep't of Health and Human Servs.*, No. 13-5368 (D.C. Cir. Feb. 28, 2014), <http://perma.cc/YD9D-QAS7>; Letter from Plaintiffs-Appellants' counsel to Mark Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit (July 8, 2014), <http://perma.cc/SNQ8-KJT2>; *Ave Maria University v. Burwell*, No. 2:13-cv-630-JSM-CM (M.D. Fla. Oct. 28, 2014), 2014 WL 5471048 (order enjoining the interim final regulations).

⁸⁹ 45 C.F.R. § 147.140 (2010) (preservation of right to maintain existing coverage, also known as the “grandfather” provision).

⁹⁰ KAISER FAMILY FOUND., *EMPLOYER HEALTH BENEFITS 2013 SUMMARY OF FINDINGS* (2013), <http://perma.cc/5YH3-B8UF>.

⁹¹ Under the government's own mid-range estimate in 2010, 98 million individuals would be enrolled in grandfathered group health plans in 2013. This number has and will continue to decrease as plans lose their grandfathered status. 75 Fed. Reg. 41,726-01 (Jul. 19, 2010).

⁹² Of course some non-profit religious organizations may be eligible for exemptions from their state's contraceptive equity law under that law's religious exemption provision, or under a state RFRA or free exercise protection, but this is not automatically the case and requires an organization to pursue an accommodation process or bring litigation.

b. Non-Profit Organizations

The grandfathered plan scenario and the “total exemption” scenario could apply to for-profit and non-profit entities alike. But there is also a particular form of religious non-profit organization that is categorically exempt from the ACA’s preventative care requirement but not from state contraceptive equity laws: religious non-profit organizations and houses of worship that use what are known as “church plans” to provide health insurance to their employees. A “church plan” is essentially a health (or other welfare benefit) insurance plan established by a church or group of churches⁹³ for the benefits of its employees or their beneficiaries.⁹⁴ Due to a technicality in ERISA law,⁹⁵ church plans are currently insulated from enforcement of the contraceptive coverage requirement against them.⁹⁶ But state contraceptive equity laws have no such exception for church plans (as long as they are not self-insured). To be sure, some religious institutions or organizations that use church plans might be eligible for an exemption in states that have religious exemptions written into their contraceptive equity laws (or have a state RFRA or state constitutional protection that exceeds the federal standard), as I discuss in further detail *infra*. But not all state contraceptive equity laws have religious exemptions, nor do all states that have contraceptive equity laws have state RFRA or broad constitutional protections.⁹⁷ Thus in at least some states, church plans that are fully insured are

⁹³ “Church” here simply means a “house of worship” of some kind, not a Christian church necessarily. “*Churches*” Defined, INTERNAL REVENUE SERV. (Mar. 4, 2014), <http://perma.cc/NP7W-27US>.

⁹⁴ For churches, or conventions or associations of churches, that are tax exempt, a church plan is defined as “a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.” 26 U.S.C.A. § 414 (e)(3)(A) (2014). See Gail Jones, Ken Fox & Diane Bloom, *Church, Governmental and Collectively Bargained Plans*, in TAX EXEMPT AND GOVERNMENT ENTITIES, <http://perma.cc/3WF8-PS9P>.

⁹⁵ Employee Retirement Income Security Program, 29 U.S.C.A. 18 (2014).

⁹⁶ See *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900, at *23 (D. Colo. Dec. 27, 2013); see *id.* at *14–15 (“Defendants have explicitly stated that they have no authority to require that Little Sisters and/or Christian Brothers Services contract with a third party provider who is subject to ERISA, or who is willing to provide contraceptive coverage to Little Sisters’ employees The purpose of Little Sisters and the Trust executing and delivering the Form to their third party administrator is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters’ plan employees or other beneficiaries. It is clear that these services will not be offered to the employees regardless of whether the Form is executed and delivered to Christian Brothers Services.”).

⁹⁷ Colorado, Georgia, Iowa, and New Hampshire all have contraceptive equity laws, but none of these states has a religious exemption in its contraceptive equity law. These states also do not have state RFRA or state constitutional protections for religious exercise that exceed the federal standard. See *infra* Tables 1, 2.

required to comply with state contraceptive equity laws even though the federal CCR cannot currently be enforced against them.⁹⁸

Self-insured plans, however, are not subject to state contraceptive equity laws, due to ERISA preemption.⁹⁹ Thus self-insured church plans are exempt from the CCR,¹⁰⁰ and would also not be subject to state contraceptive equity statutes, generally speaking.¹⁰¹ It remains an open question, however, whether state contraceptive equity guarantees in Montana and Michigan, where they are rooted in state anti-discrimination laws that apply to employers (rather than insurance companies), might continue to operate for a self-insured church plan.¹⁰²

2. Hobby Lobby's Indirect Impact: Wisconsin and Beyond

Given the preceding discussion, much remains to unfold in the litigation and regulatory process around accommodations to the CCR, but one thing is very clear: when Scott Walker's Administration said that Wisconsin would no longer be enforcing its contraceptive equality act because it had been "preempted" by *Hobby Lobby*,¹⁰³ it was speaking either in error or in

⁹⁸ It is not clear how many church plans are fully insured rather than being self-insured.

⁹⁹ See 29 U.S.C.A. § 1144(a) (2006) (preemption of all state laws that relate to employee benefit plans covered by ERISA). *But see, e.g.,* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 397–400 (1998) (discussing relationship between ERISA and state contraceptive equity laws that are interpreted to further federal antidiscrimination law under *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)). In other words, any self-insured plan is exempt from state CE laws, whether it's a house of worship, non-profit religious organization, or business.

¹⁰⁰ See, e.g., *Little Sisters of the Poor*, 2013 WL 6839900, at *23.

¹⁰¹ Some large for-profit companies, like Hobby Lobby, operate self-insured plans as well. These plans, which use a third-party administrator to administer the benefits, might be exempt from state contraceptive equity laws but are not exempt from the ACA. Theoretically a for-profit business that was self-insured and did not use a third-party administrator would be exempt from some portions of the ACA, including the CCR, but the government has stated it is not aware that any such plans exist. 78 Fed. Reg. 39,880 (July 2, 2013).

¹⁰² The answer to this question likely depends on how broadly federal courts in Michigan and Montana would read both the "deemer" clause of ERISA (which prevents states from trying to clothe employee benefit plan-related laws as insurance regulations to avoid ERISA preemption), 29 U.S.C.A. § 1144(b)(2)(B) (2006), and the "modify/impair" clause (which prevents ERISA preemption from impairing other federal law), 29 U.S.C.A. § 1144(d) (2006), under *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983). If the Montana and Michigan provisions are interpreted as furthering federal nondiscrimination policy under Title VII, then they will not be preempted. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 397–400 (1998). These states' provisions have a better chance of being interpreted this way since they are actually interpretations of nondiscrimination law rather than insurance law, and because Title VII has been interpreted by the EEOC to require contraceptive coverage. *Decision on Coverage of Contraception*, EEOC (Sept. 19, 2001), <http://perma.cc/2M6R-ZTT7>. That decision was recently reaffirmed by the newest EEOC guidance on pregnancy discrimination. *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC (July 14, 2014), <http://perma.cc/L9P4-3EGZ>. ("[E]mployment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination based on gender and/or pregnancy.")

¹⁰³ Sikma, *supra* note 5. State officials later clarified that they were still enforcing the contraceptive equity law. Jessica VanEgeren, *Wisconsin insurance commissioner clarifies it is still enforcing Contraceptive Equity Law*, THE CAP TIMES (July 25, 2014), <http://perma.cc/>

haste. Preemption occurs when a state law is displaced by federal law that supersedes or supplants any inconsistent state law.¹⁰⁴ *Hobby Lobby* does concern federal law, RFRA and the CCR in particular, but it relieved the plaintiffs in the consolidated cases only of their obligations under RFRA itself. RFRA is a statutory rule that gives greater protection than constitutionally required, but only from action by the federal government. *City of Boerne v. Flores*¹⁰⁵ took care of that: it is absolutely clear that RFRA does not apply to state action, only to federal action.¹⁰⁶ Thus, states may continue to have laws that impose duties that might violate RFRA if they were imposed by the federal government, but that are perfectly legal if imposed by a state government (so long, of course, as they do not provide less protection than the First Amendment's free exercise clause requires).¹⁰⁷

Now, of course, some states have either statutory or constitutional protections that echo the federal RFRA or the federal constitutional case law upon which the federal RFRA was based.¹⁰⁸ Wisconsin itself does not have a state RFRA, nor does its contraceptive equity law even have an internal religious exemption.¹⁰⁹ The Wisconsin Supreme Court (like several other state courts¹¹⁰), however, has held that the Wisconsin Constitution's protections of free exercise rights extend beyond the U.S. Constitution's requirements as the latter were articulated in *Employment Division v. Smith*.¹¹¹ Wisconsin, like some of these other states, continues to interpret its state constitutional free exercise protections in line with the pre-*Smith* constitu-

N52L-8AHS. Nevertheless the example is important because it typifies the confusion over whether or how *Hobby Lobby* affects state laws, whether in the insurance context or in other contexts where religious objectors claim exemptions from equality guarantees or other forms of anti-discrimination law.

¹⁰⁴ BLACK'S LAW DICTIONARY 1368–69 (10th ed. 2014).

¹⁰⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁰⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (discussing *City of Boerne* holding that Congress exceeded its authority to regulate the states under Section 5 of the Fourteenth Amendment).

¹⁰⁷ Note that I am not making any claim here about whether requiring insurance coverage of contraception is correctly understood as a RFRA violation; I have argued in prior work that it is not. Nevertheless, we now have the Supreme Court's word on the specific factual situation at issue with a set of particular plaintiffs and the federal CCR, and my point here is simply a general one about the different standards that apply to the federal government in a RFRA challenge compared to what state laws can allow.

¹⁰⁸ *See, e.g.*, Mississippi Religious Freedom Restoration Act, MISS. CODE ANN. § 11-61-1 (2014); S.C. CODE ANN. § 1-32-30 (1999); 755 ILL. COMP. STAT. ANN. 35/1 (1998). Each of these state RFRAs models its stated purpose off that of the federal RFRA: "to restore the compelling interest test laid out in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C.A. § 2000bb (West 2014).

¹⁰⁹ WIS. STAT. ANN. § 632.895 (2012).

¹¹⁰ *See, e.g.*, *Rupert v. City of Portland*, 605 A.2d 63, 65–66 (Me. 1992); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 198–99 (Mich. 1995); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992); *Rourke v. N.Y. State Dep't of Correctional Servs.*, 603 N.Y.S.2d 647, 649–50 (Sup. Ct. Albany Co. 1993); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000); *Hunt v. Hunt*, 648 A.2d 843, 852–853 (Vt. 1994); *City of Woodlinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009).

¹¹¹ *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990); *State v. Miller*, 549 N.W.2d 235, 240–41 (Wis. 1996).

tional case law, which is understood to be broader than the *Smith* standard (i.e., to give more protection to religious objectors and be more friendly towards requests for accommodations). That case law, as articulated in many RFRA statutes, requires the state to have a compelling interest and to have narrowly tailored its law in order to justify certain levels of burden on religious exercise.¹¹² This standard appears to be identical to the federal RFRA standard, as the language is facially the same, but it is now, post-*Hobby Lobby*, potentially different in its operation in at least two important respects.

First, the pre-*Smith* federal case law required the government to have a compelling interest and for the law to be narrowly tailored, but RFRA requires that the government have a compelling interest in applying the law to the *particular plaintiff in question*.¹¹³ This is a more stringent version of the pre-*Smith* standard that has the potential to make it harder for the government to satisfy the test. Second, the Supreme Court was very clear in the *Hobby Lobby* majority opinion that RFRA is to be analyzed on its own terms. Because RFRA was a reaction to the *Smith* decision, and purported to be “restoring” the standard set forth in classic free exercise decisions of the 1960s, 1970s, and 1980s like *Sherbert v. Verner*¹¹⁴ and *Wisconsin v. Yoder*,¹¹⁵ scholars and litigators alike had assumed that RFRA should be interpreted using those earlier cases as precedent.¹¹⁶ But the majority opinion in *Hobby Lobby* rejected that premise, holding that statutory construction principles required that the language of RFRA be read according to its plain meaning, on its face, without regard to how those terms had been interpreted in the case law RFRA purported to “restore.”¹¹⁷ Ironically, this makes RFRA case law *less* of a persuasive authority for state constitutions or state RFRA that have been interpreted to provide protections that mimic the earlier federal free exercise regime of the *Verner* and *Yoder* era. In other words, if RFRA is not to be interpreted according to those cases, then its interpretive case law

¹¹² Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb (West 2014).

¹¹³ *Compare* United States v. Lee, 455 U.S. 252, 252 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”), with Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1 (West 2014) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”) (emphasis added).

¹¹⁴ 374 U.S. 398 (1963).

¹¹⁵ 406 U.S. 205 (1972).

¹¹⁶ *See, e.g.*, Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The New Law of Religion*, SLATE.COM (July 3, 2014), <http://perma.cc/F4ED-2DT8> (noting the pre-*Hobby Lobby* consensus that “RFRA was designed to reinstate the legal principles that had existed before the court’s dramatic anti-religion decision in *Smith*”); *see also* Ira Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015).

¹¹⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014) (“[N]othing in the text of RFRA as originally enacted suggested that the statutory phrase “exercise of religion under the First Amendment” was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment When Congress wants to link the meaning of a statutory provision to a body of this Court’s case law, it knows how to do so.”); *see also* Schwartzman et al., *The New Law of Religion*, *supra* note 116.

has no bearing on how state courts should understand state constitutions or state RFRAs that provide protection analogous to that provided by the pre-*Smith* case law that RFRA “restored.” Thus, while it might be an open question whether Wisconsin’s constitutional free exercise protections require that religious organizations or for-profit businesses that object to complying with the CCR have to comply with Wisconsin’s contraceptive equity law, that contraceptive equity law is by no means “preempted” by *Hobby Lobby*.

So Wisconsin’s contraceptive equity law continues to operate, and should be enforced, despite *Hobby Lobby*. But needless to say, not every state has the same statutory and constitutional conditions as the ones that operate in Wisconsin. In states with state RFRAs that are directly modeled on, and interpreted according to, the federal RFRA,¹¹⁸ as I have argued above, *Hobby Lobby* is not clearly persuasive authority. Nevertheless, the case may well be understood that way by courts contemplating religious objections to state contraceptive equity laws (either through misapprehension or because such courts decide that their state RFRA or state constitutional protections do indeed track the contemporary Supreme Court understanding of the language of RFRA rather than the pre-*Smith* case law).

Nevertheless, even in these states, *Hobby Lobby* does not mean that state contraceptive equity statutes must necessarily give way to religious objections. As discussed *supra*,¹¹⁹ the Court’s opinion in *Hobby Lobby* assumed the availability of the existing accommodation, which would allow for a purportedly seamless solution. In the *Hobby Lobby* scenario, the government could, allegedly, make the accommodation available to objecting closely-held for-profit businesses, and the effect on the women whose insurance coverage was at issue would be “precisely zero.”¹²⁰ In contrast, where state contraceptive equity laws continue to apply in the post-ACA era to businesses or organizations that are exempt from, or refusing to comply with, the federal requirements as discussed *supra*, there is no similar state-run accommodation already set up and available. Some state statutes do require that enrollees whose access would be blocked by a religious exemption for a non-profit organization under the contraceptive equity law’s exemption clause be allowed to purchase their own contraceptive coverage at a group rate,¹²¹ but some state statutes have no such accommodation available.¹²² For

¹¹⁸ See ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); 775 ILL. COMP. STAT. ANN., 35/15 (1998); N.M. STAT. ANN. § 28-22-3 (2000). This may also be true in states that seem to have a lower threshold for the burden or restriction than a “substantial” burden but then require strict scrutiny. See CONN. GEN. STAT. ANN. § 52-571b (2003); R.I. GEN. LAWS § 42-80.1-3 (1993).

¹¹⁹ See *supra* Part II.B.

¹²⁰ *Hobby Lobby*, 134 S. Ct. at 2759.

¹²¹ HAW. REV. STAT. ANN. § 431:10A-116.7(e) (2014) (Hawai’i); Missouri, MO. REV. STAT. § 376.1199(6)(3) (2012) (Missouri regulation does not specify at what rate); N.Y. INS. LAW § 4303(cc)(2)(A) (2014) (New York); W.VA. CODE ANN. § 33-16E-7(c) (2005) (West Virginia).

¹²² States without accommodations: ARIZ. REV. STAT. ANN. § 20-826(Z) (2014) (Arizona); ARK. CODE ANN. § 23-79-1104 (2005) (Arkansas); CAL. INS. CODE § 10123.196 (2000) (California); CONN. GEN. STAT. ANN. § 38a-530e (2012) (Connecticut); DEL. CODE tit. 18 § 3559(d) (2001) (Delaware); 215 ILL. COMP. STAT. ANN. 5/356z.4 (2007) (Illinois); ME. REV.

the latter group, even if a state RFRA or broad state constitutional protection applies, the lack of a seamless accommodation means that *Hobby Lobby's* holding is of limited, if any, relevance.

III. ERROR ON THE LEFT: HOW THE SATANIC TEMPLE GOT IT WRONG

Scott Walker was not alone in misinterpreting the implications of *Hobby Lobby*; politically progressive organizations were equally swift to misread the decision. If Scott Walker was too quick to declare that *Hobby Lobby* limited women's reproductive rights under state law, The Satanic Temple was too quick to declare that the opinion could actually be used to broaden women's ability to access reproductive health immediately on an individual level. A few weeks after the opinion came out, The Satanic Temple announced a campaign that purported to enable women to "opt out" of the requirements of so-called "informed consent" abortion regulations based on a religious objection to inserting ideology into the practice of medicine and to paternalistic control of women's autonomy.¹²³ In this Part, I provide a brief history to situate the reader in the terrain of biased counseling laws, before analyzing the Satanists' campaign.

A. A Case Study In Informed Consent Laws

1. "Informed Consent" (Biased Counseling) Laws

In order to understand the purpose and implications of the Satanists'¹²⁴ campaign, one needs a basic understanding of the laws to which the Satanists (along with many others) object. So-called "informed consent" laws—more appropriately termed "biased counseling" laws—are laws that require a variety of information (often inaccurate and ideologically driven) to be presented to a woman before she is able to access abortion services. To be clear, all states have general "informed consent" laws that govern all medical procedures,¹²⁵ and medical service providers have professional standards

STAT. tit. 24A, § 2847-G (2014) (Maine); MD. CODE ANN. INS. § 15-826 (1998) (Maryland); MASS. GEN. LAWS ch. 175, § 47W (2002) (Massachusetts); MICH. CIV. RTS. COMM'N, DECLARATORY RULING (Aug. 21, 2006) (Michigan); NEV. REV. STAT. ANN. § 689A.0415 (1999) (Nevada); N.J. STAT. ANN. § 17B:27-46.1ee (2006) (New Jersey); N.M. STAT. ANN. § 59A-22-42 (2014) (New Mexico); N.C. GEN. STAT. § 58-3-178 (1999) (North Carolina); OR. REV. STAT. § 743A.066 (2007) (Oregon); R.I. GEN. LAWS § 27-18-57 (2014) (Rhode Island).

¹²³ The Satanic Temple Press Release, *supra* note 4.

¹²⁴ In this section, I use "Satanists" to refer to the members of The Satanic Temple, the religious institution that took the actions under discussion.

¹²⁵ Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J.L. & MED. 7, 23 (2013) ("Today . . . all states, by statute or judicial precedent, require a patient's informed consent before performing a medical procedure[.]").

of care to which they must adhere as well.¹²⁶ Those laws and professional standards cover abortion as well as all other forms of medical care. But anti-abortion advocates and legislators have been successful in many states in passing legislation that adds additional “counseling” requirements to abortion procedures. Presently 29 states have such laws in effect¹²⁷ (a few others passed laws that have been permanently enjoined).¹²⁸ Such laws range from mildly to massively ideological. The least invasive laws require doctors to give women ideologically driven pamphlets about pregnancy that attempt to dissuade them from choosing an abortion.¹²⁹ The most invasive require additional medically unnecessary ultrasounds¹³⁰ and for the provider to show the woman the ultrasound and describe what he or she is seeing in the ultrasound to the woman,¹³¹ or for the woman to be offered the “opportunity” to hear the heartbeat of the fetus if it is audible.¹³² These laws also often require waiting periods between the ultrasound or “counseling” and the abortion,

¹²⁶ See American Medical Association, *Code of Medical Ethics, Opinion 8.08 – Informed Consent*, <http://perma.cc/VA3J-EFTK> (“The physician’s obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient’s care and to make recommendations for management in accordance with good medical practice.”).

¹²⁷ ALA. CODE §§ 26-23A-4, 26-23A-6 (2014); ALASKA STAT. § 18.16.060 (2014); ARIZ. REV. STAT. ANN. §§ 36-2153, 36-2156 (2012); ARK. ADMIN. CODE §§ 007.05.2-VII to 007.05.2-VIII (2014); ARK. CODE ANN. § 20-16-602 (2003); FLA. STAT. ANN. § 390.012 (2011); GA. CODE ANN. § 31-9A-3 (2007); IDAHO CODE ANN. § 18-609 (2009); IND. CODE § 16-34-2-1.1 (2014); KAN. STAT. ANN. § 65-6709 (2014); KY. REV. STAT. ANN. § 311.725 (1998); LA. REV. STAT. ANN. §§ 40:1299.35.2 (2014), 40:1299.35.6 (2012); MICH. COMP. LAWS §§ 333.17015, 333.17015a, 333.17515 (2013); MINN. STAT. § 145.4242 (2006); MISS. CODE ANN. §§ 41-41-33 to -34 (2007); MO. REV. STAT. §§ 188.027, 188.039 (2014); NEB. REV. STAT. § 28-327 (2010); NEV. REV. STAT. § 442.253 (1985); N.C. GEN. STAT. §§ 90-21.82, 90-21.85 (2013); N.D. CENT. CODE §§ 14-02.1-02 to -04 (2013); OHIO REV. CODE ANN. §§ 2317.56 (2013), 2317.561 (2008); OKLA. STAT. tit. 63, §1-738.2 (2006); 18 PA. CONS. STAT. ANN. § 3205 (1989); S.C. CODE ANN. § 44-41-330 (2010); S.D. CODIFIED LAWS § 34-23A-10.1 (2014); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (2011); UTAH CODE ANN. § 76-7-305 (2014); VA. CODE ANN. § 18.2-76 (2012); W. VA. CODE ANN. § 16-2I-2 (2010); WIS. STAT. ANN. § 253.10 (2014).

¹²⁸ DEL. CODE ANN. tit. 24, § 1794 (1995), *held unconstitutional* by *Planned Parenthood of Del. v. Brady*, 250 F. Supp. 2d 405 (D. Del. 2003); MASS. GEN. LAWS ch. 112, §12S (1980), *held unconstitutional* by *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981); MONT. CODE ANN. § 50-20-106 (1974, *amended* 2009), *held unconstitutional* by *Planned Parenthood of Missoula v. State*, No. BDV-95-722 (Mont. D. Ct., Lewis & Clark County) (Nov. 28, 1995); TENN. CODE ANN. § 39-15-202(d)(1) (1989, *amended* 2012), *held unconstitutional* by *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

¹²⁹ See, e.g., KY. REV. STAT. ANN. § 311.725 (1998).

¹³⁰ *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INSTITUTE (2014), <http://perma.cc/83GJ-CP7V>; see also Sarah E. Weber, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 368 (2009).

¹³¹ See, e.g., LA. REV. STAT. ANN. § 40:1299.35.2 (2014). The only mercy the Louisiana statute provides is that the woman is allowed to *look away* from the ultrasound and may, in certain circumstances only, decline to listen to the description of the ultrasound. In Wisconsin, by contrast, the woman is not allowed to decline to listen to the description at all. WIS. STAT. ANN. § 253.10(3g)(4)-(5) (2014).

¹³² See, e.g., KAN. STAT. ANN. § 65-6709(i)(2) (2014).

which has been well-documented to delay abortions, increase their cost, and make them completely inaccessible for some women.¹³³

2. *The Satanic Temple Takes Initiative*

Biased counseling laws have been roundly criticized as objectionable on a number of grounds. But the Satanists do not have an obvious stake in this field of play; while they may object to these laws as private citizens, they are not known as advocates or leaders in the field of reproductive rights litigation. So the first question is, who are these Satanists and why do they object to these regulations?

Satanism is a religion¹³⁴ focused on personal autonomy, individual freedom, and ethical action.¹³⁵ The Satanic Temple is a religious institution that identifies itself as part of the Satanic religion. It does not “promote a belief in a personal Satan,” but rather states that “to embrace the name Satan is to embrace rational inquiry removed from supernaturalism and archaic tradition-based superstitions.”¹³⁶ In particular, one of the seven tenets of The Satanic Temple is that “[o]ne’s body is inviolable, subject to one’s own will alone.”¹³⁷ Another of the seven tenets holds that “[b]eliefs should conform to our best scientific understanding of the world” and that “[w]e should take care never to distort scientific facts to fit our beliefs.”¹³⁸ It’s not difficult to see where this is going in the context of biased counseling laws. About a month after the *Hobby Lobby* decision came down, The Satanic Temple issued a press release announcing that they were claiming an exemption from “informed consent” laws for abortion for “those who share their deeply held beliefs.”¹³⁹ The press release explained their envisioned process as follows:

We have drawn up a letter for women who are considering an abortion.¹⁴⁰ The letter explains our position and puts the care pro-

¹³³ Theodore J. Joyce, et al., *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, GUTTMACHER INSTITUTE (April 2009), <http://perma.cc/ZQ39-MPKU>.

¹³⁴ See, e.g., *FAQ*, THE SATANIC TEMPLE, *supra* note 2 (responding to the prompt “If you do not believe in the supernatural, how is TST a religion?” with the answer “The idea that religion belongs to supernaturalists is ignorant, backward, and offensive. . . . In fact, Satanism provides us all that a religion should, without a compulsory attachment to untenable items of faith-based belief: It provides a narrative structure by which we contextualize our lives and works. It provides a body of symbolism and religious practice – a sense of identity, culture, community and shared values.”).

¹³⁵ See, e.g., *Tenets*, THE SATANIC TEMPLE, <http://perma.cc/F5GH-PQXV>.

¹³⁶ See, e.g., *FAQ*, THE SATANIC TEMPLE, *supra* note 2.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ The Satanic Temple Press Release, *supra* note 4.

¹⁴⁰ The letter itself, available on the Satanists’ website as a Word document or a fillable PDF form, states in relevant part:

As an adherent to the principles of The Satanic Temple, my sincerely held religious beliefs are: My body is inviolable and subject to my will alone. I make any decision regarding my health based on the best scientific understanding of the world, even if the science does not comport with the religious or political beliefs of others. . . . I,

vider on notice that a failure to respect our call for an exemption from state-mandated informed consent materials constitutes a violation of our religious liberty.¹⁴¹

*B. Where the Satanists Went Wrong:
You Can't Download A Religious Exemption from the Internet*

Of course, there are several flaws in this plan. First, as a legal matter, one cannot simply “help oneself” to a religious exemption, so to speak, by filling out an unofficial form. A person or entity wishing to obtain a religious exemption must either bring a proactive suit (requesting a declaratory judgment or a preliminary injunction or similar), or must take, or refrain from taking, the action and wait for government enforcement of the objectionable law, at which point a religious exemption claim can be raised as a defense. But downloading an unofficial form from the Internet and filling it out has no legal effect.

Second, it would require some creative framing to locate the religious belief or exercise being burdened here. Physical autonomy, for example, is obviously a value that is restricted in many ways in our society. This argument would be stronger as an objection to, say, a law prohibiting performing an abortion on oneself,¹⁴² rather than to biased counseling laws. And if the value is scientific objectivity, the problem is that science in abortion regulation is subject to such extreme distortion and abortion exceptionalism that the biased counseling laws purport to be based on scientific information and courts often treat them as such.¹⁴³

and I alone, decide whether my inviolable body remains pregnant and I may, in good conscience, disregard the current or future condition of any fetal or embryonic tissue I carry in making that decision. As you know, your medical treatment of me requires my informed consent. My informed consent is based solely on scientifically true and accurate information that is relevant to my decisions regarding my health and pregnancy in accordance with my sincerely held religious beliefs. . . . This letter constitutes my acknowledgment that you have offered Political Information to me. I reject that Political Information because it offends my sincerely held religious beliefs. Please attach this letter to any forms you are required to keep regarding my informed consent.

The Satanic Temple, <http://perma.cc/FZ9Q-ZW5L>.

¹⁴¹ The Satanic Temple Press Release, *supra* note 4 (internal citation omitted).

¹⁴² See Ed Pilkington, *Indiana woman charged with feticide after unborn child's death*, THE GUARDIAN (Aug. 26, 2014), <http://perma.cc/C2M6-TPSL>; see also David Dekok, *Pennsylvania mother who gave daughter abortion pill gets prison*, REUTERS (Sept. 6, 2014), <http://perma.cc/6NJA-5VB6>.

¹⁴³ See, e.g., *Planned Parenthood v. Rounds*, 530 F.3d 724, 735–36 (8th Cir. 2008) (upholding mandatory disclosure that “the abortion will terminate the life of a whole, separate, unique, living human being,” defined under state law as “an individual living member of the species of *Homo sapiens* . . . during [its] embryonic [or] fetal age,” as merely “biological information about the fetus” that is “relevant to the patient’s decision to have an abortion.”) (citation omitted). See also Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, AM. J.L. & MED. (forthcoming 2015).

Nevertheless, the idea is not absurd. While there are difficult lines to draw (for instance, do Satanists object to standard informed consent laws?), that is *always* the case in religious accommodation/exemption issues. As I have argued elsewhere, almost everyone is a realist about religious exemption law—there are very few pure principles one can apply.¹⁴⁴ Any bright-line rule quickly produces unwelcome and unsustainable results. To demonstrate by extremes, a rule that allows for no exemptions will quickly produce unnecessary oppression and suffering, while a rule that allows for exemptions upon demand will quickly produce chaos with every individual or entity free to choose whatever laws it will or will not follow. On the whole, however, the Satanists misread the decision just as Scott Walker's Administration did, assuming a far greater degree of religious-objection-based individual autonomy in relationship to existing law than *Hobby Lobby* really allows.

IV. WHERE THE WALKER ADMINISTRATION AND SATANISTS WENT RIGHT: RELIGIOUS EXEMPTIONS AS A POLITICAL STRATEGY

Both the Walker Administration and The Satanic Temple were attempting to leverage the idea of religious exemptions and the uncertainty over *Hobby Lobby*'s impact in order to advance their own political priorities. In this, they were recognizing something true about the way that religious exemptions operate: they can be both sincere expressions of religious commitment *and* effective strategies for advancing particular political or normative goals. This has been well-recognized by political conservatives, who are behind much of the religious exemption litigation we have recently seen, particularly over the Affordable Care Act.¹⁴⁵ But political progressives have been slower to embrace this strategy. There may be good reasons for this reticence: there are certainly strong arguments that an active and varied system of religious exemptions threatens to undermine our multicultural legal and political system, where communities with very different identities and priorities have to coexist.¹⁴⁶ Nevertheless, given the Supreme Court's interpretation of RFRA in *Hobby Lobby*, religious exemptions do not appear to be fading away any time soon. Further, while I have argued in this article that they need not do so, it may very well transpire that state courts choose to interpret their state RFRAs or state constitutional protections for free exercise in line with *Hobby Lobby*'s interpretation of the federal RFRA, significantly expanding the availability of religious exemptions.

¹⁴⁴ Loewentheil, *supra* note 11, at 452–56.

¹⁴⁵ See, e.g., Amelia Thomson-DeVeaux, *The Spirit and the Law: How the Becket Fund became the leading advocate for corporations' religious rights*, THE AM. PROSPECT LONGFORM (July/Aug. 2014), <http://perma.cc/UJ9S-4A9N>.

¹⁴⁶ See, e.g., Katherine Franke, *Religious Accommodation's Roots in Legal Pluralism*, GEND. AND SEXUALITY LAW BLOG (June 2, 2014), <http://perma.cc/W8NK-9VC4>.

And so the question becomes: to what extent might progressive¹⁴⁷ communities utilize religious exemption law to advance their own normative and political agendas that arise out of religious commitments or beliefs?¹⁴⁸ In this section, I provide a brief treatment of this question, demonstrating that despite the heavy presence of culturally conservative religious claimants recently, the logic of religious exemptions in the case law those claims produce cannot be easily cabined to one particular normative orientation.

A. *History Lesson: The Sanctuary Movement*

There are precedents for the politically progressive use of religious exemptions, both legal and historical. As to the first, Christopher Eisgruber and Lawrence Sager, among others, have persuasively argued that the purpose of the First Amendment's free exercise clause was in fact what we would now call progressive: to protect minority religious practice from discrimination

¹⁴⁷ The term "progressive" by nature is imprecise, and yet it stands for a particular constellation of fairly consistent values and organizing principles for human political life. Jeremy Paul has eloquently described it in the following way:

Consider then the following possible tenets of one brand of progressive politics: (1) We live in a society and a world in which a few people have too much and too many people have far too little; (2) our day-to-day lives are dominated by a network of human relationships in which far too often one person has the effective power to tell another what to do; (3) our thought structures and habits of being, including racism, sexism, and classism, often cloud the ability of privileged and underprivileged people to acknowledge the full extent of propositions one and two; and, here's the kicker, (4) traditional debate includes too little discussion of propositions one, two, and three and, more importantly, tends to underestimate and undervalue the gains (and overestimate and overvalue the costs) that might be experienced from altering current conditions leading to propositions one, two, and three.

Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1782 (1991). For a synopsis of progressive political values, see *Progressive Thinking: A Synthesis of Progressive Values, Beliefs, and Positions*, AM. VALUES PROJECT (2012), <http://perma.cc/VBP7-MH3P>.

¹⁴⁸ I am not necessarily drawing a distinction here between "sincere" and "strategic" religious exemptions. I believe those are categories with significant overlap, which is to say that people with sincere religiously-rooted beliefs may also appreciate the strategic utility of seeking a religious exemption to advance a normative goal (which may itself grow out of their religious beliefs). It seems unlikely to me that many blatantly insincere religious exemptions will be advanced. To assume bad apples in this way—people of either progressive or conservative political orientation bringing self-consciously "false" claims—seems to me the wrong concern to have, since true sincerity qua sincerity (meaning, "at this very moment do you truly believe what you are saying to me") is difficult to determine and human beings are notoriously susceptible to interpreting their own beliefs and actions in the most flattering light (i.e., people may be predisposed to believe that their normative or ideological objections are in fact sincere religious beliefs). Cf. Kent Greenawalt, *The Hobby Lobby Case: Controversial Interpretive Techniques and Standard of Application*, COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-421, 26 (2014), <http://perma.cc/L7HY-RSSV> ("If exemptions are available and those who receive them are not to suffer adverse consequences, it is natural for those who would like the exemption to cast their claim, and actually to view it, as based on avoiding a substantial burden."). Regardless, to the extent that courts are currently reluctant to examine sincerity of religious exemption claims, there is little doctrinal hay to be made of the distinction.

and oppression by majoritarian legislators.¹⁴⁹ As to the second, to take one example, in the late 1970s and early 1980s, a wave of immigrants from Central America fled to the United States. Churches and synagogues began declaring themselves “sanctuaries” and offering asylum to undocumented immigrants who would otherwise be targeted for deportation.¹⁵⁰ Religious activists in California, Texas, and Chicago were the first to join the movement as it spread out from Tucson; eventually it reached over 150 Jewish and Christian congregations.¹⁵¹ Today, with the current immigration crisis, the notion of sanctuary is making a comeback, with media outlets reporting in June 2014 on a family from Mexico that is physically claiming sanctuary in Tucson’s Southside Presbyterian Church.¹⁵² “New Sanctuary” coalitions are forming in New York,¹⁵³ Philadelphia,¹⁵⁴ and elsewhere.

Meanwhile, on a front closer to home for advocates for reproductive and sexual liberty and equality, this year The United Church of Christ sued North Carolina over that state’s gay marriage ban, arguing that the law violated the free exercise rights of its clergy whose religious beliefs call them to solemnize marriages between partners of the same sex.¹⁵⁵ The law in question actually prohibited clergy from performing marriages that were not accompanied by a civil license, and allowed for private suit against clergy for doing so.¹⁵⁶ While these penalties made the law in question an easier target for suit than a law that simply forbids civil licenses for marriage between partners of the same sex, the conceptual point is not so limited.

B. Looking Ahead

There is obviously powerful cultural resonance in the idea of religious objection—it invokes a sense of a higher moral authority, above the corrupted world of man, and a sense of integrity, duty, purpose, and holiness. These are intensely felt and stirring sentiments for many people, particularly those already committed to social justice and resisting oppression, whatever their religious orientation. It is unsurprising that scholars of religious exemptions (including myself) see the troubling implications of such calls to action in a multicultural secular society where man’s law is all that citizens can be

¹⁴⁹ See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

¹⁵⁰ Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POLICY INSTITUTE (April 1, 2006), <http://perma.cc/95UV-HTS6>.

¹⁵¹ *Id.*

¹⁵² Caitlin Dickson, *This Church is Reviving the Sanctuary Movement to Shelter Undocumented Immigrants from Deportation*, THE DAILY BEAST (June 11, 2014), <http://perma.cc/G2GZ-PKKB>.

¹⁵³ See generally THE NEW SANCTUARY COALITION OF NYC, <http://perma.cc/A8JC-EBY3>.

¹⁵⁴ See generally NEW SANCTUARY MOVEMENT OF PHILADELPHIA, <http://perma.cc/LG3M-AEH3>.

¹⁵⁵ Yonat Shimron, *United Church of Christ sues over North Carolina gay marriage ban*, THE WASH. POST (Apr. 28, 2014), <http://perma.cc/33PY-LHMY>.

¹⁵⁶ *Id.*

said to have in common. But at the same time, these discourses cannot be cabined to any particular set of political norms. Any system that allows for religious exemptions can be leveraged to advance any given set of normative or political goals. Many people of faith have progressive political commitments as well, commitments that arise from their faith. Socially and politically conservative actors have been quick to capitalize on the potential of religious exemptions, but the ways that religious exemptions could be deployed for progressive political aims has been less fully explored. I do not pretend to map an entire cultural and legal strategy here, which is neither feasible in this article, nor my role. But I do want to begin thinking through the ways that a religious exemptions regime like the one *Hobby Lobby* inhabits might be leveraged in different ways, in order to explore and challenge our ideas of how religious exemptions operate and to whose benefit they accrue.¹⁵⁷

One place to start might be with challenges to the extremely limited health exemptions contained in many state abortion restrictions. Indiana has typical language, defining “medical emergency” for the purposes of the state’s abortion regulations (including a mandatory ultrasound statute and a ban on abortions past 20 weeks “post-fertilization”) as a condition that “complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.”¹⁵⁸ One can easily imagine that a woman—or an abortion provider—might have a religious belief that abortion is not only permissible, but perhaps even *required*, when a woman’s health would be negatively impacted by carrying a pregnancy to term even if the harm falls short of “substantial and irreversible impairment of a major bodily function.” This is in fact already the established position of several established progressive religious denominations.¹⁵⁹ Similarly, some state abortion

¹⁵⁷ I am not alone in this effort—as the *Hobby Lobby* decision loomed, one long-time scholar-advocate argued that those concerned with reproductive rights should “prepare [themselves] to use RFRA to enforce equal protection for [their] own religious freedom, and to challenge restrictions on actions mandated by [their] consciences in [their] relationships with [their] own ‘divinities.’” Priscilla J. Smith, *Who Decides Conscience? RFRA’s Catch 22*, 22 BROOK. J.L. & POL’Y 727, 761 (2014); see also Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1532–40 (2012) (discussing the conscience-based claims of the “willing provider” of abortion care).

¹⁵⁸ IND. CODE ANN. § 16-18-2-223.5 (2014) (medical emergency); IND. CODE ANN. § 16-34-2-1 (2014) (requirements for legal abortion); IND. CODE ANN. § 16-34-2-1.1 (2014) (ultrasound). Pennsylvania uses similar language. See 18 PA. CONS. STAT. ANN. § 3205(b) (1989).

¹⁵⁹ See, e.g., *Faith Perspectives: A Matter of Faith, Conscience and Justice*, RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, <http://perma.cc/KQW8-SUUS> (providing perspectives on reproductive choice from a variety of religious denominations) (“Faith traditions such as the Episcopal Church, Presbyterian Church (USA), United Church of Christ, United Methodist Church, Unitarian Universalist Association, and Reform, Reconstructionist and Conservative Judaism support reproductive choice as the most responsible position a religious institution can take on this issue.”); see also Lisa H. Harris, *Recognizing Conscience in Abortion Provision*, 367 N. ENG. J. MED. 981, 982 (2012) (discussing caregivers who offer abortion services “because deeply held, core ethical beliefs compel them to do so”).

bans expressly exclude mental or psychological health.¹⁶⁰ It is easy to imagine a religious objection—again by a provider or by a woman—to the exclusion of psychological health from the kinds of health protected by a strict health exemption.

Or take the common situation of a willing provider employed by an unwilling entity.¹⁶¹ For instance, willing providers of abortion, emergency contraception, or sterilization who are employed by unwilling Catholic hospitals might bring claims for religious accommodation against their employers under employment non-discrimination statutes or against state restrictions on provision of care.¹⁶² Another example is orthogonal to The Satanic Temple's suggestion. Physical autonomy may not be a religious value that clearly forbids informed consent counseling, but one could certainly imagine an abortion provider who believes that he or she has a religious obligation to tell women the medical and scientific truth as he or she understands it when counseling them about a procedure, particularly one like abortion. If a religious objector is allowed to define what medications or instruments are abortifacients outside of the standard scientific understanding,¹⁶³ then a doctor who believes that biased counseling laws are against her faith-based understanding of when life begins or how to interpret the medical evidence should get similar latitude. (The irony here is that one might have to claim a religious belief in what actually exists in medical fact in order to win the right to provide only that medical information.) Even further, to the extent that courts refuse to question the line drawn by religious objectors to the contraceptive coverage requirement as to the degree of "complicity" that is impermissible,¹⁶⁴ so too should courts decline to question why some forms of medical regulation, or "informed consent," might be acceptable while others are not.¹⁶⁵ If the Supreme Court has held that the owners of Hobby Lobby should not be precluded from pursuing their chosen profession and business because of their religious beliefs, the same should be true for an objecting abortion provider.¹⁶⁶

¹⁶⁰ See, e.g., IND. CODE ANN. § 16-34-2-0.5 (2011) (specifying that "medical emergency" for the purpose of abortion regulations does not include "a patient's claim or diagnosis that the patient would engage in conduct that would result in the patient's death or substantial physical impairment"—meaning that risk of self-harm or suicide due to psychological distress over the pregnancy is not a medical emergency under the statute); see generally Maya Manian, *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, 74 OHIO ST. L.J. 75, 85–86 (2013).

¹⁶¹ See, e.g., Sepper, *supra* note 157, at 1534.

¹⁶² See *id.* at 1535.

¹⁶³ See *supra* note 55 and accompanying text.

¹⁶⁴ For an incisive discussion of the nature of "complicity" claims in this context, see generally Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. (forthcoming 2015).

¹⁶⁵ To be clear, I am not advocating this approach as a doctrinal or normative matter. But I do think that while it remains the prevailing wisdom, we should be clear that it can be deployed in different political and normative directions. If the notion of "substantial burden" is a lazy gatekeeper, *id.* at 497, it must be lazy as to everyone.

¹⁶⁶ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768, 2775 (2014).

More expansively in the abortion context, one could also imagine a religious belief that life is so sacred that one should only bring it into the world when one is prepared and capable and willing to support it, and that access to contraception and abortion is essential to the exercise of that belief. On that basis, to mimic the insurance challenges to the contraceptive coverage requirement, one could imagine progressive employers in states with abortion insurance coverage bans challenging such laws, particularly in state-run insurance exchanges.¹⁶⁷ If the owners of Hobby Lobby have a judicially-recognized religious belief that they must provide insurance coverage for their employees (and therefore cannot simply provide no insurance and pay the tax instead to avoid the contraceptive coverage requirement¹⁶⁸), then it seems plausible that a business owner might just as well have a religious belief that he or she must provide insurance coverage that *includes* coverage for abortion to their employees.

The immediate response to these sorts of ideas is usually to demand that the speaker identify a canonical religious text that supports the belief. But when progressives fold in the face of this demand they concede too much. Not all religions are, like Catholicism, possessed of an “infallible” supreme authority that can determine the religion’s dictates. And RFRA, as it is currently usually interpreted, does not require that a religious objector be able to demonstrate that his or her religious belief is canonical or mainstream, or even that the line he or she is drawing is rational or objectively reasonable.¹⁶⁹ If that is the case for culturally conservative objectors, it is equally the case for progressive objectors, and the lack of a canonical text addressing the importance of women’s health in the context of modern abortion care should not be a bar. In this much, The Satanic Temple had the right idea.

There are obviously challenges to this approach—questions of standing, remedy, applicability, and scope, and all the rest. In such a brief article I cannot take them all on, and I do not pretend to know the answers already. But what I do know is that it might be wise for those with normative progressive goals and expertise in religious exemption law to think critically not only about the problems of religious exemption regimes,¹⁷⁰ but also about their potential to achieve progressive political goals.

CONCLUSION

With events changing by the day, much remains to be seen about how *Hobby Lobby*, and subsequent litigation around the ACA’s contraceptive

¹⁶⁷ See, e.g., ALA. CODE § 26-23C-3 (2014) (Alabama’s Federal Abortion Mandate Opt-Out Act); MISS. CODE ANN. § 41-41-99 (2010). Idaho, Indiana, Louisiana, North Carolina, Missouri, and Nebraska also have similar provisions, none of which provide for a separate rider.

¹⁶⁸ *Hobby Lobby*, 134 S. Ct. at 2776.

¹⁶⁹ See *id.* at 2798 (citing *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.* 450 U.S. 707, 715 (1981)).

¹⁷⁰ This is a subject well-covered in the legal literature. For a recent, post-*Hobby Lobby* exploration of this subject, see Lupu, *supra* note 11, at 65.

coverage requirement, will shape state and federal law. In the meantime, however, the rush to judgment on all fronts is premature. *Hobby Lobby* has not ushered in a regime of exemptions upon demand when it comes to objections to legal guarantees of women's reproductive rights. State contraceptive equity statutes continue to provide an important stopgap to ensure at least basic coverage for women employed by objecting institutions or closely-held corporations. But it may transpire that religious objections become more common, and are granted more frequently, and the logic of such exemptions cannot be cabined to a particular set of political or normative goals. Thus even as progressive advocates resist the spread of exemptions in this realm, the *Hobby Lobby* decision and resulting reinvigoration of RFRA have the potential to create spaces for innovative progressive organization and litigation aimed at leveraging overly broad interpretations of religious rights to accomplish progressive political and policy goals.

TABLE 1: STATE CONTRACEPTIVE EQUITY LAWS

States with Contraceptive Equity Laws	States with Contraceptive Equity Laws as an Interpretation of Non-Discrimination Laws	Requires Coverage of All FDA-Approved Contraceptives	Excludes Emergency Contraception	Does Not Provide Coverage for Drugs Intended to Terminate a Pregnancy or Cause an Abortion
Arizona		X		
Arkansas			X	X ⁱ
California				
Colorado				X ⁱⁱ
Connecticut		X		
Delaware		X		
Georgia		X		
Hawaii		X		
Illinois		X		X ⁱⁱⁱ
Iowa		X		
Maine		X		X ^{iv}
Maryland		X		
Massachusetts		X		
Michigan	X	X		
Missouri		X		X ^v
Montana	X	X		
Nevada		X		
New Hampshire		X		
New Jersey		X		
New Mexico		X		
New York		X		
North Carolina			X	X ^{vi}
Ohio				
Oregon		X		
Rhode Island		X		X ^{vii}
Texas				
Vermont		X		
Virginia				
Washington		X		
West Virginia		X		
Wisconsin		X		

TABLE 2: RELIGIOUS EXEMPTIONS WITHIN STATE CONTRACEPTIVE EQUITY LAWS

States with Contraceptive Equity Laws	Contraceptive Equity Law Includes a Religious Exemption	Religious Exemption in Contraceptive Equity Law for Non-Profit, Religiously-Motivated Organizations	Religious Exemption in Contraceptive Equity Law May Extend Beyond Religious Non-Profit Organizations	Contraceptive Equity Law has an "Exception to the Exemption"	Employees of Organizations Opting Out of Contraceptive Coverage Must Be Given Opportunity to Purchase at Group Plan Rate
Arizona	X		X ^{viii}	X	
Arkansas	X	X			
California	X	X		X	
Colorado					
Connecticut	X			X	
Delaware	X	X			
Georgia					
Hawaii	X	X		X	X
Illinois					
Iowa					
Maine	X	X		X	
Maryland	X	X			
Massachusetts	X	X			
Michigan	X	X ^{ix}			
Missouri	X		X ^x		X
Montana					
Nevada	X	X			
New Hampshire					
New Jersey	X	X		X	
New Mexico	X		X ^{xi}		
New York	X	X			X
North Carolina	X			X	
Ohio					
Oregon	X	X			
Rhode Island	X	X			
Texas					
Vermont					
Virginia					
Washington					
West Virginia	X	X		X	X
Wisconsin					

TABLE 3: STATE RFRAS AND “CONSCIENCE CLAUSES” EXTERNAL TO CONTRACEPTIVE EQUITY LAWS

States with Contraceptive Equity Laws	States with RFRA	State RFRA Is Broader than the Federal RFRA	State RFRA Is Narrower than the Federal RFRA	States with “Conscience Clause” that Addresses Abortion	“Conscience Clause” Addresses Contraception
Arizona	X			X	X
Arkansas				X	X
California				X	X ^{xii}
Colorado				X	X
Connecticut	X	X ^{xiii}		X	
Delaware				X	
Georgia				X	
Hawaii				X	
Illinois	X			X	X ^{xiv}
Iowa				X	
Maine				X	X
Maryland				X	
Massachusetts				X	
Michigan				X	
Missouri	X		X ^{xv}	X	X
Montana				X	
Nevada				X	
New Hampshire					
New Jersey				X	
New Mexico	X	X ^{xvi}		X	
New York				X	
North Carolina				X	
Ohio				X	
Oregon				X	
Rhode Island	X			X	
Texas				X	
Vermont					
Virginia				X	
Washington				X	X ^{xvii}
West Virginia					
Wisconsin				X	

ⁱ ARK. CODE ANN. § 23-79-1103(b) (2005) (insurance companies not required to provide coverage for an abortion or abortifacient).

ⁱⁱ COLO. REV. STAT. ANN. § 25-3-110(1)(a) (2009) (definition of emergency contraception excludes “RU-486, mifepristone, or any other drug or device that induces a medical abortion”).

ⁱⁱⁱ 215 ILL. COMP. STAT. 5 / 356z.4 (2007) (insurance companies not required to cover services related to an abortion).

^{iv} ME. REV. STAT. ANN. tit. 24A, §§ 2332-J(1) (2004), 2756(1) (1999), 2847-G(1) (2004), 4247(1) (2004) (“This section may not be construed to apply to prescription drugs or devices that are designed to terminate a pregnancy.”).

^v MO. REV. STAT. § 376.1199(4) (2012) (“‘contraceptive’ . . . shall exclude all drugs and devices that are intended to induce an abortion”).

^{vi} N.C. GEN. STAT. ANN. § 58-3-178(c)(4)(a) (1999) (RU-486 or any equivalent drug product not included).

^{vii} R.I. GEN. LAWS ANN. §§ 27-18-57(a) (2000), 27-19-48(a), (2000), 27-20-43(a) (2000), 27-41-59(a) (2002) (coverage for RU-486 not required).

^{viii} Includes any “entity whose articles of incorporation clearly state that it is a religiously motivated organization and whose religious beliefs are central to the organization’s operating mission.” ARIZ. REV. STAT. ANN. §§ 20-826(Z) (2014), 20-1057.08(B) (2012), 20-1402(M) (2012), 20-1404(V) (2014), 20-2329(B) (2012).

^{ix} Allows exemptions for religious non-profit organizations but specifies that “certain entities, while owned or operated by a religious organization, will not qualify for an exemption if they provide services to the general public.” MICH. CIV. RTS. COMM’N DECLARATORY RULING ON CONTRACEPTIVE EQUITY (Aug. 21, 2006) at 7.

^x Applies to any “person or entity” objecting to contraceptive coverage. MO. REV. STAT. § 376.1199(4) (2012).

^{xi} Applies to any “religious entity,” without further definition. N.M. STAT. ANN. §§ 59A-22-42(D), 59A-46-44(D) (2014).

^{xii} Contraception is covered via a general allowance for health care refusals. CAL. BUS. & PROF. CODE § 733(b)(3) (2014).

^{xiii} Requires only a “burden” rather than a “substantial burden” on religious exercise for state RFRA to apply. CONN. GEN. STAT. ANN. § 52-571b (2003).

^{xiv} Illinois’ law is particularly broad in that it applies to all phases of patient care, including any phase related to the “use or procurement of contraceptives.” 745 ILL. COMP. STAT. ANN. 70/3 (1998).

^{xv} The phrase “not unduly restrictive considering the relevant circumstances” is used, rather than a “least restrictive means” test. MO. REV. STAT. § 1.302 (2003). See also James A. Hanson, *Missouri’s Religious Freedom Restoration Act: A New Approach to the Cause of Conscience*, 69 MO. L. REV. 853, 875, 896 (2004).

^{xvi} Uses “restrict” instead of “burden,” though it is unclear which term is actually broader. N.M. STAT. ANN. § 28-22-3 (2000).

^{xvii} Contraception is covered via a general allowance for health care refusals. WASH. REV. CODE § 48.43.065 (2)(a)(i) (2014).