Culture War Politics & the Rise of Religious Exemptions against Reproductive Health Access: Pitting Patients Against Religious Freedom is A Losing Game

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Abstract: Recent cases and political movements have severely limited reproductive healthcare access for many across the United States. Religious freedom has been the purported reason for these intrusions into bodily autonomy. In this article, I show how the range of ways in which religious exemptions are growing and impinging on the legal rights of those seeking reproductive healthcare, and especially abortion care. I argue that while cases like Hobby Lobby *undermine the original intent of religious freedom laws, much*

of the political rhetoric remains the same. The polarization between religion and sex and gender-related rights—another iteration of culture war politics—causes the growth in these exemptions. I recommend several policy reforms that can align religious freedom laws to their original intent and warn legal activists against proactive litigation in the era of Trump-appointed judges. Importantly, I present a novel survey of state-level religious freedom statutes and offer a roadmap for legislators to protect access to reproductive healthcare in their states.

I. INTRODUCTION

In 2019, the Supreme Court announced its decision in *Little Sisters of the Poor Saints Peter* and *Paul Home v. Pennsylvania*, two consolidated cases that picked up where *Hobby Lobby* left off. For better or for worse, these decisions announced the constitutionality of the Trump administration's rules allowing employers and hospitals to deny birth control coverage to employees and patients.[1] Going against decades of precedent, the Court declared that religious exemptions were constitutional even if they imposed a heavy burden on third parties.[2] These cases involve employers' religious right to deny their employees' essential reproductive healthcare—namely contraception. Without the third-party harm as a restraint on religious exemptions to generally applicable laws, it is left unclear what limiting principles exist.[3]

In recent years, healthcare systems and the law have increasingly prioritized religious rights. Fueling employers' ability to seemingly trample on patients' access to healthcare and equal treatment is the growing support for religious refusals, also known as conscience clauses, in healthcare delivery policy and law. Since the advent of *Roe v. Wade* and expanding access to reproductive healthcare, both state and federal legislatures have authorized religious refusals.[4] Policymakers first drafted conscience clauses to be bipartisan and pro-life/pro-choice compromises to protect access to healthcare while protecting individuals' religious rights.[5] However, the

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[1] *Id.*

[2] *See Affordable Care Act — Contraceptive Mandate — Religious Exemptions — Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* , 134 HARV. L. REV. 560, 560 (2020).

[3] *Id.*

[4] *See* Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX: J. L.-MED. 237, 242 (2006) (discussing the prevalence of conscience clauses).

[5] *See* Sara Dubow, *"A Constitutional Right Rendered Utterly Meaningless": Religious Exemptions and Reproductive Politics, 1973-2014*, 27 J. OF POL. HIST. 1, 5 (2015) (discussing the common ground view of the conscience clause between pro-life and pro-choice legislators).

expanding reach of conscience clauses, especially in the context of insurance, has sparked a debate on their effectiveness.

Employers with religious affiliations are not the only ones to blame. Religiously affiliated hospitals and individual practitioners have increasingly cited religious exemptions to deny patients access to reproductive healthcare. Taken together, patients are now losing insurance coverage and access to equal healthcare treatment.

These compounding barriers are borne out in everyday people's lives. Evan Minton, a thirty-seven year old man, scheduled a hysterectomy at Mercy San Juan Medical Center in Carmichael, California, before his gender affirming surgery.[6] Mercy San Juan was one of the thirty-nine hospitals owned by Dignity Health, a Catholic hospital network. During a routine phone call with a nurse two days before his surgery, he casually mentioned that he was transgender, and he used the pronouns "he/him/his." The next day the hospital called him claiming that they considered his hysterectomy sterilization and had canceled the surgery. Despite ongoing litigation filed by the ACLU, Mr. Minton still has no answers and has not received the procedure. Elizabeth Gill, Senior Attorney at the ACLU of Northern California, argued in that case that section 1557 of the ACA expressly protects against anti-transgender discrimination in any hospital that receives federal funding.[7] In objecting to this argument, the USCCB responded that "[they] believe, as do many health care providers, that medical and surgical interventions that attempt to alter one's sex are, in fact, detrimental to patients. Such interventions are not properly viewed as health care because they do not cure or prevent disease or illness."[8] As of this writing, the Court of Appeals has ruled that Minton's complaint against the hospital did violate his right to "full and equal access to health care treatment."[9] Still, both the passage of time and the fact that Minton was eventually able to obtain his hysterectomy mitigated his claim to damages.[10] Minton is not alone; providers

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[6] *See* Katie Hafner, *As Catholic Hospitals Expand, So Do Limits on Some Procedures*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/health/catholic-hospitals-procedures.html [https://perma.cc/CD7L-55MG].

[7] *See* Amy Littlefield, *Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds*, REWIRE NEWS GRP. (Aug. 31, 2016, 5:39 PM), https://rewire.news/article/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds [https://perma.cc/QN39-UQW3].

[8] *Id.*

[9] Minton v. Dignity Health, 39 Cal. App. 5th 1155, 1164(2019), *review denied* (Dec. 18, 2019)

[10] *Id.*

across the nation deny healthcare to thousands of patients due to their gender. Healthcare providers deny approximately one in four transgender people equal treatment, and around one-third of transgender patients delayed or did not seek care because of discrimination.[11]

It is no coincidence that Catholic hospitals are at the center of the majority of these stories of refusal of treatment based on gender. While about one in five hospitals in the U.S. is religiously affiliated,[12] the bulk of these hospitals are Catholic. In a 2016 report, the ACLU and MergerWatch estimated that one in six hospitals in the U.S. is affiliated with a Catholic network, and that proportion is larger for rural communities.[13] That same year, forty-six communities' sole community hospitals were Catholic hospitals.[14] From 2001 to 2016, Catholic-affiliated hospitals have grown in number by twenty-two percent, as the total of U.S. hospitals has shrunk in a push to merge secular hospitals with Catholic hospitals.[15] The Patient Protection and Affordable Care Act (ACA) may have intentionally encouraged the rise in hospital mergers in an attempt to reduce overall costs.[16] These mergers can only benefit from the ACA's perks if the entities show that their consolidation "will meaningfully integrate the two healthcare entities," thus enabling Catholic hospitals to push their set of beliefs to

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[11] *See* Kim D. Jaffee et al., *Discrimination and Delayed Health Care Among Transgender Women and Men: Implications for Improving Medical Education and Health Care Delivery*, 54 MEDICAL CARE 1010, 1011 (2016).

[12] LOIS UTTLEY & CHRISTINE KHAIKIN, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE REPORT 1 (2016), http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf [https://perma.cc/ZM9G-ZLF8].

[13] *See* JULIA KAYE ET AL., HEALTH CARE DENIED: PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN'S HEALTH AND LIVES (2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf [https://perma.cc/UA2Y-M4SJ] [hereinafter HEALTH CARE DENIED].

[14] Sole community hospitals are defined as facilities which are located at least 35 miles away from like hospitals or located in a rural area that meets certain other criteria, like being 45 minutes driving distance from another like hospital. See UTTLEY & KHAIKIN, *supra* note 12, at 5.

[15] *See* Anna Maria Barry-Jester & Amelia Thomson-DeVeaux, *How Catholic Bishops are Shaping Health Care in Rural America*, FIVETHIRTYEIGHT (July 25, 2018), https://fivethirtyeight.com/features/how-catholic-bishops-are-shaping-health-care-in-rural-america.

[16] *See* Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 YALE L. J. 2470, 2484 (2015).

previously secular entities.[17] Throughout this article, much of the focus will be on Catholic hospitals, which dominate the religiously affiliated hospitals landscape. Still, other religious denominations, like Adventist, have also contributed to the shrinking number of secular hospitals.

Foregrounding this debate is this country's history of culture war politics and the ongoing rise of backlash constitutional jurisprudence against reproductive healthcare access. Cultural war politics, often described as the increasing hostility lead by religious movements against "counterculture" issues, includes abortion and LGBTQ issues.[18] The confluence of religious conservative groups' opposition to practices that separate sex from procreating, like same-sex marriage or abortion, has brought classic culture war politics into the present, albeit not always following the culture war narrative.[19] Cases like *Hobby Lobby* and *Masterpiece Cakeshop* are prime examples of modern-day culture war politics, [20] where morality arguments justify the restriction of unwanted departures from the traditional family model. While these cases may not touch on healthcare access specifically, they add to a growing body of constitutional jurisprudence that emboldens state and federal action against marginalized communities' access to reproductive healthcare. When employers, businesses, and hospitals expand religious freedom exemptions, they can decide what care they will provide and who needs services. Healthcare is not accessible without a hospital or clinic, healthcare professionals, and insurance programs that will cover the care people need.

In this article, I argue that when religious freedom is balanced against patients' right to healthcare, and in particular reproductive healthcare services, patients are increasingly losing. To better understand why denials of reproductive healthcare services are often gender-based discrimination that affect varied communities, it is necessary to define what I am calling reproductive healthcare services. Reproductive healthcare includes more than access to abortion or contraception. It also involves gender-affirming care, birth and delivery, STI screening, and many other services that affect bodily

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[17] *Id.* at 2485.

[18] *See* IRENE TAVISS THOMSON, CULTURE WARS AND ENDURING AMERICAN DILEMMAS 3 (2010).

[19] Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2546 (2015).

[20] *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (claiming violation of religious freedom by ACA's requirement that employers provide health insurance coverage for abortion procedures, education, and counseling); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (challenging cease and desist order from Colorado Civil Rights Commission due to shop's refusal to sell a wedding cake to a same-sex couple).

autonomy and sexual health. Throughout this article, I will use examples of different reproductive choices that are all affected by religious refusals in varying degrees. Of course, these examples will not be exhaustive and are inherently limited by available caselaw and media attention, which often privilege the reproductive healthcare of cisgender, white, and affluent women. Reproductive justice (RJ), which is a framework created by Black women who were dissatisfied with the women's rights movement of the 1990s, invites scholars and activists to use intersectionality as a starting point—recognizing that different communities have varying and intersecting reproductive health needs. Sistersong, one of the leading RJ organizations, defines reproductive justice as the "conditions of liberation that will exist when all people have the power and resources necessary to make their own decisions about their bodies, health, gender, sexuality, relationships, families, and communities, to create and choose their families, and to reproduce their communities as a whole."[21] Using RJ as a framework allows for an intersectional analysis of religious refusals, considering both healthcare access (insurance and hospital denials) and specific services (abortions, hysterectomies, gender-affirming care, for example).

RJ specifically contends that culture war politics are often at the root of reproductive oppression.[22] Tracing the history of religious refusals and conscience exemption clauses, we can see how this new era of Department of Health and Human Services (HHS) mandates and backdoor settlement agreements violating the ACA are a stark departure from the original intent of these laws. While other scholars have focused on religious refusals when it comes to individual practitioners or hospitals, few have focused on the intersecting effect of both hospitals that follow religious directives prohibiting certain reproductive healthcare and employers who deny reproductive health coverage citing religious objections. Even fewer have called attention to the underlying premise fueling expanding religious exemptions: culture war politics.

Foregrounding this shift, I argue that culture war politics and an increasingly divided political discourse are fast-tracking this already high-speed movement. In Part I, I trace the origins of culture war politics and how they gave rise to conscience clauses. Part II focuses on the protections of the ACA, especially when it comes to reproductive healthcare, and two major threats to the ACA's coverage: hospital mergers and employers' ability to deny contraceptive coverage. Part III analyzes the Supreme Court's opinion on *Hobby Lobby*, contextualizing the expanding reach of religious exemptions under the continuation culture war politics. In Part IV, I then turn to how

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[21] *See* LORETTA ROSS ET AL., RADICAL REPRODUCTIVE JUSTICE: FOUNDATION, THEORY, PRACTICE, CRITIQUE 14 (2017).

[22] *Id.* at 20.

the Trump administration's rule changes, judicial appointments, and commitment to culture war politics will enshrine many of the limits to access to reproductive healthcare for generations to come. To counter these federal policies and Court decisions, many states have passed comprehensive protections for employees and patients, which I will explore in Part V. In particular, this Part will provide a novel survey of current religious exemption laws at the state level and how they interact with statewide protections. Finally, Part VI will call for action at the state level—urging lawmakers and movement leaders to strategize around state protections against the ever-evolving threat of culture war politics.

II. CULTURE WAR POLITICS AND THE RISE OF CONSCIENCE CLAUSES

Culture war politics have influenced the judiciary and legislature for nearly 100 years. These same debates animate both the courts' recent decisions and states' ongoing role in protecting patients against the insidious use of religious exemptions. In this section, I first explore what culture war politics are and the issues that have defined this debate. Then I will explain how legislators and eventually the Court have responded to how culture war politics augmented political by increasing the reach of religious exemptions. Finally, this section will culminate with an analysis of how culture war politics is still a vital part of politics and reactionary rhetoric, arguing against the claim that we are in a post-culture war society. When discussing culture war politics in relation to religious exemptions, it is important to note that religion is not always tied to, but did shape culture war issues—or "wedge" issues— in the U.S. context. As I explain throughout this section, the intertwining between wedge issues and the Religious Right is not incidental[23] but a political strategy to mobilize an already passionate congregation against the common enemy of abortion, among other issues.

James Davidson Hunter coined the term "culture war politics" in his 1991 book, *Culture Wars: The Struggle to Define America.*[24] Hunter argued that an increasing number of "hot button issues," like abortion, gun reform, homosexuality, and censorship, were creating a dramatic polarization that

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[23] The Religious Right is a broad moniker for moral traditionalist, cultural and social conservatives, who are often Christian. *See e.g.*, Soya Jung, *Left or Right of the Color Line? Asian Americans and the Racial Justice Movement,* 2012 CHANGELAB 1, 6 (2012), https://www.changelabinfo.com/reports/ChangeLab_Left-or-Right-of-the-Color-Line.pdf [https://perma.cc/C6WW-SVHG].

[24] *See generally* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (defining cultural conflict as political and social hostility rooted in the American systems of moral understandings).

transformed American politics and culture throughout his book.[25] While the definition and theory of the term dates back from the1990s, scholars and political pundits began using culture war politics as a lens to understand the history of moral and political polarization in America dating back to the 1920s.[26] Hunter's central point was that cultural issues like abortion or LGBTQ rights primarily polarized the public along religious lines.[27] While there has been debate about how relevant religion continues to be in the culture war context, research has shown that religious tradition and partisanship play an essential role in explaining polarized attitudes in issues of religious liberty—including protecting that liberty against other people's liberty, such as abortion rights and contraceptive access.[28]

Though culture war politics existed well before the *Roe* era, it became increasingly apparent when abortion became a legal right. Cases like *Whole Women's Health v. Hellerstedt* (2016)[29] and *Harris v. McRae* (1980)[30] show the Court's hostility to the right of abortion for women, but fail to acknowledge the cultural debate between those that see reproductive healthcare access as facilitating sexual liberty and those that decry the popularity of reproductive choice as facilitating moral wrongs.[31] Instead, *Harris* and *Whole Woman's Health* limit access to meaningful reproductive choice as a matter of constitutional rights without acknowledging the underlying right to sexual pleasure and choice as a part of the individual rights asserted.[32] The same tension between a silently divided Court is present in LGBT cases like *Romer v. Evans* (1996)[33] and *Lawrence v. Texas* (2003).[34] When more progressive

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[25] *Id.*

[26] *Id.*

[27] *See* Jeremiah Castle, *New Fronts in the Culture Wars? Religion, Partisanship, and Polarization on Religious Liberty and Transgender Rights in the United States*, 47 AM. POL. RSCH. 650, 653 (2019).

[28] *Id.* at 655, 670.

[29] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[30] Harris v. McRae, 448 U. S. 297 (1980) (holding that the Hyde Amendment, which prohibits federal funding for abortion care, does not violate the Fifth Amendment or the Establishment Clause of the First Amendment).

[31] *See* Robin West, Hobby Lobby*, Birth Control, and Our Ongoing Culture Wars: Pleasure and Desire in the Crossfires*, 26 HEALTH MATRIX: J.L.-MED. 67, 69–70 (2016).

[32] *See generally Whole Woman's Health*, 136 S. Ct. (addressing abortion as a constitutional right); *see also Harris*, 448 U.S.(addressing the Hyde Amendment).

[33] Romer v. Evans, 517 U.S. 620, 623 (1996).

[34] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

Justices side with the interests of LGBT individuals and women, they are labeled by the dissent as judicial activists. Even so, the more progressive Justices never seriously consider the constitutional rights of sexual pleasure and choice.[35]

While people were guaranteed the right to abortion, culture war politics demanded a reactionary limitation of its access. Congress immediately responded to the possibility of medical staff being forced to perform abortions after *Roe v. Wade* by enacting the Church Amendment, [36] which protected individuals' rights to refuse to provide abortion or sterilization procedures.[37] "[M]ore than half the states" passed similar protections following the passage of the Church Amendment.[38] While the Church Amendment received bipartisan support, defectors, such as then House Representative Bella Abzug (D-N.Y.), knew that such an amendment would discriminate "against persons of lesser means."[39] Plainly, if a woman seeking an abortion lives in a community that only has access to a Catholic hospital, and she cannot afford to go to another hospital, "perhaps hundreds of miles distant, her constitutional right will be rendered utterly meaningless."[40] In a pragmatic turn of events, Abzug, despite her reservations, voted for the amendment to maintain her relationship with other women members of Congress who did not support abortion but supported other issues, like equal access to credit and Social Security benefits.[41]

In recent cases, the Supreme Court buoyed the Church Amendment by establishing a strict scrutiny standard when deciding protections under the Free Exercise Clause of the First Amendment. "In *Sherbert v. Verner* (1963), the court found laws requiring Seventh-Day Adventists to work on Saturdays unconstitutional."[42] Justice Brennan noted that requiring Ms. Sherbert to "violate a cardinal principle of her religious faith effectively penalize[d] the free exercise of her constitutional liberties."[43] In *Wisconsin v. Yoder* (1972), the

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[35] *Id.* at 602 (Scalia, J., dissenting).

[36] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (upholding abortion as a right).

[37] *See* Deutsch, *supra* note 16, at 2477–78.

[38] *Id.* at 2478.

[39] *See* Dubow, *supra* note 5, at 12.

[40] *Id.*

[41] *See id.* at 13–14.

[42] *Id.* at 8.

[43] Jesse Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV. 1709, 1714–15 (2000).

Court found laws requiring Amish children to attend public school were also unconstitutional.[44] In both of these cases, the Court established a high benchmark for the government to overcome: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[45] Not even the "laudable goals" of preparing Wisconsin's students "for participation in modern life" could circumvent the Amish's right to raise their children at home, per their religious convictions.[46]

The Church Amendment led to later expansions that went well beyond its original intent. In 1996, the Coats Amendment prohibited the federal government from discriminating against providers that refused to offer training on abortion services because of religious objections.[47] Then in 1997, the Balanced Budget Act expanded protections to "insurance companies administering Medicare and Medicaid benefits" so that individuals could object to the dissemination of information, for example, the availability of certain birth control. This includes more than just services.[48] The Weldon Amendment in 2005 restricted state and local government access to HHS funds if the government discriminated against healthcare entities that did not "provide, pay for, . . . or refer for abortions" (including HMOs and insurance plans).[49] All of these expansions used the Church amendment as their precedent.[50]

In 2008, the growing lists of exemptions reached a new peak during the Bush Administration. Then HHS Secretary, Mike Leavitt, adopted the "Midnight Regulations," which expanded the definitions of "assistance" to include referrals and "health care entity" to include any individual physician, postgraduate student, or health insurer.[51] These exceptions, modeled after even more expansive state laws, were reversed by the Obama Administration in 2011.[52] While there are no federal provisions that exempt medical

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[44] Dubow, *supra* note 5, at 8.

[45] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[46] *See* Choper, *supra* note43, at 1715.

[47] 42 U.S.C. § 238n (a) (2012).

[48] *See* Deutsch, *supra* note 16, at 2479.

[49] *See id.* at 2480.

[50] *See* Dubow, *supra* note 5, at 21.

[51] *See* Deutsch, *supra* note 16, at 2480.

[52] *Id.* at 2481.

professionals from giving medical or referral information, many religious hospitals follow directives that often lead to patient misinformation. In twenty-nine states, however, medical professionals are required to provide patients specific information about abortion procedures, but much of this information is purposefully medically unsound or misleading.[53]

Of course, these exceptions to reproductive care have existed in other areas. Since 1977, the Hyde Amendment, for example, barred federal funds for use in abortion care except for cases of life endangerment, rape, or incest.[54] Since its inception, Congress has reenacted the Amendment every year by attaching it to the yearly Medicaid fiscal appropriation.[55] As a result, most people enrolled in Medicaid must pay for these services out of pocket.[56] Similarly, while there have been a growing number of protections for trans individuals seeking sex-reassignment surgery, many insurance providers still deny claims, leading to exorbitant out-of-pocket costs.[57]

A. Religious Freedom Restoration Act

These religious protection policies became more and more stringent as culture war politics moved into the turn of the century with the Religious Freedom Restoration Act (RFRA) of 1993 and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.[58] "Congress passed the RFRA following the Supreme Court's decision in *Employment*

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[53] *See Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/4XR5-AXSM].

[54] *State Funding of Abortion Under Medicaid,* GUTTMACHER INST. (Jan. 1, 2019), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid [https://perma.cc/4WEB-537B].

[55]*See Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, ACLU (Jan. 2019), https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion [https://perma.cc/4HLX-VJF6].

[56] See Alina Salganicoff et. al., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, KAISER FAMILY FOUNDATION (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/ [https://perma.cc/585Q-M8T2]. As of 2017, 55% of reproductive age women on Medicaid live in a state that restricts abortion coverage and does not provide state-only funds for abortion services. *Id.*

[57] For example, the price of hormone therapy is about $1,500 per year and gender affirming surgeries often cost more than $100,000 out of pocket. Alexis M. Florczak, *Make America Discriminate Again? Why Hobby Lobby's Expansion of RFRA is Bad Medicine for Transgender Healthcare*, 28 HEALTH MATRIX: J.L.-MED. 431, 454 (2018).

[58] *See id.* at 445; 42 U.S.C. § 2000cc (2000).

Division v. Smith."[59] In *Smith*, two Native American employees "were fired from their jobs for ingesting peyote during a religious ceremony."[60] The fired employees argued that this state action violated their rights under the First Amendment since they were not free to exercise their religion.[61] In an opinion by Justice Antonin Scalia, however, the Court held that religious beliefs do not exempt individuals to avoid laws of general applicability that do not "target or restrict" the exercise of religious beliefs.[62] Since Oregon's law against substance use was facially neutral (i.e., it did not attempt to restrict religious freedom), the state had not infringed on the employees' First Amendment rights.[63]

RFRA directly addressed the *Smith* holding by establishing that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[64] Congress intended to restore the compelling interest test established in *Sherbert* and *Yoder*.[65] Under this balancing test, the federal government must prove that it has a "compelling government interest" in maintaining the law and that it has implemented "the least restrictive" or "least burdensome means to further that interest."[66] In a House Report, Congress explicitly directed that the compelling interest test "should not be construed more stringently or more leniently than it was prior to *Smith*."[67] RFRA currently only applies to federal laws, per *City of Boerne v. Flores* (1997), which held the statute unconstitutional as applied to the states under the Fourteenth Amendment.[68]

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[59] *Id.* at 446.

[60] *Id.*

[61] *Id.*

[62] *See id.*; Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

[63] *See* Florczak*, supra* note 57, at 446.

[64] 42 U.S.C. § 2000bb(a)(2) (1993).

[65] 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are-(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government").

[66] *See* Florczak, *supra* note 57, at 446–47; Burwell v. Hobby Lobby Stores, Inc.*,* 573 U.S. 682, 703–04 (2014).

[67] *See Hobby Lobby,* 573 U.S. at 749 (Ginsburg, J., dissenting).

[68] *See* Florczak, *supra* note 57, at 447. *See also City of Borne v. Flores,* 521 U.S. 507, 534 (1997). In *City of Borne*, the Court held that while Congress has broad power under the Enforcement

However, it is important to note that all three of these cases which supported the passage of the RFRA (*Sherbert*, *Yoder*, and *Smith*) were brought by plaintiffs from minority religions seeking to protect unfamiliar religious convictions.[69] The Seventh-Day Adventists in *Sherbert*, the Amish in *Yoder*, and the members of the Native American Church in *Smith* sought exemptions to abide by beliefs that were likely not contemplated when the government originally crafted the challenged laws.[70] It follows that the Court previously had a tradition of protecting minority religious beliefs, which did not incur the third-party harms of protecting larger religious groups since they were limited in scope and membership.

This distinction is important for two reasons: (1) if RFRA's purpose was to protect minority religions from government interference, then its application to the broad Judeo-Christian "morality" discussed in this article surely runs counter to this goal; and (2) if RFRA intentionally expanded religious protection to serve the interests of a growing religious or political coalition, RFRA is more accurately described as a product of culture war politics and not a continuation of the tradition of religious freedom.

B. Culture Wars Today

The surrounding political response to the abortion question was undeniable: the post-Roe era saw an uncommon alliance between conservative Protestants and Catholics, creating the Religious Right we see today.[71] When conservative religious groups perceived an attack of "family values" via *Roe*, they organized around abortion, and other reproductive health and LGBTQ issues, to solidify political power. At the national level, abortion became one of the key "wedge issues" that divided Democrats and Republicans post-*Roe*.[72] For example, in a bid to garner the votes of previously conservative Southern Democrats, presidential candidate Ronald Reagan used the abortion issue as a drawing line between Democrats and

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Clause of the Fourteenth Amendment to enact statutes, it did not hold 'unlimited power' to contravene the separation of powers and federal balance. *Id.* at 536.

[69] *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2525 (2015).

[70] *Id.*

[71] *See* Sarah E. Jones, *Access Denied: Prodded by Religious Extremists, State Officials Are Increasingly Decimating Reproductive Care Options for Women*, CHURCH & STATE MAG. (December 2015), https://www.au.org/church-state/december-2015-church-state/featured/access-denied [https://perma.cc/LMV4-LUNY].

[72] Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 953 (2016).

Republicans, solidifying the party lines by the early 1980s.[73] These political realities transformed how religion and morality were weaponized against women and other marginalized groups to restrict reproductive autonomy and ensure a political identity based on these wedge issues. As these ideas crystallized in organization and political power, groups like the Moral Majority, the Christian Coalition, and the "tea party" movement espoused culture war politics following President Obama's election in their quest to "take [their] country back" from the "conquering secularist radicals."[74] This divided political landscape has ebbed between partisanship and a call to Christian morality. While religion has not always been the organizing force for these movements, *morality* and traditional family values have.

Some have argued that President Obama's election signaled a ceasefire on the traditional culture war rhetoric.[75] Instead, it has taken a new face. During Obama's presidency, the Tea Party became the most vocal group of conservatives between 2008 and 2012, but their views and candidates mirrored that of the Religious Right's, including opposition to abortion and same-sex marriage.[76] This new right-wing group perpetuated the same strands of culture war politics used by explicitly religious groups. Reactionist events bear this out: a proposal to ban same-sex marriage in California, the murder of abortion provider George Tiller by a pro-life activist, and a push by members of Congress to ban health-care subsidies for abortions in the proposed ACA, among others.[77]

More recently, culture war politics have shown up in popular news and media. Media has been shown to play an influential role in the polarization of American voters, especially as the trend of individuals seeking out "self-

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[73] *Id.* at 954.

[74] John Dombrink, *After the Culture War?: Shifts and Continuities in American Conservatism*, 42 CAN. REV. OF AM. STUD. 301, 315 (2012).

[75] *See id.* at 303 ("Some political analysts and social scientists claimed that the 2008 election of Barack Obama signaled a shift in American politics to an era of 'post-partisanship' and an end to the 'culture wars' that had helped define contested American politics and political discourse for thirty years. A mature, industrialized, democratic society, it was argued, would move beyond the wedge issues and misplaced moral grievances of an often anxious polity and address more central economic and social concerns.").

[76] *See* Frédérick Gagnon, *Introduction: Ceasefire or New Battle? The Politics of Culture Wars in Obama's Time*, 42 CAN. REV. AM. STUD. 261, 269 (2012).

[77] *Id.*

reinforcing" viewpoints and media fragmentation is on the rise.[78] FOX News' Bill O'Reilly published a book, *Culture Warrior* (2006), in which he calls himself a "warrior in the vicious culture war," describing the current political tension as a fight between "the armies of the traditionalists" and the "secular-progressive movement that want to change America dramatically: mold it in the image of Western Europe."[79] Arthur C. Brooks, president of the American Enterprise Institute, wrote in *The Battle* (2010) that the culture war in America is between those who believe the country should "continue to be a unique and exceptional nation organized around the principles of free enterprise" and those who think it should move "toward European-style statism [*sic*] grounded in expanding bureaucracies, increasing income redistribution, and government-controlled corporations."[80]

In this context of political polarization and increasingly self-affirming media, the culture wars have not ended but are now more deeply entrenched as a driving political feature of the American system. Importantly, reproductive health care services are still considered "wedge issues" by many, which has spurred legislation and Constitutional doctrine to widen conscience objections, or religious exemptions, as a sword for those who believe access to reproductive healthcare is in opposition to their morality or religion.

III. ACA PROTECTIONS AND FAILURES: PATIENTS CAN BE DISCRIMINATED AGAINST WITH MORAL IMPUNITY

In this political backdrop, the Obama administration introduced one of the largest changes to the healthcare delivery system in the United States: The Patient Protection and Affordable Care Act (ACA). Notably, the ACA guarantees coverage of FDA-approved contraception for all people, regardless of their insurer. Since the ACA's introduction, Republicans and more extremist conservative groups have tried to stop the ACA from reaching the public. Linking the ACA to Obama's presidency through rebranding it as "ObamaCare" served as a rhetorical tool for the Right to oppose the ACA. Through ad campaigns, the Right was able to shape American's opinion on the ACA, and polls have shown that less than 50%

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[78] *See* John V. Duca and Jason L. Saving, *Income Inequality, Media Fragmentation, and Increased Political Polarization*, 35 CONTEMP. ECON. POL'Y 392, 411 (Apr. 2017). Media fragmentation can be defined as a byproduct of increased medica choices, leading individuals to self-select into watching channels that reinforce their viewpoints, which commonly include political vilification leading to less sympathy for opposing views. *Id.* at 396.

[79] Gagnon, *supra* note 76, at 269.

[80] *Id.*

of Americans support the ACA.[81] During the 2014 midterm election, 94% of the $445 million spent on TV campaigns was spent on negative ad messages about the ACA.[82]

The ACA, like many other federal programs, included limited exceptions for religious employers and healthcare providers. Specifically, nonprofit religious organizations are exempt from the ACA's requirement that employer-provided insurance plans cover preventative services including many types of contraception without co-payments. But that exemption is quickly expanding.[83] To counter some of these harms, the ACA established some patient protections that scholars believe could curtail the recent expansion of religious refusals. Among them is Section 1557 of the ACA.[84] However, as I explain below, Section 1557 has not been an effective remedy for many patients. It is especially losing its teeth in the face of the Trump administration's HHS rule changes and executive orders. To make matters worse, the ACA has encouraged the mergers of hospital networks, which has accelerated the rate of religious networks acquiring previously secular institutions. Taken together, the ACA has failed to protect patients against religious exemptions to care.

A. Section 1557: The Healthcare Rights Act and Legal Challenges

Section 1557 of the ACA is the first of its kind to provide individuals a private right of action in the healthcare setting.[85] Under this Section, individuals have a right to be free from discrimination in "any health program or activity . . . which is receiving Federal financial assistance . . ."[86] This Section broadly covers all health programs, including hospitals, pharmacies, and insurance providers.[87]

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[81] James E. Dalen et. al., *Why Do So Many Americans Oppose the Affordable Care Act?,* 128 AM. J. MED. 807, 808 (2015).

[82] *Id.* at 809.

[83] *See* Dubow, *supra* note 5, at 21.

[84] *See generally* Deutsch, *supra* note 16 (discussing equality in care through federal healthcare); *see also* Florczak, *supra* note 57 (discussing the ACA's Nondiscrimination or Civil Rights provision).

[85] Florczak, *supra* note 57, at 442.

[86] *Id.* (quoting 42 U.S.C. § 18116(a) (2010)).

[87] *See* Deutsch, *supra* note 16, at 2491.

Section 1557 bases its definition of sex discrimination on Title VII and IX.[88] Doing so expands the definition of sex discrimination to include discrimination based on pregnancy, gender identity, and sexuality.[89] The ACA also authorizes HHS to issue guidance in the implementation of the nondiscrimination requirements of the section.[90] In May 2016, HHS introduced a final rule on Section 1557 that clarified that discrimination on the basis of sex includes discrimination based on gender identity.[91] Further, barring a medical reason, a medical service offered to non-transgender individuals must also be offered to transgender patients. For example, "an insurance company that covers hormone therapy [for menopausal women]," it must also provide hormone therapy for transition-related care.[92]

Importantly, scholars have argued that "Section 1557 provides anti[-]discrimination protection greater than [that offered by] the Equal Protection Clause [since it includes] Title IX's definition."[93] For one, Title IX explicitly defines discrimination on the basis of sex as including pregnancy.[94] In contrast, the Supreme Court has ruled that "unfavorable treatment of pregnant people did not necessarily" meet the discrimination threshold required by the Equal Protection Clause.[95] Therefore, Section 1557 creates more robust protections for any person capable of becoming pregnant and especially protects people from being refused services or information about their reproductive health.[96]

Despite its lofty goals, Section 1557 has recently come under fire. In *Franciscan Alliance v. Burwell*, "Texas, along with seven additional states and three private healthcare organizations challenged Section 1557's recognition of gender identity discrimination [under the umbrella of] sex discrimination."[97] Federal district court Judge O'Connor agreed with the claimants' position that complying with 1557 conflicted with their rights

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[88] *See id.* at 2490.

[89] *See id.* at 2493.

[90] *Id.* at 2493.

[91] Florczak, *supra* note 57, at 443.

[92] *Id.* at 444.

[93] Deutsch, *supra* note 16, at 2494.

[94] *Id.*

[95] *Id.* (summarizing Geduldig v. Aiello, 417 U.S. 484, 494 (1974)).

[96] *Id.*

[97] Florczak, *supra* note 57, at 455.

under the RFRA and granted a nationwide injunction to prevent Section 1557 from going into full effect.[98] In his opinion, Judge O'Connor reasoned that since Section 1557 adopted Title IX's language, it was strictly referring to biological sex and not "an internal sense of gender identity."[99] Further, the plaintiffs seek an order allowing them to discriminate against individuals who seek reproductive healthcare, like abortion.[100] On August 29, 2021, the U.S. District Court for the Northern District of Texas issued an order holding that the RFRA entitles the plaintiffs to permanent injunctive relief from the provision or coverage of gender affirming care.[101]

It is unclear what section 1557's future holds. It is important to note that the plaintiffs in *Franciscan Alliance* were not "closely held, for-profit organizations" like Hobby Lobby.[102] Instead, the plaintiffs are Catholic hospital systems and a faith-based group of providers.[103] As I will show in the discussion of *Hobby Lobby*, the expansion of religious refusals to large, for-profit health systems like the Franciscan Alliance could pave the way for other for-profit health care corporations to bring similar challenges,[104] chipping away at access to reproductive healthcare.

In 2020, the Trump administration finalized substantial revisions to Section 1557 that would go beyond the relief requested or injunction in *Franciscan Alliance.*[105] Importantly the rule would eliminate the prohibition based on gender identity, adopt blanket abortion and religious freedom exemptions for health care providers, and eliminate the provisions that grant

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[98] *See id.*

[99] *See id.* at 456.

[100] *See* Brigitte Amiri, *Texas Claims it 'Zealously Protects the Physician-Patient Relationship.' Tell That to Texas Women Trying to Access Abortion*, ACLU (Sept. 16, 2016, 12:00 PM), https://www.aclu.org/blog/reproductive-freedom/texas-claims-it-zealously-protects-physician-patient-relationship-tell [https://perma.cc/3XE7-32QY].

[101] *See* Franciscan All., Inc. v. Becerra, Civil Action No. 7:16-CV-00108-O (N.D. Tex. Aug. 9, 2021)

[102] *See* Florczak, *supra* note 57, at 456.

[103] *See id.*

[104] *See id.* at 457.

[105] MaryBeth Musumeci, et. al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAMILY FOUND. (Sept. 18, 2020), https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/#:~:text=Section%201557%20prohibits%20discrimination%20based, health%20care%20based%20on%20sex [https://perma.cc/8JMU-NM42].

private individuals to challenge alleged Health Care Rights Act violations.[106] Further, while the ACA applies broadly to health programs and activities that receive federal funding, including insurances outside of the ACA's Marketplace, the new rule narrows the reach of the regulations to only cover specific activities that receive federal funding but no other operations that are not "principally engaged in the business of providing health care."[107] Thus, many insurers outside of the Marketplace would no longer be subject to the regulations, allowing private insurances to exclude coverage for reproductive healthcare otherwise guaranteed by the ACA.[108] Additionally, Section 1557 regulations no longer apply to all HHS-administered programs. [109] While the Biden-Harris administration has signed an executive order promising to restore access to reproductive health care,[110] the Trump administration's 1557 final rule is still in effect. However, it is in the middle of extensive litigation, and many measures are currently enjoined by federal courts.[111]

B. Hospital Mergers

Healthcare delivery does not only include access to insurance coverage but, in many cases, depends on the providers individuals can access. One unforeseen consequence of the ACA as it stands is the rise of hospital mergers. In an effort to streamline the health care industry, the ACA gives incentives to health care entities to merge and combine resources. Secular hospitals have increasingly merged with Catholic hospitals, which often follow mandates that limit access to reproductive health services.

Since ACA's implementation, hospital mergers have intensified to serve the purported goals of cost-saving and streamlining health services.[112] The ACA has allowed commercial payers to negotiate prices with healthcare providers, giving hospitals an incentive to expand or merge to gain back

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[106] *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37160 (June 19, 2020).

[107] *Id.* at 37171.

[108] *Id.*

[109] *Id.* at 37173.

[110] Press Release, White House Briefing Room, FACT SHEET: President Biden to Sign Executive Orders Strengthening Americans' Access to Quality, Affordable Health Care, (Jan. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/28/fact-sheet-president-biden-to-sign-executive-orders-strengthening-americans-access-to-quality-affordable-health-care/ [https://perma.cc/HH23-DHR8].

[111] *See* Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116 (2020).

[112] *See* Deutsch, *supra* note 16, at 2484.

bargaining power.[113] In order to comply with the Federal Trade Commissions' guidance on hospital mergers, organizations must demonstrate clinical consolidation that will result in cost savings rather than price hikes. [114] And, to satisfy the USCCB mandates, secular organizations seeking to merge with Catholic hospitals must comply with the directives.[115] The mandate leaves secular hospitals with little recourse when their only viable way to stay afloat is to merge with a Catholic institution.

As a result, Catholic hospitals are increasingly the only option for many communities. As of 2016, 548 hospitals adhered to the directives (nearly fifteen percent of all acute care hospitals in the United States).[116] In at least 46 communities across the United States, the federal government has found that Catholic hospitals are the "sole community hospitals" for their region.[117] For example, in 2017, a hospital in southeastern Washington, Walla Walla General, closed, leaving 78,500 in the area to one Catholic hospital, St. Mary's Medical Center.[118] While the number of Catholic hospitals increased by twenty-two percent from 2001 to 2016, rural hospitals closed their doors by the dozen.[119] Catholic hospitals' size and reach have lead many fledgling secular health networks to merge, requiring them to follow the directives.

The rise of conscience clauses and mergers stirred reform in the USCCB's set of directives. In 2014, the USCCB updated the Ethical and Religious Directives for the first time in over a decade.[120] These new changes, which pose the greatest threat to women and LGBT individuals, targeted the rise of mergers, preventing previous loopholes that medical professionals had used to maintain patient autonomy.[121] Under these directives, Catholic

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[113] *See id.* at 2485.

[114] *See id.* at 2486.

[115] *See id.*

[116] *Health Care Denied*, *supra* note 13, at 22.

[117] *Id.* at 24.

[118] *See* Barry-Jester & Thomson-DeVeaux, *supra* note 15; Beth Jones Sanborn, *Adventist Health Closes Walla Walla General Hospital Under Strain of Mounting Financial Issues,* HEALTHCARE FIN. NEWS (Jul. 24, 2017), https://www.healthcarefinancenews.com/news/adventist-health-closes-walla-walla-general-hospital-under-strain-mounting-financial-issues [https://perma.cc/N4D2-FUFH].

[119] *Id.*

[120] *See* Deutsch, *supra* note 16, at 2483.

[121] *See id.*

hospitals may not "promote" or "condone" contraceptives.[122] Abortion or sterilization (of any gender) is strictly prohibited.[123] Even physicians with admitting privileges at Catholic hospitals must comply with these directives, and local bishops must approve all partnerships or consolidation between Catholic and non-Catholic hospitals.[124] Coverage also varies from insurance to insurance, but Catholic hospital have denied their employees and their families transition-related services in the past.[125]

In an interview, Dr. Katherine Kaplan, a retired OB-GYN from Wisconsin, recalled the restrictions the directives put on her ability to provide patients the best care.[126] While Dr. Kaplan worked primarily in a secular institution, the hospital where she delivered babies, and the only hospital available in the community, was Catholic.[127] When she first started working there, she had almost no restrictions on the type of care she could provide, except for abortions, which were always prohibited. As time passed, the local bishop became stricter with the directives, which made Dr. Kaplan suddenly unable to perform tubal ligations after C-sections or prescribe contraceptives.[128] Dr. Kaplan remembers one patient who the clinic denied a tubal ligation even though another pregnancy would endanger her health. Within months, the woman ended up pregnant and had to make over 100 doctor appointments to manage her complicated pregnancy, which resulted in a premature delivery by over two months.[129]

In 2016, Catholic hospitals accounted for 14.5 percent of all acute care hospitals. Out of the largest hospital systems in the U.S. in that same year, Catholic systems accounted for four out of the top ten systems.[130] But the data we have available now may not paint a clear picture. Since data is only

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[122] LOIS UTTLEY ET AL., MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT TO REPRODUCTIVE HEALTH CARE 23 (2013), http://static1.1.sqspcdn.com/static/f/816571/24079922/1387381601667/Growth-of-Catholic-Hospitals-2013.pdf?token=ubpahokQSSV4F12RVBuOZX8US0U%3D [https://perma.cc/PR6W-B9DF] [hereinafter MISCARRIAGE OF MEDICINE].

[123] *Id.* at 2.

[124] *Id.*

[125] *See* Ana Sofia Knauf, *WA ACLU Sues Catholic Health Group for Discriminating Against Transgender Teen*, THE STRANGER (Oct. 5, 2017, 1:37 PM), https://www.thestranger.com/slog/2017/10/05/25455701/wa-aclu-sues-catholic-health-group-for-discriminating-against-transgender-teen [https://perma.cc/8LX5-BCPV].

[126] Barry-Jester & Thomson-DeVeux, *supra* note 15.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See* UTTLEY & KHAIKIN, *supra* note 12, at 3.

available going back to 2016, it is hard to say how many more communities are affected. Still, the growth of Catholic hospitals is not likely to slow down, especially with the resurgence of expanding religious freedom and cultural shift towards more conservative politics.

This unintended consequence aligns with culture war politics: restricting patient choice for the sake of provider or institutional religious objection. Taken together with the expanding applicability of religious exemptions for reproductive healthcare, religious hospitals are now empowered to buy out the competition and limit patient choice with little legal intervention.

Many religious hospitals are nonprofits with stated religious tenets, but they do not uniformly hire or treat persons with that shared belief. This distinction, however, is becoming increasingly immaterial to religious exemptions with the constitutional backlash borne out in recent cases. Under the Texas injunction, Section 1557 does not apply to religiously affiliated hospitals. As I shortly discuss, other interpretations of entities covered could further expand who can assert these exemptions, such as employers and private companies.

Employers and private companies that provide employee insurance are also entitled to claim religious exemptions. While the ACA guidelines outline religious exceptions for the contraceptive mandate, the exception is limited to nonprofit employers who primarily employ and serve persons who "share its religious tenets."[131] In *Hobby Lobby*, two for-profit corporations, Hobby Lobby and Conestoga, successfully challenged the requirement to provide contraceptive coverage to employees under the RFRA and Free Exercise Clause, opening the possibility of more for-profit employers and hospitals to claim religious exemptions.[132]

IV. CONSTITUTIONAL BACKLASH OF *HOBBY LOBBY*: EMPLOYERS NO LONGER HAVE TO FOLLOW ACA MANDATES.

In *Burwell v. Hobby Lobby* (2014), Justice Alito expressed the opinion of the Court that allowing for-profit businesses to deny contraceptive coverage to their employees would have "precisely zero" effect on their employees.[133] Yet despite Justices Alito and Kennedy's assurances that the holding was

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[131] *See* Christopher Ogolla, *The Public Health Implications of Religious Exemptions: A Balance Between Public Safety and Personal Choice, or Religion Gone Too Far?*, 25 HEALTH MATRIX: J.L.-MED. 257, 287 (2015).

[132] *See id.*

[133] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014).

narrow, *Hobby Lobby* represents a setback for anyone accessing reproductive health services, especially women and LGBT people. In the coming years, especially with the shifting make-up of the Court, the real harms of *Hobby Lobby* will be more aptly felt.

Hobby Lobby was a consolidation of cases brought by Hobby Lobby Stores and Conestoga Wood Specialties, both effectively controlled by families with stated purposes to commit their businesses under their respective religious beliefs.[134] At the time, Conestoga had 950 employees, and Hobby Lobby had more than 13,000 employees.[135] Both companies sued HHS to challenge the contraceptive mandate using RFRA and the Free Exercise Clause.[136] Under RFRA, HHS had to prove a compelling governmental interest and show that the mandate was the least restrictive means to carry out that interest.

In his opinion, Justice Alito made four important holdings. First, he claimed that a "for-profit closely held corporation" is capable of holding religious beliefs.[137] Justice Alito then dismissed the government's interest in gender equality and public health, citing the government's unwillingness to pay for the coverage in question as proof that this interest was not important to the government.[138] Then, the Court insisted on a stringent reading of the least-restrictive-means test, relying on *City of Boerne*.[139] Lastly, and arguably most importantly, Justice Alito implied that claims based on complicity, i.e., claims that are not directly related to the "sinful" behavior, but are tangentially related to their completion, warrant religious protection.[140]

While RFRA applies to "a person's exercise of religion" and had not previously applied to corporations, the Court expanded the definition of "persons" to include corporations.[141] Doing so, Alito focused on a legal

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[134] *Id.* at 700–03.

[135] *Id.* at 700, 702.

[136] *Id.* at 703–04.

[137] *Id.* at 719, 706 ("Is there any reason to think that the Congress that enacted [RFRA] put small-business owners to the choice that HHS suggests? An examination of RFRA's text . . . reveals that Congress did no such thing.").

[138] *Id.* at 726–30.

[139] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

[140] *Id.* at 724 n.34.

[141] *Id.* at 705–06.

fiction, insisting that corporations cannot act separately from their owners.[142] Moving swiftly past this issue, the Court then tackled the issue of for-profit corporations claiming religious exemptions that are usually reserved for religious nonprofits. Alito again relied on another legal fiction in his decision: creating the ambiguous category of "for-profit closely held corporation[s]."[143] Even conceding the outlandish leap that corporations should be treated as people since they are made up of "human beings,"[144] as Alito wants us to think, corporations cannot possibly attest to every employee's and their families' set of beliefs.[145] The Court placed greater importance on the corporation's stated set of beliefs than on the employees' right to express *their* beliefs – which may include access to reproductive healthcare.

RFRA requires that some compelling government interest is furthered through the proposed action. While Justice Alito admitted that "public health" and "gender equality" were compelling interests, his flippant dismissal of these interests colored the rest of his opinion.[146] Alito mocked HHS's claim of a strong interest in women's equality by asking that if providing all women contraceptives was "a Government interest of the highest order," then why was it not required by the RFRA to "pay *anything* in order to achieve this important goal."[147] Justice Alito relied on *Gonzales v. O Centro*'s interpretation of the RFRA, which requires the government to demonstrate the compelling interest in the context of the "sincere exercise of

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[142] *Id.* at 706–07.

[143] *Id.* at 718–19.

[144] While it is true that Constitutional doctrine has considered corporations people for similar reasons, here context is important. *See* Citizens United v. FEC, 558 U.S. 310, 392 (2010) (Scalia, J., concurring). The Court is not considering the corporations' right to free speech, but the corporation's right to refuse medical coverage because of its moral beliefs. In both cases it is dubious as to how a corporation can claim to represent the political or religious beliefs of its employees, but, in the insurance context, third-party harms, like inability to access reproductive health, is more poignant. As Justice Stevens reminded the court in *Citizens United*, corporations have "no consciences, no beliefs, no feelings, no thoughts, no desires." *Id.* at 466 (Stevens, J., concurring).

[145] *Hobby Lobby*, 573 U.S. at 740 (Ginsburg, J., dissenting). ("In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.").

[146] *Hobby Lobby*, 573 U.S. at 726.

[147] *Id.* at 729.

religion [that] is being substantially burdened."[148] Under this guidance, the Court reasoned the government's interest is "very broadly framed."[149] Instead of delving into the merits of HHS' interests, Justice Alito assumed there is a compelling interest in order to move on to what he believed was more critical – the least-restrictive-means test.[150] However, in glossing over the government's compelling interest in women's equality, Justice Alito ignored how access to reproductive health is vital in women's equality in both the workplace and society. In the end, Justice Alito created a dangerous precedent for dismissing future interests in women's equality.

The Court insisted on a stringent reading of the least-restrictive-means test, relying on *City of Boerne*.[151] As noted above and explained in Justice Ginsburg's dissent, the least-restrictive-means test should be no more or less stringent than in pre-*Smith* jurisprudence.[152] Under the misguided use of this overly stringent test, the Court made the second mistake of assuming a substantial burden on Hobby Lobby and Conestoga's exercise of religion instead of appropriately questioning it. Justice Alito further claimed that HHS had failed the least-restrictive-means standard because, in the Court's view, HHS could have covered the contraceptives itself.[153]

While it is true that HHS has already made exceptions for non-profit organizations, religious non-profit organizations are designed to serve the specific purpose of carrying out their religious beliefs. In contrast, for-profit companies are inherently interested in making a profit, albeit their owners may make their personal decisions about running their businesses according to their personal beliefs. For-profit companies have chosen to join the marketplace, making themselves open to the public with varied religious and moral views. Requiring their employees to follow the company's religious beliefs, even indirectly through refusing to cover certain health services, gives for-profit companies organizational religious protection that should be reserved for non-profits. The Court allows for-profit companies to push personal convictions on their employees, who then will carry the additional burden of sifting through government bureaucracy to get the coverage they

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[148] *Id.* at 726 (quoting Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

[149] *Hobby Lobby*, 573 U.S. at 727.

[150] *Id.* at 727–28.

[151] *Id.* at 728 ("The least-restrictive-means standard is exceptionally demanding . . .").

[152] *Id.* at 749–50 (Ginsburg, J., dissenting).

[153] *Id.* at 730–31.

need, not to mention the dignitary harm caused by knowing that your employer will not cover your reproductive healthcare.

The Court relied on Hobby Lobby's and Conestoga's statement of belief that providing certain types of contraception makes them complicit in the immoral act of ending the life of an embryo.[154] The Court did not question the burden on the Green and Hanh families but takes their tenuous connection between providing coverage and assisting women in accessing contraception as a substantial burden in itself. As Justice Ginsburg pointed out in her dissent, this logic entirely dismisses people's decisional autonomy, which breaks the causal link between providing insurance coverage and using contraception.[155] Some organizations have gone as far as to challenge the act of filling out a form for their religious refusal, insisting that providing documentation makes them complicit in providing the care they deem morally wrong.[156] While the challenge to the form is pending appeal, *Hobby Lobby* provides no real limit to how much credit the Court can give to tenuous complicity in another's actions.[157] However, "eight of nine appeals courts (D.C., 2nd, 3rd, 5th, 6th, 7th, 10th, and 11th) have ruled that filling out a form to ask for the accommodation is not a substantial burden on the employer's religious beliefs."[158]

The *Hobby Lobby* decision is a classic example of culture war politics at work. As Professor Robin West notes, little academic literature has focused on the heteronormative morality foregrounding *Hobby Lobby*.[159] The case is a far deviation from the original purpose of RFRA, which endeavored to protect minority religious individuals practicing unfamiliar traditions.[160] *Hobby Lobby* dramatically departs from the traditional understanding of religious freedom by ignoring the harms of denying thousands of employees their privacy rights, assuming companies hold religious beliefs, and finding

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[154] *Id.* at 758 (Ginsburg, J., dissenting).

[155] *Id.* at 760–61 (Ginsburg, J., dissenting).

[156] *See* Nejaime & Siegel, *supra* note 19, at 2531–32 (quoting Wheaton Coll. v. Burwell, 573 U.S. 958, 958 (2014) (Sotomayor, J., dissenting)).

[157] *See id.*

[158] *Challenges to the Federal Contraceptive Coverage Rule*, ACLU, https://www.aclu.org/challenges-federal-contraceptive-coverage-rule [https://perma.cc/7AHB-N4RZ].

[159] *See* West, *supra* note 31, at 71.

[160] *See* Florczak, *supra* note 57, at 445–47.

the that ACA mandate significantly harms employers who do not wish to follow it.[161]

The Court is not alone, however, in expanding the reach of religious freedoms. As we have seen from the start of Trump's presidency, HHS and other agencies have doubled down on enacting culture war politics regulations, cementing the Court's misguided interpretation of the RFRA and other civil rights laws. Under this context, for-profit religious employers and hospitals are emboldened to continue discriminating against LGBT individuals and women.

A. Little Sisters of the Poor *and* Trump v. Pennsylvania

In 2019, the Court heard the two consolidated cases that followed *Hobby Lobby*: *Little Sisters of the Poor Saints* and *Trump v. Pennsylvania*. The two cases involved the Trump Administration's interim rules, which allowed employers to opt-out of the ACA's contraception requirement without notifying HHS or providing a pathway to alternate coverage. The *Little Sisters* challenged an earlier HHS rule that required them to self-certify their exemption because, in their view, completing the form would force them to violate their religious beliefs by "tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme."[162] To comply with *Hobby Lobby* and other RFRA claims that arose out of the contraception mandate, HHS reformulated the rules in 2016 and 2017, significantly broadening the definition of an exempt employer to include an employer that "objects . . . based on its sincerely held religious beliefs," "to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services" including both for-profit and publicly traded entities.[163] The second interim rule created a "moral exemption" further broadening the scope of the exemption.[164] The State of Pennsylvania sued the Department within a week of this second IFR, claiming that the rules were procedurally and substantively invalid under the Administrative

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[161] *See, e.g.*, Andrew Koppelman, *Masterpiece Cakeshop and how "religious liberty" became so toxic*, VOX (Dec. 6, 2017, 12:00 PM), https://www.vox.com/the-big-idea/2017/12/6/16741840/religious-liberty-history-law-masterpiece-cakeshop [https://perma.cc/TWM9-DKHB].

[162] Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2376 (2020) (quoting Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell 794 F.3d 1151, 1168 (10th Cir. 2015)).

[163] *Id.* at 2377 (quoting 82 Fed. Reg. 47812 (2017)).

[164] *Id.* at 2382.

Procedure Act (APA), and a nationwide preliminary injunction was granted by the District Court.[165]

Writing for the majority, Justice Thomas reversed and remanded the Third Court's opinion finding that: 1) "the ACA gives HRSA broad discretion to define preventative care" and promulgate "religious and moral exemptions", and 2) the interim rules were procedurally valid.[166] Although the Court tried to categorize the holding as a narrow one dealing with the APA requirements of rulemaking, it significantly changed how the Court has dealt with religious refusals of care and the balancing act vital to recognizing third-party harms.[167] As Justice Ginsburg declared in her dissent, "the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree."[168] In her opinion, and as *Hobby Lobby* previously held, the accommodation of self-certification "does not substantially burden objectors' religious exercise,"[169] but the interim rules now being upheld requires the insurer of objecting employers to "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan."[170]

The tenuous connection between an employer's moral objection to contraception and a self-certification form which would require an insurance plan to provide alternate coverage to qualified employees should not be enough to weaponize the RFRA to gut one of the most important sections of the ACA for gender justice.

V. THE TRUMP ADMINISTRATION IMPACT ON THE FUTURE OF RELIGIOUS EXEMPTIONS

The forty-fifth presidential administration threatened marginalized communities' future access to reproductive health, among other civil rights. During his presidency, Trump doubled down on his brand of culture war politics, especially when it came to LGBT people and reproductive health. Trump's allegiance to the growing voting block of white evangelical Christians may seem incongruent with his religious history (of which there is

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165 *Id.* at 2367.

166 Leading Cases, *supra* note 2, at 562–63.

167 Little Sisters Poor Saints Peter Paul Home, 140 S. Ct. at 2386.

168 Id. at 2400 (Ginsburg, J., dissenting).

169 *Id.* at 2409 (Ginsburg, J., dissenting).

170 *Id.* at 2411 (Ginsburg, J., dissenting) (quoting 45 C.F.R. § 147.131(c)(2)(i)(A) (2013)).

little), but they "are united by a common desire to constrain the behavior of women" or anyone else that threatens "family values."[171] Trump focused his efforts on restricting the rights of transgender individuals, limiting access to abortions, strengthening religious exemptions, and stacking the federal judiciary with nominees hostile to reproductive rights.

The Trump Administration was openly hostile to transgender rights. In 2017, Trump rescinded the Obama Administration's HHS guidance recognizing gender identity discrimination as a form of sex discrimination.[172] HHS additionally spearheaded an effort to establish a limited legal definition of sex and gender under Title IX "as a biological, immutable condition determined by genitalia at birth."[173] In his attempt to humiliate and limit trans folks' ability to serve their country, Trump announced his plan to ban trans people from serving in the military, claiming that the "military must be focused on decisive . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail."[174] And now, the Supreme Court has allowed the transgender ban to go into effect.[175] Similar arguments have been made in the transgender-bathroom debates, painting transgender people as covert intruders causing "disruption" and danger to society.

Because abortion has remained a ripe issue for culture war politics, Trump increased already strict limitations on both international and domestic use of federal funds for abortion services. In 2017, weeks into his presidency, Trump signed the "Mexico City Policy," also known as the global gag rule.[176] The global gag rule requires nongovernment organizations which receive US funding or aid to refrain from providing or even counseling patients about

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[171] *See* Peter Beinart, *The New Authoritarians are Waging War on Women*, THE ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/authoritarian-sexism-trump-duterte/576382 [https://perma.cc/V9GR-YNEU].

[172] *See* Florczak, *supra* note 57, at 458.

[173] Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html [https://perma.cc/2X3U-DMSK].

[174] *See* Ariane de Vogue & Zachary Cohen, *Supreme Court allows transgender military ban to go into effect*, CNN (Jan. 22, 2019), https://www.cnn.com/2019/01/22/politics/scotus-transgender-ban/index.html [https://perma.cc/463U-T95Z].

[175] *See id.*

[176] *See Trump's 'Mexico City Policy' or 'Global Gag Rule'*, HUM. RTS. WATCH (Feb. 14, 2018), https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule [https://perma.cc/AN5V-Q7WK].

abortion services.[177] Signing this order, he dramatically expanded its reach. While Republican presidents have signed on to the rule since its inception, this new expansion goes beyond restricting US family funds (approximately $575 million a year) to any US global health assistance (estimated $8.8 billion a year).[178] Throughout his presidency, Trump backed proposals to defund Planned Parenthood and signed legislation that paved the way for state and local governments to limit abortion clinics from receiving federal funds.[179] Just last March, the Trump administration released a final rule barring clinics that provide or refer patients for abortions from getting federal family planning funds.[180] This "domestic gag rule" would especially target health clinics, like Planned Parenthood, which sees about 41% of patients who get family planning services under Title X funding.[181]

In 2020, Trump announced the new "Conscience and Religious Freedom" Division of HHS, under the Office for Civil Rights.[182] HHS's Office for Civil Rights has traditionally protected people's access to medical care, regardless of race or gender.[183] However, under the direction of Trump's appointee Roger Severino, an anti-abortion Catholic lawyer, the Office of Civil Rights is heading in a different direction.[184] Recently, HHS announced a new "conscience protection rule that would allow" healthcare professionals to discriminate against LGBT people and anyone seeking

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[177] *Id.*

[178] *Id.*

[179] *See* Sabrina Siddiqui, *How has Donald Trump's first year affected women?,* THE GUARDIAN (Jan. 18, 2018, 9:48 AM), https://www.theguardian.com/us-news/2018/jan/18/how-has-donald-trumps-first-year-affected-women [https://perma.cc/AMB8-3MWL].

[180] *See* Anna North, *The Legal Battle Over the Trump Administration's "Domestic Gag Rule," Explained*, VOX (July 5, 2019, 11:59 AM), https://www.vox.com/policy-and-politics/2019/2/22/18236227/abortion-planned-parenthood-gag-rule-title-x [https://perma.cc/F3XF-A28C].

[181] *Id.*

[182] *See* Press Release, U.S. Dep't Health and Hum. Servs.: Office for C.R., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018).

[183] *See generally* Alison Kodjak, *Civil Rights Chief at HHS Defends the Right to Refuse Care on Religious Grounds*, NPR (Mar. 20, 2018, 3:38 PM), https://www.npr.org/sections/health-shots/2018/03/20/591833000/civil-rights-chief-at-hhs-defends-the-right-to-refuse-care-on-religious-grounds [https://perma.cc/EJU4-CZR8] (discussing traditional roles of HHS).

[184] *See* Emma Green, *The Man Behind Trump's Religious-Freedom Agenda for Health Care*, THE ATLANTIC (June 7, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-man-behind-trumps-religious-freedom-agenda-for-health-care/528912 [https://perma.cc/AU3L-54MC].

reproductive healthcare.[185] According to the draft, health care providers would be able to refuse to "provide treatment, referrals, or assistance with procedures if these activities would violate their stated religious or moral convictions."[186] The proposed rule effectively strengthens the RFRA, institutionalizing hospitals' abilities to deny care. This "right to discriminate" would significantly affect LGBT people, who already face incredible burdens when it comes to accessing basic healthcare.[187]

Finally, the shifting make-up of the federal courts under Trump ensures that culture war politics lives on through constitutional jurisprudence. In an interview in 2016, Trump proclaimed that he would "appoint pro-life, conservative, second amendment Judges," and he has delivered on that promise.[188] Since he's been in office, Trump has "appointed nearly 1 in 4" of the nation's appeal court judges and 1 in 7 district court judges.[189] Around 70% of Trump's judicial appointees are white men, making it one of the least diverse class of judicial nominees in modern history.[190] Many of these judges are bad news for anyone trying to access reproductive healthcare.

Trump's nominees to the highest court, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, were especially jarring for reproductive justice advocates. During his confirmation hearings, Gorsuch reluctantly confirmed *Roe v. Wade* as "the law of land" after incessant questioning by Democrats.[191] During his time on the United States Court of Appeals for the 10th Circuit, he held "that closely held, for-profit businesses" were not required to provide contraception in their insurance plans—an opinion which was later

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[185] S.E. Smith, *The Trump Administration is Trying to Make it Easier for Doctors to Deny Care to LGBTQ People*, REWIRE NEWS GRP. (Jan. 28, 2019, 4:09 PM), https://rewirenewsgroup.com/article/2019/01/28/the-trump-administration-is-trying-to-make-it-easier-for-doctors-to-deny-care-to-lgbtq-people [https://perma.cc/SCL4-8D7B].

[186] *Id.*

[187] *See id.*

[188] Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of "Originalist" Judges,* 55 CAL. W. L. REV. 341, 342 (2019).

[189] *See* Carrie Johnson, *Trump's Impact on Federal Courts: Judicial Nominees by the Numbers*, NPR (Aug. 5, 2019, 5:01 AM), https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers [https://perma.cc/4VRB-HJ35].

[190] *Id.*

[191] Siddiqui, *supra* note 179.

confirmed by the Supreme Court.[192] On the heels of the #MeToo movement, Trump continued to support Brett Kavanaugh as his Supreme Court nomination, as the nation watched Christine Blasey Ford tell her story—a story thousands of women have experienced before.[193] Despite this, Kavanagh sits on the bench and will have the power to hold women's reproductive lives hostage for the foreseeable future.

In the lower federal courts, Trump's nominees are no less hostile to reproductive rights. For example, Kyle Duncan, a nominee to the Fifth Circuit Court of Appeals, has spent most of his career supporting religious freedom over people's access to healthcare.[194] Duncan played a leading role in Hobby Lobby by writing an amicus brief supporting a non-profit organization that wanted to refuse to cover birth control (going as far as denying any accommodation for getting that care) and writing a brief arguing that pharmacies must be allowed to refuse to fill contraception prescriptions.[195] Although the judiciary has a duty to remain independent from the political process, undeniably, judges are often appointed because they "embraced, to some degree, the same ideological stance of the person that chose them."[196] While this moment in political history is not new or unanticipated, the lasting power of the judiciary and the precedent they are setting will harm marginalized communities for generations to come.

Culture war politics demand assimilation into a tired vision of family cohesion. It restricts people's mobility in choosing if, when, and how to become parents. It humiliates and endangers the lives of LGBT people or anyone who does not conform to a stringent view of sexuality and family life. While the Biden-Harris administration has already rolled back many harmful policies, including the Global Gag Rule and Title X funding of abortion providers, Trump-appointed judges have yet to reach their potential

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[192] *Id.*

[193] *See* Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 2:28 AM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html [https://perma.cc/SA9S-8ZDV].

[194] *See* Rachel Easter, *Trump is Using Judicial Nomination to Advance His Anti-Woman, Anti-LGBTQ Agenda*, NAT'L WOMEN'S L. CTR. (Mar. 5, 2018), https://nwlc.org/blog/trump-is-using-judicial-nominations-to-advance-his-anti-woman-anti-lgbtq-agenda [https://perma.cc/YN2M-VN76].

[195] *Id.*

[196] Addicott, *supra* note 188, at 360.

influence. They will likely still be standing in patients' way for the next 20 years.[197] However, state-level advocacy efforts to protect patient rights and realign state RFRA's to mirror the federal RFRA's original intent presents a new avenue where legislators could step up for their constituents.

VI. RELIGIOUS EXEMPTIONS ON THE STATE LEVEL: STATE RFRAS AND NOTIFICATION REQUIREMENTS CONVERGE TO DENY EMPLOYEE INSURANCE BENEFITS

Since 1993, nineteen states have passed state RFRAs.[198] Modeled after the federal RFRA, these religious imposition laws (as some critics call them) have traditionally shielded businesses and individuals from consequences of complying with civil rights laws, including the ACA's mandate of contraception coverage and the constitutional right to abortion.[199] For example, Indiana's RFRA applies even when the government is not a party, opening up religious claims to private individuals.[200] Vice President Mike Pence, Indiana's former Governor, argued that the state's RFRA mirrored the federal RFRA. But Senator Chuck Schumer, who authored the federal RFRA of 1993, disagreed, calling the state's RFRA a "Funhouse mirror" image of the federal legislation.[201]

State RFRAs have the potential to pose significant harm to patients and other marginalized groups. For example, in New Mexico, a photography company used the RFRA to justify its decision to discriminate against a same-sex couple who wanted pictures taken of their commitment ceremony.[202]

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[197] *See* Jacob Finkel, *Trump's Power Won't Peak for Another 20 Years*, THE ATLANTIC (April 10, 2021), https://www.theatlantic.com/ideas/archive/2021/04/trump-circuit-court-judges/618533/?fbclid=IwAR1mIAt36WEofLitRUvYMdBCWmljrkSaXE-oGqe9D0qVEbuPvXienUMpHE4 [https://perma.cc/4SRJ-NZC4].

[198] The states are Connecticut, Rhode Island, Florida, Illinois, Alabama, Arizona, South Caroline, Texas, Idaho, New Mexico, Oklahoma, Pennsylvania, Missouri, Virginia, Tennessee, Louisiana, Kentucky, Kansas, Mississippi, and Indiana. *See* David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious-Freedom Laws*, TIME (April 2, 2015, 3:30 PM), https://time.com/3766173/religious-freedom-laws-map-timeline [https://perma.cc/LFS9-GFAX].

[199] *See* Jessica Mason Pieklo & Imani Gandy, *A Timeline of the Religious Imposition Laws Sweeping the Nation*, REWIRE NEWS GRP. (December 13, 2016, 2:33 PM), https://rewire.news/article/2016/12/13/timeline-religious-imposition [https://perma.cc/892X-T97R].

[200] *See* Alisa Lalana, *RFRA and the Affordable Care Act: Does the Contraceptive Mandate Discriminate Against Religious Employers?* 49 LOY. L.A. L. REV. 661, 679 (2016).

[201] *Id.*

[202] *See* Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53, 59 (2013).

Alarmingly, states have proposed expanding their current RFRAs to mirror the standard set in *Hobby Lobby*. States like Arizona, Arkansas, and Indiana proposed expanded RFRAs to include for-profit businesses. The key to these changes is not necessary the language used but the context in which they are being introduced.[203] The Indiana legislature rejected a clause providing that the new state RFRA could not be used to discriminate. Some of the law's supporters went as far as to state that they seek to permit denials of service to same-sex couples, for example.[204] The changing attitudes surrounding state RFRAs combined with the expansion of the federal RFRA is not just political rhetoric. It is a continuation of culture war politics that uses the guise of "religious freedom" to restrict civil rights to those condoned by a limited, heteronormative vision in which ideological morality trumps bodily autonomy.

Other states have expanded coverage, going beyond the floor set by the ACA and protecting patients even if the ACA is repealed. These protections include accessibility of contraception by requiring coverage of 12-month dispensing, narrowing the types of religious organizations that are exempted, and providing coverage for condoms and emergency contraception, among other benefits.[205]

To combat the expanding reach of state RFRA's, I propose that state legislatures adopt comprehensive contraception protections that have already proven effective in progressive states like California. Bellow, I offer an analysis of both the existing religious exemptions and comprehensive contraception protections to serve as a roadmap for legislators and activists to prioritize key states and identify model legislation.

A. Current Survey of State RFRA's as They Relate to Insurance and Employer Coverage of Reproductive Health Services

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[203] *See* Erik Eckholm, *Context for the Debate on 'Religious Freedom' Measures in Indiana and Arkansas*, N.Y. TIMES (Mar. 31, 2015), https://www.nytimes.com/2015/04/01/us/politics/context-for-the-debate-on-religious-freedom-measures-in-indiana-and-arkansas.html [https://perma.cc/6YRH-8FUZ].

[204] *Id.*

[205] *See* Liz McCaman, *Fact Sheet: State Contraceptive Equity Laws*, NAT'L HEALTH L. PROGRAM, https://9kqpw4dcaw91s37kozm5jx17-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/Fact-Sheet-State-Contraceptive-Equity-Laws.pdf [https://perma.cc/739W-S7GT] at 1.

Twenty states and D.C. have religious exemptions, while nine do not.[206] These exemptions have two defining features: (1) notice requirements; and (2) scope of the definition of a "religious employer." Notice requirements ensure that patients are given ample notice, either by their insurer, employer, or both, that their plan may not cover certain reproductive health care because their employer has an objection to such coverage. More importantly, to the degree in which the definition of a religious employer is limited or left undefined, these statutes govern what types of employers are permitted to seek an exemption.

Below is a chart comparing state RFRAs based on their interpretations of "religious employer" (limited, broader, expansive) and their notice requirements (none, insurance, employer, or both):[207]

Type of Exemption v. Notification Requirement	**Limited**	**Broader**	**Expansive**	**Almost Unlimited**
Insurance		NC	CT NV WV	MO
Employer	CA	ME MA	AZ DE	

[206] The states which did not include religious exemptions are Arkansas, Colorado, Georgia, Iowa, Montana, New Hampshire, New Jersey, Vermont, Washington, and Wisconsin. N.J. STAT. ANN. § 17:48-6ee (West 2020).

[207] *See Insurance Coverage of Contraceptives*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives [https://perma.cc/HH2Y-CDB2].

		RI	D.C. HI MD	
Both	NY			
None	OR MI[208]		NM	IL

Their legislatures were clear in all four states with limited exemptions (California, New York, Oregon, and Michigan). A religious employer must show that "[t]he inculcation of religious values is the purpose of the entity[,] [t]he entity primarily employs persons who share the religious tenets of the entity [and] [t]he entity serves primarily persons who share the religious tenets of the entity."[209] However, each of the four states has different notification requirements. California only requires employers to notify their employees,[210] New York requires both the employer and the insurance company to notify

[208] Guttmacher lists Michigan as a state with "broader" exemption laws; but the text of the religious exemption in the Commission's order is almost identical to states with limited exemption laws. *See Declaratory Ruling on Contraceptive Equity, Mich. C. R. Comm'n (Aug. 21, 2006),* https://www.michigan.gov/documents/Declaratory_Ruling_7-26-06_169371_7.pdf [https://perma.cc/NT9Q-ZTEL] [hereinafter *MCRC Ruling*].

[209] CAL. INS. CODE § 10123.196 (West 2017); N.Y. INS. LAW § 3221 (McKinney 2021); OR. REV. STAT. § 743A.066 (2021); *see also MCRC Ruling*, supra note 208, at 7 (including the requirement that religious organizations seeking an exemption must show that they primarily serve people who share their beliefs).

[210] CAL. INS. CODE § 10123.196(e)(1)(D)(2) (West 2017) ("Every religious employer that invokes the exemption provided under this section shall provide written notice to any prospective employee once an offer of employment has been made, and prior to that person commencing that employment, listing the contraceptive health care services the employer refuses to cover for religious reasons.").

their members,[211] while Oregon and Michigan have no notification requirements.[212]

States with broader religious exemptions either have fewer requirements than limited exemptions states or defer to federal definitions of religious employers. For example, in North Carolina, religious employers need to prove that the "inculcation of religious values" is one of their primary purposes and that they primarily employed people who share their religious beliefs, but they do not have to prove that they primarily *serve* people with their religious tenets.[213] In contrast, Maine, Massachusetts, and Rhode Island all limit religious employers to churches or church-controlled organizations as defined in the United States Code.[214]

States with "expansive" religious exemptions either expand the definition of what a religious employer is and who can object or do not provide any guidance in defining the limits of who could be considered a religious employer. Hawaii falls somewhere between the broader and expansive exemption states. While Hawaii's exemption follows much of the broader states' language (requiring religious employers to have a purpose of "inculcation of religious values" and primarily employ those with the same

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[211] N.Y. INS. LAW § 3221(l)(16)(E)(2)–(F)(2) (McKinney 2021) ("Every religious employer that invokes the exemption provided under this paragraph shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons . . . Where a group policyholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with subparagraph (E) of this paragraph, the insurer that provides such coverage shall provide written notice to certificate holders [sic] upon enrollment with the insurer of their right to directly purchase a rider for coverage for the cost of contraceptive drugs or devices. The notice shall also advise the certificate holders [sic] of the additional premium for such coverage.").

[212] *See generally* OR. REV. STAT. § 743A.066 (2021); *MCRC Ruling*, *supra* note 208.

[213] *See* N.C. GEN. STAT. § 58-3-178(e) (2021) ("As used in this subsection, the term 'religious employer' means an entity for which all of the following are true: (1) The entity is organized and operated for religious purposes and is tax exempt under section 501(c)(3) of the U.S. Internal Revenue Code. (2) The inculcation of religious values is one of the primary purposes of the entity. (3) The entity employs primarily persons who share the religious tenets of the entity.").

[214] *See* ME. REV. STAT. ANN. tit. 24-A, § 2847-G (West 2021); MASS. GEN. LAWS ANN. ch. 176G, § 4O(c) (West 2021) ("The requirements of this section shall not apply to a health maintenance contract delivered, issued or renewed pursuant to this chapter if that contract is purchased by an employer that is a church or qualified church-controlled organization, as those terms are defined in 26 U.S.C. section 3121(w)(3)(A) and (B)."); 27 R.I. GEN. LAWS § 27-20-43(c) (2021) ("As used in this section, 'religious employer' means an employer that is a 'church or a qualified church-controlled organization' as defined in 26 U.S.C. § 3121.").

beliefs)[215], its other requirements differ in important ways. Specifically, the exemption does not apply to any public employees, but it does extend to any "educational, health care, or other nonprofit institution or organization owned or controlled" by the religious employer.[216]

In Connecticut, Delaware, and Maryland, the religious exemption includes employers whose "bona fide religious" beliefs or tenets are contrary to providing contraceptive coverage.[217] However, Connecticut further extends the exemption to any *individual* who states in writing that contraceptive coverage is contrary to their "religious or moral beliefs."[218] Further, Connecticut defines religious employers as "qualified church-controlled organization[s]," deferring to the U.S. Code standard, but also includes any "church-affiliated organization."[219]

Nevada is broader and has an exemption for any religiously affiliated organization which objects to coverage on "religious grounds."[220] Similarly, Arizona's exemption covers nonprofit religiously affiliated organizations but also 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 principles."[221]

D.C. has the only law which explicitly includes for-profit companies, tracking with *Hobby Lobby* jurisprudence and granting exemptions to both nonprofit organizations which "hold [themselves] out as [] religious organization[s]" and "closely-held for-profit entit[ies] . . . [that] ha[ve] adopted a resolution or similar action establishing that it objects to covering

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[215] HAW. REV. STAT. § 431:10A-116.7(a) (2021).

[216] *Id.*

[217] MD. CODE ANN., INS. § 15-826(c)(1) (West 2021); DEL. CODE ANN. tit. 18, § 3559(f) (2021) ("A religious employer may request and an entity subject to this section shall grant an exclusion from coverage under the policy, plan, or contract for the coverage required under this section for the insertion and removal and medically necessary examination associated with the use of FDA-approved drugs or devices if the required coverage conflicts with the religious organization's bona fide religious beliefs and practices."); CONN. GEN. STAT. § 38a-503e(c)(1) (2021).

[218] CONN. GEN. STAT. § 38a-503e(c)(2) (2021).

[219] *See* CONN. GEN. STAT. § 38a-530e(g) (2021).

[220] NEV. REV. STAT. § 689B.0378(7) (2019).

[221] ARIZ. REV. STAT. ANN. § 20-1402(P)(3)(b) (2012).

some or all of the contraceptive drugs, devices, products, or services on account of the owners' sincerely held religious beliefs."[222]

West Virginia and New Mexico allow any "religious employer" to object to coverage and do not define the limits of "religious employer."[223]

Missouri and Illinois have almost unlimited religious exemption laws. In Missouri, any "person or entity" can object "if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity."[224] Individual enrollees and any health carrier "which is owned, operated or controlled in substantial part by an entity that is operated pursuant to moral, ethical or religious tenets that are contrary to the use or provision of contraceptives" can also object to coverage.[225] The insurance plan must provide written notice to enrollees.[226] However, Missouri's religious exemption was held invalid by *Missouri Insurance Coalition*.[227] Illinois' Health Care Right of Conscience Act supersedes its contraceptive equity law, providing that:

> It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in providing, paying for, or refusing to obtain, receive, accept, deliver, pay for, or

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[222] D.C. CODE § 31-3834.04(c)(1–2) (2018).

[223] W. VA. CODE § 33-16E-7 (2020); N.M. STAT. ANN. § 59A-22-42 (West 2019).

[224] MO. REV. STAT. § 376.1199 (2012); *see also* Missouri Ins. Coal. v. Huff, 947 F. Supp. 2d 1014, 1019 (E.D. Mo. 2013) ("The State law says that insurers cannot provide contraceptive coverage to any person or entity that objects to such coverage based on any moral, ethical, or religious objection. The Court is hard-pressed to see how this does not create a direct conflict for Missouri health insurers. The Court rejects Defendant's argument that the state law does not conflict with the federal law because the state law provides more coverage for contraceptives. The state law, however, does not provide more coverage-without-cost-sharing, the kind of coverage mandated by the Affordable Care Act.").

[225] *Id.*; MO. REV. STAT. § 376.1199(4)(3) (2012).

[226] MO. REV. STAT. § 376.1199(6).

[227] Missouri Ins. Coal. v. Huff, 947 F. Supp. 2d 1014, 1020 (E.D. Mo. 2013).

> arrange for the payment of health care services and medical care. It is also the public policy of the State of Illinois to ensure that patients receive timely access to information and medically appropriate care.[228]

While this statute applies to all facets of health care delivery, including individual medical professionals and insurers themselves, it poses particular harms to those insured by any employer who can claim a religious objection.

B. Key States Primed for RFRA Reform

In improving states' religious exemptions, the focus should be amenable to stricter limits on religious employers. For example, states like California, Oregon, and Michigan—which currently have limited definitions of "religious employers" but do not have notification requirements for both insurances and employers—can follow the New York model and expand their notice requirements to include both.[229] As demonstrated by New York's historic passing of the Comprehensive Contraception Coverage Act (CCCA) (which codified its expansion of contraception coverage and limited its religious exemptions), states hoping to pass similar laws will likely need a strong show of support from their governors and a pro-choice or progressive state legislature.[230]

None of the states with broader religious exemptions require notification from both insurance companies and the employer. However, the focus in

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[228] 745 ILL. COMP. STAT. 70/2 (2017).

[229] *See* N.Y. INS. LAW § 3221 (McKinney 2021) ("(2) Every religious employer that invokes the exemption provided under this paragraph shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons. (F) (1) Where a group policyholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with subparagraph (E) of this paragraph each certificateholder covered under the policy issued to that group policyholder shall have the right to directly purchase the rider required by this paragraph from the insurer which issued the group policy at the prevailing small group community rate for such rider whether or not the employee is part of a small group. (2) Where a group policyholder makes an election not to purchase coverage for contraceptive drugs or devices in accordance with subparagraph (E) of this paragraph, the insurer that provides such coverage shall provide written notice to certificateholders upon enrollment with the insurer of their right to directly purchase a rider for coverage for the cost of contraceptive drugs or devices. The notice shall also advise the certificateholders of the additional premium for such coverage.").

[230] *See* Auditi Guha, *New York Democrats Are Finally in Position to Cement Abortion Rights*, REWIRE NEWS GRP. (Nov. 29, 2018, 3:23 PM), https://rewire.news/article/2018/11/29/new-york-democrats-are-finally-in-position-to-cement-abortion-rights [https://perma.cc/H9L4-EUDB].

these states would be better placed in reforming their definitions of "religious employers" to limit the number of employers that can use the exemption.

While North Carolina is politically hostile to expanding reproductive rights, its religious exemption is already more limited than other broader exemptions.[231] The only difference between NC and NY, for example, is that NC does not require employers to prove that they primarily serve those who follow their religious tenets.[232] While NC has a hostile legislature, the state's governor, Roy Cooper (D), has supported reproductive rights in the past, and the state has failed to pass a Religious Freedom Restoration Act (RFRA).[233] Therefore, NC is likely to be somewhat open to restricting its religious exemption statute or receptive to guidance on greater limits to the current exemption.

In the rest of the states with broader or expansive religious exemptions, amending the current exemption laws would be more substantive. For these states, religious employers seeking an exception should show that: 1) primarily ***employ*** individuals who follow their religious tenets; and 2) ***serve*** individuals who follow their religious tenets—and *not* the general public. Because this would be more of a wholesale approach, the political landscape and the risk of backlash are heightened.

First, targeting states that already have a pro-choice legislature and protective family-planning policies would be relatively safe options. Maine has a pro-choice governor (Janet Mills), who has publicly committed to protecting reproductive rights, and a pro-choice legislature.[234] Connecticut,

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[231] *See* N.C. GEN. STAT. § 58-3-178 (2019).

[232] *Compare* N.C. GEN. STAT. § 58-3-178 (2019) (no requirement for employers to prove that their clientele follow their religious tenets), *with* N.Y. INS. LAW § 3221(l)(16)(A)(1)(c) (McKinney 2021) ("The entity serves primarily persons who share the religious tenets of the entity.").

[233] *See* Richard Fausset, *North Carolina Fails to Overturn Governor's Veto of Anti-Abortion Bill*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/north-carolina-abortion-bill.html [https://perma.cc/H3AD-8UP2]; *Legislative Tracker: North Carolina Religious Freedom Restoration Act (SB 550)*, REWIRE NEWS GRP. (Nov. 18, 2018), https://rewire.news/legislative-tracker/law/north-carolina-religious-freedom-restoration-act-sb-550 [https://perma.cc/H2BN-Z2YV].

[234] *See Protecting Reproductive Rights*, JANET MILLS FOR MAINE, https://www.janetmills.com/issues/reproductive-rights [https://perma.cc/3QCC-SLU9]; NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF REPRODUCTIVE HEALTH IN THE UNITED STATES 53 (2021), http://www.prochoiceamerica.org/wp-content/uploads/2021/03/Who-Decides-2021-Digital-Edition.pdf [https://perma.cc/59DP-J3H2] [hereinafter NARAL REPORT]; s*ee also* Amanda Michelle Gomez, *Maine governor signs bill to increase number of abortion providers*, THINK PROGRESS (June 11, 2019, 10:16 AM),

Delaware, Hawaii, Nevada, and New Mexico have a pro-choice governor, legislature, and protective contraception policies.[235] D.C. also has a pro-choice Mayor, Muriel Bowser (D), and protective family-planning policies.[236]

Next, there are some states that carry moderate risk in trying to introduce limited religious exemptions. For example, New Jersey has a pro-choice governor, Phil Murphy (D), and legislature but has never introduced a state RFRA. New Jersey has failed to pass 53 anti-reproductive rights bills since 2013.[237] Again, Rhode Island's mixed legislature makes it hard to predict how the state legislature would vote.[238] Arizona has a hostile governor and legislators and restrictive access to reproductive health.[239] In 2015, Arizona failed to pass SB 1431, which would have strengthened individual access to contraceptives by prohibiting a religious employer from discriminating against an employee who obtains contraceptives from another insurance and requiring pharmacists to fill emergency contraception prescriptions, among

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https://thinkprogress.org/maine-law-increases-number-abortion-providers-nurse-practitioners-2beb546dabb1 [https://perma.cc/CB9D-X9QM] (describing Maine's efforts to increase access to reproductive care).

[235] See NARAL REPORT, *supra* note 234, at 40–65. Connecticut has a state RFRA that mirrors the federal RFRA, but since its passage in 1993 it has not been used in the context of providing reproductive healthcare. *See* CONN. GEN. STAT. § 52-571b (2021). Hawaii legislators failed to pass a state RFRA in 2015 that would have tracked the federal RFRA. *See Legislative Tracker: Hawaii Freedom of Religion Bill (HB 1160)*, REWIRE NEWS GRP. (Sept. 29, 2016), https://rewire.news/legislative-tracker/law/hawaii-freedom-religion-bill-hb-1160 [https://perma.cc/K37J-ZMKV]. Nevada's proposed state RFRA (AB 277) failed to pass in 2015 and included private action. *See Legislative Tracker: Nevada Protection of Religious Freedom Act (AB 277)*, REWIRE NEWS GRP. (Dec. 6, 2016), https://rewire.news/legislative-tracker/law/nevada-protection-religious-freedom-act-ab-277 [https://perma.cc/QR5L-X2UT].

[236] *See* NARAL REPORT, *supra* note 234, at 42.

[237] *See Legislative Tracker: New Jersey*, REWIRE NEWS GRP., https://rewire.news/legislative-tracker/state/new-jersey [https://perma.cc/KZZ7-WS5A]; David Johnson & Katy Steinmetz, *This Map Shows Every State With Religious-Freedom Laws*, TIME (Apr. 2, 2015, 3:30 PM), https://time.com/3766173/religious-freedom-laws-map-timeline [https://perma.cc/9RBG-J34J]; *see also* Miriam Zoila Pérez, *New Jersey Governor Authorizes Two laws That Expand Access to Reproductive Health*, COLORLINES (Feb. 22, 2018, 4:20 PM), https://www.colorlines.com/articles/new-jersey-governor-authorizes-two-laws-expand-access-reproductive-health [https://perma.cc/5S3Z-R6CL] (describing New Jersey's efforts to expand access to reproductive care).

[238] *See, e.g.*, Jessica Campisi, *Rhode Island governor signs bill protecting abortion rights*, THE HILL (June 20, 2019, 8:04 PM), https://thehill.com/homenews/state-watch/449645-rhode-island-governor-signs-bill-protecting-abortion-rights [https://perma.cc/TB7E-ZGAF]; NARAL REPORT, *supra* note 234, at 73.

[239] *See* NARAL REPORT, *supra* note 234, at 36.

other provisions.[240] It, therefore, seems like there is a coalition of activists and legislators that would be willing to bring an amendment to the current religious exemption law, but the state's RFRA and most of the legislators would deter such efforts.[241] While Maryland has protective family-friendly policies and a pro-choice legislature, its governor, Larry Hogan (R), is not particularly committed to expanding access to reproductive health. While he has not stood in the way of progressive protections for reproductive rights, it is unclear if that resolve will hold with pressure from his party.[242] Similarly, Massachusetts has a pro-choice legislature and no state RFRA, but its governor, Charlie Baker (R), has a mixed record when it comes to reproductive rights.[243] Recently he has opposed expanding abortion access for minors and later abortions but has supported current Massachusetts protections.[244] In these states, it is critical to do more research on state stakeholders and legislatures.

Out of the states with broader or expansive exemptions, West Virginia may be the riskiest state politically. West Virginia has severely restrictive access to reproductive health services and a hostile state legislature and governor, Jim Justice (R).[245] Since 2015, West Virginia legislators have failed to pass three versions of their "Freedom of Conscience Protection Act" (HB 2508, HB 2830, SB 11, SB 19, SB 487, SB 93).[246] Introducing an amendment to the religious exemption may open to door to further restrictions to access to reproductive care.

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[240] *See Legislative Tracker: Arizona Bill Amending Provision Regarding Birth Control Benefit (SB 1431),* REWIRE NEWS GRP. (Feb. 9, 2015), https://rewire.news/legislative-tracker/law/arizona-bill-amending-provision-regarding-birth-control-benefit-sb-1431 [https://perma.cc/J5LL-YU6L].

[241] *See* ARIZ. REV. STAT. ANN. § 41-1493.01 (2021).

[242] *See* Maureen Shaw, *Maryland Governor Takes Atypical GOP Approach to Reproductive Rights*, REWIRE NEWS GRP. (Apr. 26, 2017, 12:32 PM), https://rewire.news/article/2017/04/26/maryland-governor-takes-atypical-gop-approach-reproductive-rights [https://perma.cc/B7JN-MSKE].

[243] *See* Auditi Guha, *Massachusetts Governor Says He's Pro-Choice. But He Might Not Sign a Pro-Choice Bill*, REWIRE NEWS GRP. (June 20, 2019, 1:53 PM), https://rewire.news/article/2019/06/20/massachusetts-governor-says-hes-pro-choice-but-he-might-not-sign-a-pro-choice-bill [perma.cc/R26G-RZBZ].

[244] *Id.*

[245] *See* NARAL REPORT, *supra* note 234, at 82.

[246] *See Legislative Tracker: West Virginia*, REWIRE NEWS GRP., https://rewirenewsgroup.com/legislative-tracker/state/west-virginia [perma.cc/7KPE-RDD4].

Lastly, Missouri and Illinois have almost unlimited religious exemptions. Missouri has severely restricted access to reproductive care along with a hostile governor and state legislature.[247] Additionally, Missouri's state RFRA has been in place since 2003, and Missouri's legislature has passed or introduced at least 241 bills that would limit access to reproductive care.[248] Attempting to limit Missouri's exemption would likely be politically fraught. In contrast, Illinois has a supportive governor and state legislature and highly protective family-planning policies.[249] However, Illinois also has one of the oldest state-RFRAs, first introduced in 1998.[250] Recently, Gov. J.B. Pritzker signed the Reproductive Health Act, which establishes the fundamental right to reproductive health, including the right to choose birth control.[251] On the heels of this momentous win for Illinoisans, it seems likely that an amendment to protect access to contraception would succeed.

VII. RECOMMENDATIONS

As outlined at the outset of this article, several policy reforms could alleviate some of this harm. First, state and federal policy should clarify and restrict the circumstances under which medical providers, insurers, and any health entity can deny care for religious or moral convictions.[252] Next, those

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[247] *See* NARAL REPORT, *supra* note 234, at 59. *See also* Dennis Carter, *Here's How Missouri's Governor 'Weaponized Government' Against the State's Last Abortion Clinic (Updated)*, REWIRE NEWS GRP. (last updated June 28, 2019, 1:28 PM), https://rewirenewsgroup.com/article/2019/06/19/heres-how-missouris-governor-weaponized-government-against-the-states-last-abortion-clinic [perma.cc/5E4M-ZC4V] (discussing Missouri's continuing fight to restrict access to reproductive care).

[248] *See Legislative Tracker: Missouri Religious Freedom Restoration Act (SB 12)*, REWIRE NEWS GRP. (Dec. 12, 2016), https://rewirenewsgroup.com/legislative-tracker/law/missouri-religious-freedom-restoration-act-sb-12 [https://perma.cc/2KWB-TTTL].

[249] *See* NARAL REPORT, *supra* note 234 at 47; *see also* Lolly Bowean, *Gov. J.B. Pritzker signs abortion rights law making procedure a 'fundamental right' for women in Illinois*, CHICAGO TRIBUNE (June 12, 2019, 8:50 PM), https://www.chicagotribune.com/politics/ct-met-illinois-abortion-rights-law-governor-jb-pritzker-20190612-story.html [perma.cc/ER2M-DDTY] (discussing Illinois' efforts to protect access to reproductive care).

[250] *See Legislative Tracker: Illinois Religious Freedom Restoration Act*, REWIRE NEWS GRP. (Dec. 12, 2016), https://rewire.news/legislative-tracker/law/Illinois-religious-freedom-restoration-act [perma.cc/8RVW-83VH].

[251] *See SB 25: Illinois Reproductive Health Act*, ACLU ILLINOIS (June 12, 2019) https://www.aclu-il.org/en/legislation/hb-2495-illinois-reproductive-health-act [https://perma.cc/GRD6-ZB5P].

[252] *See* KIRA SHEPHERD ET AL., BEARING FAITH: THE LIMITS OF CATHOLIC HEALTH CARE FOR WOMEN OF COLOR (2018), https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/bearingfaith.pdf [https://perma.cc/ZT6J-EZNM] (discussing in

providers with conscience-based health care refusals should be required to notify their patients or members about their limitations and offer referrals to other providers.[253] Additionally, state governments should strengthen oversight and protections of hospital mergers to prevent the loss of reproductive health care.[254]

Section 1557 may not be as politically useful for patients as once thought. With the nomination of several Trump judges in the past couple of years, claimants have diminishing options when it comes to judges that will likely interpret the Health Care Rights Act to protect their rights. More research needs to be done on a state-by-state, jurisdiction-to-jurisdiction basis to determine what judicial or extralegal avenues patients affected by the rise of culture war politics and the recent rule changes may successfully access.

State and federal versions of RFRA should be amended to reflect its original intent. Recently, Congressional Democrats reintroduced a bill to reduce the unintended harms of RFRA. The Do No Harm Act (H.R. 3222) provides that RFRA "should not be interpreted to authorize an exemption from generally applicable law that imposes the religious views, habits, or practices of one party upon another . . . ."[255] The act would also ensure that RFRA can only be raised if the government is a party in a judicial proceeding.[256] Importantly, the scope of "meaningful harm" to third parties would include dignitary harm.[257] First introduced in 2017 following the *Hobby Lobby* decision, the act has received broad support from civil rights organizations, including the ACLU, AIDS United, Center for American Progress, Lambda Legal, and the National Women's Law Center.[258] This type of federal reform may not be possible under the current administration, but state actors can reform their local RFRAs to reflect the protections envisioned in the Do No Harm Act. As outlined above, there are several states that are in favorable political positions to enact RFRA reform, but more in-depth research, especially with key stakeholders and activists already on the ground, is needed.

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depth the detrimental consequences of widespread religiously or morally based denials of reproductive care).

[253] *Id.*

[254] *Id.*

[255] Do No Harm Act, H.R. 3222, 115th Cong. § 2(1) (2019).

[256] *Id.* § 4(b).

[257] *Id.* § 2(2).

[258] *See* Gwen Aviles, *Congressional Democrats reintroduce the Do No Harm Act*, NBC NEWS (Mar. 1, 2019, 10:43 AM), https://www.nbcnews.com/feature/nbc-out/congressional-democrats-reintroduce-do-no-harm-act-n978101 [https://perma.cc/9SCE-2UHG].

However, real, lasting change follows shifts in culture. Activists and scholars need to call this what it is: a continuation of culture war politics. It is not enough to treat this as a policy or legal issue. Especially when culture is so clearly shaping policy and law, we need to take serious steps to address the cultural forces at play. To dismantle culture war politics, activists and leaders must coordinate efforts to (1) start naming the issue as culture war politics, (2) have frank discussions about the sexist and bigoted rationales for restricting reproductive health, and (3) build coalitions that expose and combat culture war politics through direct action and lasting cultural and policy change.

Importantly, there needs to be more research combating culture war politics through communications and policy efforts. This political moment will cause irrevocable harm to marginalized communities, especially marginalized communities who may already have limited options. We must remember that culture war politics have existed for a long time, and solutions that do not directly address and dismantle culture war politics will revert us to the status quo – which was not that great either.