THE CONTRACEPTIVE-COVERAGE CASES AND POLITICIZED FREE-EXERCISE LAWSUITS

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The latest lawsuits challenging the Affordable Care Act's contraceptive-coverage regulations illustrate the transformation of free-exercise lawsuits—including those brought under the federal Religious Freedom Restoration Act—into potent political tools. Current free-exercise doctrine and practice inadequately address organized campaigns of free-exercise litigation seemingly motivated by political ideology rather than sincere religious belief. This Article examines the political, ideological, and religious forces that have culminated into the political and legal opposition to the ACA's contraceptive-coverage regulations, identifying anomalies in the resulting legal challenges from for-profit corporations and non-profit organizations along the way.

After describing the harms caused by politicized free-exercise lawsuits turning on insincere claims of religious burden, the Article offers initial proposals to both courts and governmental litigants to combat the transformation of free-exercise lawsuits into weapons of political warfare. In particular, courts and governmental litigants should adopt a more flexible approach that acknowledges the practical realities of modern religious-liberty cases, involves more frequent and sustained challenges to plaintiffs' sincerity when appropriate, and gives the government leeway to reach compromises with religious objectors without undermining the government's ability to defend other cases. On the other hand, failure to police insincere free-exercise claims will continue to cause mainstream support for genuine free-exercise claims and religious accommodations to dwindle.

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I. INTRODUCTION

Lawsuits challenging the Patient Protection and Affordable Care Act's ("Affordable Care Act") contraceptive-coverage regulations have transformed free-exercise lawsuits, including those brought under the federal Religious Freedom Restoration Act, into potent political tools. Plaintiffs have challenged regulations requiring them to do things they used to do voluntarily. Good-faith accommodations have been denounced, even as nearly identical relief from the courts has been embraced. Objectors have strained to conflate contraception and abortion.

Current free-exercise doctrine and practice inadequately address organized campaigns of free-exercise litigation that appear to be motivated more by ideology than sincere religious belief. The government has largely taken the plaintiffs' sincerity for granted, failing to invoke (or even investigate) significant evidence that many of the asserted claims are insincere. The government has offered increasingly generous accommodations, despite any reason to believe that they would be accepted; plaintiffs and courts have, in turn, presented these accommodations as evidence that the previous requirement violated the plaintiffs' free-exercise rights.[1] Plaintiffs and their lawyers refuse to take yes for an answer.

If free-exercise lawsuits become just another weapon of political warfare, then mainstream support for genuine free-exercise claims and religious accommodations will dwindle. To combat politicized free-exercise litigation, courts and defendants should adjust their approach; I offer a few initial proposals below. A more flexible approach by both courts and governmental litigants, which acknowledges the practical realities of modern religious-liberty cases, would help to restore religious accommodations to their intended scope and purpose and would make reasonable religious accommodations more sustainable in the long run.

1. Kara Loewentheil, *When Free Exercise is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 499, 500 (2014).

II. A PERFECT STORM

Challenges to the Affordable Care Act's contraceptive-coverage regulations emerged from broader political, ideological, and religious opposition to the Obama administration and its reform of the healthcare system. President Obama has drawn sustained and intense opposition from conservative religious entities, and has long faced unseemly questions about his own religious beliefs. Many conservatives have criticized President Obama for being insufficiently Christian, for supposedly waging war on religion generally or Christianity more specifically, and even for acknowledging that the Crusades were bad.[2] And a surprising number of Republican voters incorrectly believe that President Obama is a Muslim.[3]

Other opposition, particularly from conservative Catholics, arose from President Obama's support for LGBT rights, access to abortion, and stem-cell research.[4] For some, President Obama's delivery of a commencement address and receipt of an honorary degree at the University of Notre Dame added insult to injury.[5]

Then there is the ongoing conservative opposition to the Affordable Care Act.[6] Well before Congress enacted the Act in 2010, conservatives opposed it—quite viscerally.[7] The legislation passed without a single Re-

2. *See, e.g.*, Dan Balz & Robert Costa, *Gov. Scott Walker: 'I Don't Know' Whether Obama is a Christian*, WASH. POST (Feb. 21, 2015), http://www.washingtonpost.com/politics/walker-says-he-is-unaware-whether-obama-is-a-christian/2015/02/21/6fde0bd0-ba17-11e4-bc30-a4e75503948a_story.html; Juliet Eilperin, *Critics Pounce After Obama Talks Crusades, Slavery at Prayer Breakfast*, WASH. POST. (Feb. 5, 2015), http://www.washingtonpost.com/politics/obamas-speech-at-prayer-breakfast-called-offensive-to-christians/2015/02/05/6a15a240-ad50-11e4-ad71-7b9eba0f87d6_story.html; Rachel Weiner, *Romney: Obama Waging 'War on Religion*,' WASH. POST (Aug. 9, 2012), http://www.washingtonpost.com/blogs/the-fix/post/romney-obama-waging-war-on-religion/2012/08/09/192c4e02-e213-11e1-a25e-15067bb31849_blog.html.

3. Jesse Byrnes, *Poll: Majority of Republicans Think Obama is a Muslim*, HILL (Sept. 1, 2015, 8:57 AM), http://thehill.com/blogs/blog-briefing-room/news/252393-poll-majority-of-republicans-thinks-obama-is-a-muslim.

4. *See, e.g.*, *US Bishops Criticize Obama Administration's Decision on Marriage Law*, CATHOLIC NEWS SERVICE (Feb. 24, 2011), http://www.catholicnews.com/services/englishnews/2011/us-bishops-criticize-obama-administration-s-decision-on-marriage-law-cns-1100769.cfm; Jim Tankersley & Noam N. Levey, *Barack Obama Lifts Restrictions on Federal Funding for Stem Cell Research Using Human Embryos*, CHI. TRIB. (Mar. 10, 2009), http://articles.chicagotribune.com/2009-03-10/news/0903090708_1_cells-through-alternative-methods-executive-order-lifting-bush-bush-administration-set-policy ("Cardinal Justin Rigali of Philadelphia, chairman of a panel of the U.S. Conference of Catholic Bishops, called Obama's stem cell order 'morally wrong, because it encourages the destruction of innocent human life, treating vulnerable human beings as mere products to be harvested.'").

5. *See, e.g.*, Peter Slevin & Jacqueline L. Salmon, *Antiabortion Protesters Converge on Notre Dame Before Obama's Visit*, WASH. POST (May 13, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203656.html ("To some abortion foes, including prominent Catholics and evangelical Christians, Obama's support for abortion rights remains a nonnegotiable negative.").

6. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

7. *See, e.g.*, Eduardo Porter, *Why the Health Care Law Scares the G.O.P.*, N.Y. TIMES (Oct. 1, 2013), http://www.nytimes.com/2013/10/02/business/economy/why-the-health-care-law-scares-the-gop.html?smid=tw-share&_r=1 (describing ongoing Republican efforts, including a government shutdown, to block or gut the Affordable Care Act).

publican vote and attracts fierce obstruction to this day.[8] Opposition seems to be nakedly partisan,[9] and repeal efforts continue.[10]

The Act has faced not only indefinite political opposition, but perpetual legal challenges as well. Lawsuits began the day that the Act was signed.[11] Although the Supreme Court rejected a constitutional challenge to the Act's individual-coverage requirement in 2012, with Chief Justice Roberts joining the four more liberal justices to uphold it, the four dissenters issued a rare joint opinion and would have invalidated not only the individual mandate but the entire law.[12] The Court rejected another lawsuit, seeking to prevent the government from subsidizing insurance purchased on federal healthcare exchanges, in June 2015.[13] Other challenges persist.[14]

Healthcare reform aside, political opponents (often Republican elected officials) have filed lawsuits targeting other administration initiatives such as immigration reform and even the routine treatment of refugees.[15] There are many others, as the conservative legal establishment turned to litigation to revisit policy battles that they lost through the political process.[16]

8. Ed O'Keefe, *The House Has Voted 54 Times in Four Years On Obamacare. Here's the Full List.*, WASH. POST (Mar. 21, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/; Norm Ornstein, *The Real Story of Obamacare's Birth*, ATLANTIC (July 6, 2015), http://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/ ("[G]uerrilla efforts to undermine its implementation and disrupt the delivery of its services continue apace.").

9. *See, e.g.*, Ezra Klein, *Unpopular Mandate*, NEW YORKER (June 25, 2012), http://www.newyorker.com/magazine/2012/06/25/unpopular-mandate (noting that arguments underlying legal challenges to the individual mandate imply "that the Republicans spent two decades pushing legislation that was in clear violation of the nation's founding document").

10. Sahil Kapur, *Senate Republicans Plan to Repeal Obamacare With 51 Votes*, BLOOMBERG (July 28, 2015, 1:15 PM), http://www.bloomberg.com/politics/articles/2015-07-28/senate-republicans-plan-to-repeal-obamacare-with-51-votes.

11. Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html ("Attorneys general in more than a dozen states, most Republican, filed lawsuits contending that the measure is unconstitutional.").

12. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012); *id.* at 2609 (Ginsburg, J., concurring in the judgment in part, and dissenting in part); *id.* at 2642–43 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

13. King v. Burwell, 135 S. Ct. 2480 (2015).

14. *See, e.g.*, Johnson v. U.S. Office of Pers. Mgmt., 783 F.3d 655 (7th Cir. 2015) (holding that Republican Senator lacked standing to challenge Affordable Care Act regulations governing health coverage for members of Congress and their staff); Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1 (D.C. Cir. 2014) (rejecting argument that Affordable Care Act complies with Origination Clause), *cert. denied*, 84 U.S.L.W. 3240 (2016); U.S. House of Representatives v. Burwell, No. 14-1967 (RMC), 2016 WL 2750934 (D.D.C. May 12, 2016) (sustaining congressional challenging to certain HHS reimbursements to insurance companies under Affordable Care Act) (stayed pending appeal).

15. Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015) (holding that the infamous Sheriff of Maricopa County lacked standing to challenge Obama administration's deferred-action immigration policies), *cert. denied*, 2016 WL 207283 (U.S. Jan. 19, 2016); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (granting states preliminary injunction against Obama administration's deferred-action immigration policies), , *aff'd by equally divided Court*, No. 15-674 (U.S. June 23, 2016); Tex. Health & Human Servs. Comm'n v. United States, No. 3:15-cv-3851-N (N.D. Tex. Dec. 9, 2015) (denying request for preliminary injunction barring settlement of Syrian immigrants in Texas).

16. *See* Brian Beutler, *The Rehabilitationists*, NEW REPUBLIC (Aug. 30, 2015), http://www.newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal.

These circumstances combined to create a perfect storm of political and legal opposition to the Affordable Care Act's contraceptive-coverage regulations. The Affordable Care Act requires that insurance policies cover certain types of preventive care—including preventive care unique to women—without cost to patients.[17] Relying on recommendations from the Institute of Health, the Department of Health and Human Services ("HHS") included in the required coverage bundle all FDA-approved contraceptives for women.[18] For a conservative political movement hostile to the Affordable Care Act and skeptical of the Obama administration on questions of religion, the contraceptive-coverage regulations became an epicenter of opposition.

Even extensive efforts by the Obama administration to accommodate religious objections have failed to quell this litigation campaign. Although HHS initially exempted only houses of worship from the coverage requirement, in February 2012 the agency announced that it planned to accommodate other nonprofit organizations with religious objections to including contraceptive coverage in the insurance policies that they provided to their employees.[19] To take advantage of the accommodation, objecting entities would send a written notice of objection to their insurance company or third-party administrator, which would then provide the required contraceptive coverage to the objector's employees, at no cost to either the objector or its employees.[20]

Despite this accommodation, both for-profit and nonprofit organizations filed dozens of lawsuits challenging the regulations. For-profit entities objected to including contraceptives (or certain contraceptives) in their health plans; nonprofit entities claimed that the accommodation failed to address their objections.[21] Both sets of plaintiffs invoked, among other statutory and constitutional provisions, the Religious Freedom Restoration Act ("RFRA").[22] Under RFRA, the government must exempt a religious objector from even a neutral, generally applicable law if that law substantially burdens the objector's religious exercise and is not the least-restrictive means of achieving a compelling governmental inter-

17. 42 U.S.C. § 300gg-13 (2012) (preventive care); *id.* § 300gg-13(a)(4) (preventive care specific to women).

18. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011).

19. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012).

20. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870 (July 2, 2013).

21. *See, e.g.*, Jennifer Haberkorn, *More Challenge Contraception Rule*, POLITICO (May 21, 2012), http://www.politico.com/story/2012/05/more-challenge-contraception-rule-076570 ("More than 40 Catholic institutions on Monday filed lawsuits challenging the Obama administration's policy that requires employers to provide insurance coverage of contraceptives, a coordinated strategy backed by the U.S. Conference of Catholic Bishops.").

22. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

est.[23] RFRA, enacted almost unanimously in 1993, emerged as a powerful weapon in a divisive culture war—over birth control, of all things.[24]

III. THE FOR-PROFIT CORPORATIONS: NEW OBJECTIONS TO OLD PRACTICES

From the start, many of these free-exercise challenges to the contraceptive-coverage regulations seemed insincere. Many of the for-profit plaintiffs had previously provided the very contraceptive coverage which they all of a sudden claimed to oppose. The recent converts included Hobby Lobby Stores and Conestoga Wood, whose cases ultimately reached the U.S. Supreme Court, and at least a dozen other for-profit plaintiffs.[25] Nearly every plaintiff in this situation provided the same explanation: After the Obama administration announced the contraceptive coverage regulations, the company reviewed its healthcare plan, and was shocked—shocked!—to discover that the company was covering contraceptives (or, in some cases, certain contraceptives).[26]

Certain for-profit challenges flew even brighter red flags. Most notably, when asked why he was challenging the regulations, the CEO of organic-food-distributor Eden Foods responded, "[b]ecause I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me that I have to do that?"[27] Hobby Lobby, meanwhile, invested and continues to invest its 401(k) plan in companies that manufacture the very drugs and devices to which it purports to object on religious grounds.[28]

The plaintiffs also strained to conflate birth control and abortion. Many of the for-profit plaintiffs were owned by evangelical Protestants,

23. *Id.*

24. *See* Linda Greenhouse, Opinion, *Sex After 50 at the Supreme Court*, N.Y. TIMES (Nov. 26, 2015), http://www.nytimes.com/2015/11/26/opinion/sex-after-50-at-the-supreme-court.html?_r=0 ("Fifty years after the Supreme Court, in Griswold v. Connecticut, granted married couples the constitutional right to use birth control, here we are back at the court, still wrestling with contraception. Am I the only one who finds this remarkable?").

25. *See e.g.*, Complaint at ¶ 55, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp 2d 1278 (2012) (No. CIV-12-1000-HE), *rev'd en banc*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ("That was when, according to the company's complaint, they were surprised to learn their prescription drug policy included two drugs, Plan B and ella, which are emergency contraceptive pills that reduce the chance of pregnancy in the days after unprotected sex."). *See also* Armstrong v. Burwell, No. 13-cv-00563-RBJ, 2014 WL 5317354 (D. Colo. Sept. 29, 2014); Briscoe v. Sebelius, No. 13-cv-00285-WYD-BNB, 2013 WL 4781711 (D. Colo. Sept. 6, 2013); Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013); Annex Med., Inc. v. Sebelius, No. 12-2804(DSD/SER), 2013 WL 101927 (D. Minn. Jan. 8, 2013), *vacated*, 769 F.3d 578 (8th Cir. 2014); Complaint ¶ 27, Bick Holding, Inc. v. Sebelius, No. 13-cv-00462-AGF, slip op. (E.D. Mo. Apr. 1, 2013).

26. *See id.*

27. Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, SALON (Apr. 15, 2013, 6:45 AM), http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/.

28. Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (Apr. 1, 2014, 5:00 AM), http://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers.

most of whom have not historically opposed birth control.[29] Instead, these plaintiffs purported to object to covering only certain contraceptives—in most cases, emergency contraceptives and the intrauterine device ("IUD")—which they claimed were "abortifacients," because (they said) those forms of contraception prevent the implantation of fertilized eggs.[30] Virtually all modern science, however, refutes the factual premise of the argument; even if stopping a newly fertilized egg from implanting amounted to an abortion, most evidence suggests that emergency contraceptives and the IUD prevent fertilization, not implantation.[31] But the plaintiffs nonetheless insisted that the cases involved religious beliefs about the taking of human life, and many of their lawyers pretended that they were fighting an "abortion pill mandate."[32]

Despite these and other anomalies, the government conceded that the plaintiffs' religious objections were sincere, and did not even pursue factual discovery on the question of their sincerity.[33] As it turned out, the government could have used an extra defense. After hearing cases brought by sets of for-profit corporations, the Supreme Court held in a five-to-four decision that (1) for-profit corporations could pursue RFRA claims, (2) including contraceptives in the hundreds of other drugs and services covered by a company health plan constituted a substantial burden on the plaintiffs' religious exercise, and (3) even assuming that ensuring women's access to affordable contraception was a compelling governmental interest, the coverage regulations were not the least-restrictive means of vindicating that interest, given that the government had made a less-restrictive accommodation available to nonprofit organizations.[34]

The government failed to challenge the sincerity of Eden Foods—even after the Court in *Hobby Lobby* rejected the government's other

29. Amelia Thomson-Deveaux, *The Strange Bedfellows of the Anti-Contraception Alliance*, AM. PROSPECT (Mar. 17, 2014), http://prospect.org/article/strange-bedfellows-anti-contraception-alliance.

30. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2766 (2014) ("[T]he Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.").

31. *See* Gregory M. Lipper, *Zubik v. Burwell, Part 3: Birth Control is Not Abortion*, BILL OF HEALTH (Mar. 19, 2016), http://blogs.harvard.edu/billofhealth/2016/03/19/zubik-v-burwell-part-3-birth-control-is-not-abortion/; *see, also* Joerg Dreweke, *Contraception is not Abortion: The Strategic Campaign of Antiabortion Groups to Persuade the Public Otherwise*, 17 GUTTMACHER POL'Y REV. 14 (2014), *available at* https://www.guttmacher.org/pubs/gpr/17/4/gpr170414.pdf; *Emergency Contraception (EC) and Intrauterine Devices (IUDs) are Not Abortifacients*, AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS (June 12, 2014), http://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsAreImportantEC.pdf?dmc=1&ts=20150822T1415051742; Julie Rovner, *Morning-After Pills Don't Cause Abortion, Studies Say*, NPR (Feb. 21, 2013, 5:04 PM), http://www.npr.org/sections/health-shots/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say; Annie Sneed, *Fact or Fiction?: Emergency Contraceptives Cause Abortions*, SCI. AM. (July 3, 2014), http://www.scientificamerican.com/article/fact-or-fiction-emergency-contraceptives-cause-abortions.

32. *Defeat the Abortion-Pill Mandate, Defend Religious Liberty*, ACLJ, http://aclj.org/obamacare/oppose-abortion-pill-mandate-defend-religious-liberty (last visited Mar. 18, 2016); *No One Should Be Forced to Pay for Another Person's Abortion*, ALLIANCE DEFENDING FREEDOM, http://www.adflegal.org/issues/sanctity-of-life/beginning-of-life/defending-those-who-defend-life/key-issues/obamacare/hhs-obamacare ("Obamacare's abortion pill mandate") (last visited Mar. 18, 2016).

33. *See, e.g.*, Brief of Petitioner at 8, 12, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356) (conceding that the plaintiffs' asserted religious beliefs were sincere).

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

arguments. In a 2013 decision upholding the denial of Eden Foods's request for a preliminary injunction against the contraceptive-coverage regulations, the Sixth Circuit, before rejecting the company's claims on other grounds, observed that the CEO's "deeply held religious beliefs more resembled a laissez-faire, anti-government screed."[35] Yet after the Supreme Court vacated the Sixth Circuit's decision and remanded the case for reconsideration in light of *Hobby Lobby*,[36] the government inexplicably declined to challenge Eden Foods's sincerity and conceded that company should receive an injunction.[37]

In sum, the lawsuits brought by for-profit corporations suggested that opposition to the regulations flowed from ideology as much as religion; the government neither challenged nor pursued factual discovery on the question of sincerity; and the courts did not otherwise address the issue. As a result, the government resisted a coordinated, ideological campaign on the defensive, and passed up the chance to develop evidence that might have highlighted the plaintiffs' actual, improper motivations.

IV. THE NONPROFIT ORGANIZATIONS: REFUSING TO TAKE YES FOR AN ANSWER

Challenges to the contraceptive-coverage accommodation brought the politicization of free-exercise cases into even sharper focus. As discussed above, in early 2012 the Obama administration announced an accommodation: Nonprofit organizations with religious objections need not cover contraceptives, so long as they send a form to their insurance company or third-party administrator indicating their objection to providing such coverage.[38] After receiving this written notice, the objector's insurer or third-party administrator must provide the contraceptive coverage, without charging either the objecting nonprofit organization or the affected employees.[39]

Some religious organizations, such as Georgetown University and the Catholic Health Association, accepted and even praised the accommodation.[40] And although it later changed its mind, the University of

35. Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 629 n.3 (6th Cir. 2013) (citation omitted), *vacated sub nom.*, Eden Foods, Inc. v. Burwell, 134 S. Ct. 2902 (2014).

36. *Eden Foods*, 134 S. Ct. at 2902.

37. *See* Eden Foods, Inc. v. Burwell, No. 13-cv-11229, slip op. at 1 (E.D. Mich. Feb. 12, 2015).

38. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873–76 (July 2, 2013).

39. *Id.* at 39,876.

40. *See* Bridgette Dunlap, *For It Before They Were Against It: Catholic Universities and Birth Control*, RH REALITY CHECK (Feb. 13, 2013, 9:23 PM), http://rhrealitycheck.org/article/2013/02/13/before-birth-control-before-they-were-against-it-when-georgetown-fordham-and-notre-dame-and-other-catholic-affiliated-schools-supported-access-to-contraception/; Julie Rovner, *White House Bends on Birth Control Requirement For Religious Groups*, NPR (Feb. 10, 2012, 11:49 AM), http://www.npr.org/sections/health-shots/2012/02/10/146693907/white-house-bends-on-birth-control-requirement-for-religious-groups.

Notre Dame, through its president, called the accommodation a "welcome step toward recognizing the freedom of religious institutions."[41]

But other nonprofit organizations rejected the accommodation, and then filed lawsuits claiming that the accommodation—which creates a process exempting objecting organizations from covering contraceptives—itself violated RFRA.[42] Much has been written on the merits of these claims,[43] and I will not rehash the arguments here. A short-staffed and divided Supreme Court struggled to decide the cases, and ultimately sent them back to the lower courts for further consideration—thus deferring ultimate resolution until the Court gets its ninth justice.[44] For now, suffice it to say even after *Hobby Lobby*, challenges to the accommodation were rejected by eight of nine federal appeals courts to consider them,[45] and the plaintiffs' description of their own religious injury has morphed over time.[46]

Especially revealing has been the reactions of these plaintiffs, and their lawyers at conservative religious legal organizations, to (1) offers of additional accommodations by the government, and (2) similar accommodations imposed by the U.S. Supreme Court.

To review: The government's original accommodation required objecting nonprofit organizations to complete a form and send it to their insurance provider or third-party administrator. Through interim orders in December 2013 and June 2014, the Supreme Court massaged this requirement a bit: Rather than send a form to its insurance company or administrators, an objecting nonprofit could instead "inform[ ] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services . . . ."[47] At the same time, the Court authorized the government to "rely[ ] on this notice, to the extent it considers necessary, to facilitate the provision of full contraceptive coverage under the Act."[48] The Court issued a similar version of this in-

41. Irin Carmon, *This is the Next Hobby Lobby*, MSNBC (July 30, 2014, 11:19 AM), http://www.msnbc.com/msnbc/the-next-hobby-lobby.

42. *See* Lyle Denniston, *Court to Hear Birth-Control Challenges*, SCOTUSBLOG (Nov. 6, 2015, 02:15 PM), http://www.scotusblog.com/2015/11/court-to-hear-birth-control-challenges/.

43. *See, e.g.*, *id.* (describing the issues, arguments, and rulings from prior RFRA exemption cases).

44. Zubik v. Burwell, 136 S. Ct. 1557 (2016); *see also* Gregory M. Lipper, *What to Expect When You're Expecting at Least Another Year of Contraception Litigation*, BILL OF HEALTH (May 17, 2016), http://blogs.harvard.edu/billofhealth/2016/05/17/what-to-expect-when-youre-expecting-at-least-another-year-of-contraception-litigation/.

45. Timothy Jost, *Eleventh Circuit Upholds Religious Accommodation on Contraceptive Coverage*, HEALTH AFFAIRS BLOG (Feb. 19, 2016), http://healthaffairs.org/blog/2016/02/19/eleventh-circuit-upholds-religious-accommodation-on-contraceptive-coverage/ (discussing circuit court decisions).

46. *See* Gregory M. Lipper, *Zubik v. Burwell, Part 1: Why Paperwork Does Not Burden Religious Exercise*, BILL OF HEALTH (Mar. 16, 2016), http://blogs.harvard.edu/billofhealth/2016/03/16/zubik-v-burwell-part-1-why-paperwork-does-not-burden-religious-exercise/.

47. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014) (interim order); *see also* Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius, 134 S. Ct. 1022 (2014) (interim order).

48. *Wheaton*, 134 S. Ct. at 2807.

terim order for another objecting organization in June 2015; and again, the Court authorized the government to "rely[] on information provided by [objecting nonprofits], to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the [Affordable Care Act]."[49]

In response to the June 2014 interim order (in the case brought by Wheaton College), the government expanded the accommodation to allow for an alternative form of notice similar to the one devised by the Supreme Court.[50] Under this alternative, an organization may opt out of covering contraceptives by notifying the government of its religious objection, the nature of its health plan, and the identity of its insurance provider or plan administrator.[51] HHS finalized this alternative accommodation in July 2015, and also extended it to closely held for-profit corporations, as required by *Hobby Lobby*.[52]

So both the Supreme Court and HHS have required objecting entities to provide written notice of their objection to either their insurance company or third-party administrator, or the government, with the government retaining the right to rely on this notice to arrange for the objectors' employees to receive contraceptive coverage from the specified third parties. If the plaintiffs were making genuine efforts to obtain religious accommodations from actual burdens on religious exercise, we would expect the plaintiffs to react similarly to each set of decisions.

But that is not what happened. Take, for instance, the responses from the Becket Fund for Religious Liberty, which represents many of the for-profit and nonprofit plaintiffs, including Hobby Lobby, Little Sisters of the Poor, and Wheaton College. In response to the Supreme Court's approach in *Wheaton College*—notify the government of your objection, and the government may arrange for your employees to receive contraceptive coverage from your insurance provider—the Becket Fund touted "another important victory against the HHS Mandate, [in which] Wheaton College received last minute relief from the Supreme Court today, protecting the College's right to carry out its religious mission free from crippling IRS fines."[53] But when describing the government's alternative accommodation—notify the government of your objection, and the government may arrange for your employees to receive contraceptive coverage from your insurance provider—the Becket Fund lamented that "the government still won't give up on its

49. Zubik v. Burwell, 135 S. Ct. 2924 (2015) (interim order).

50. *Instructions for Model Notice (OMB Control No. 1210-0150)*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 22, 2014), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-22-14.pdf.

51. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094–95 (Aug. 27, 2014).

52. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015) (final rules).

53. Press Release, Becket Fund for Religious Liberty, Supreme Court Grants Emergency Relief to Christian College (July 3, 2014), http://www.becketfund.org/wheaton-scotus-victory/.

quest to force nuns and other religious employers to distribute contra-contraceptives."[54]

What could explain these divergent responses? The only distinction between the accommodation devised by the Supreme Court and the one offered by HHS is that the latter requires objecting organizations to identify their insurance providers or third party administrators, so that the government knows whom to contact to arrange for coverage for the objector's employees. But all the plaintiffs have already provided that information to the government—in writing, no less—in the complaints initiating their lawsuits challenging the accommodation. Which makes it difficult, if not impossible, to believe that these anomalous responses reflected bona fide reactions to good-faith attempts to relieve genuine burdens on religious exercise.

And then there is the University of Notre Dame, which has worn its insincerity on its sleeve.[55] When President Obama announced the accommodation in February 2012, Notre Dame's president called it a "welcome step toward recognizing the freedom of religious institutions."[56] But three months later, Notre Dame filed a lawsuit challenging the coverage regulations (that lawsuit was dismissed because HHS delayed the coverage requirement while it worked to finalize the accommodation).[57] After HHS issued the final accommodation in July 2013, Notre Dame waited five months to challenge it, filing its new lawsuit just weeks before the regulations were set to take effect. This delay baffled the trial court: "Notre Dame has in many ways created its own emergency, and I am left to wonder why."[58]

It turns out that, before it filed its second lawsuit in late 2013, Notre Dame had decided to take advantage of the accommodation beginning with the 2013–2014 school year.[59] But in October 2013, a powerful alumni group wrote to Notre Dame's president and urged the university to bring a new lawsuit because of the university's "symbolic importance" to the challenges; only then did Notre Dame resume its fight against the accommodation.[60] Even after filing its tardy lawsuit, Notre Dame has

54. Press Release, Becket Fund for Religious Liberty, Administration Issues Final Contraceptive Mandate Rules In Defiance of Supreme Court (July 10, 2015), http://www.becketfund.org/new-hhs-mandate-rules-defiance-supreme-court/.

55. Full disclosure: At my previous job, I represented a Notre Dame student who has intervened to oppose Notre Dame's challenge to the accommodation (you can read a recent filing at https://au.org/files/15-812_BIO-Intervenor.pdf.).

56. Carmon, *supra* note 41.

57. Univ. of Notre Dame v. Sebelius, No. 3:12CV253RLM, 2012 WL 6756332, at *4 (N.D. Ind. Dec. 31, 2012).

58. Univ. of Notre Dame v. Sebelius, 988 F. Supp. 2d 912, 919 (N.D. Ind. 2013), *aff'd* 743 F.3d 547 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015), *and aff'd*, 786 F.3d 606 (7th Cir. 2015), *vacated and remanded*, 136 S. Ct. 2007 (2016).

59. UNIV. OF NOTRE DAME, OPEN ENROLLMENT DECISION GUIDE 14 (2014), http://hr.nd.edu/assets/80205/2014_decision_guide_final.pdf ("New: Contraceptive Coverage-Our third party administrator, Meritain Health, will be offering coverage for these services.").

60. E-mail from William H. Dempsey, Chairman, Sycamore Trust, to Rev. John I. Jenkins, President, Univ. of Notre Dame (Oct. 26, 2013, 03:46 PM), http://sycamoretrust.org/media/images/bulletins/131120/jenkinsHHS131026.pdf.

stalled at nearly every stage: It declined to seek emergency relief from the Supreme Court, and took the maximum possible time to seek rehearings and Supreme Court review, and sought and received multiple extensions throughout the case.[61]

These do not sound like the actions of an entity with a genuine religious objection to the accommodation. Indeed, in April 2014—five months after Notre Dame had filed its second lawsuit challenging the accommodation!—its president stated the university's "complicity is not an evil so grave that we would compromise our conscience by going along" with the accommodation.[62] "I don't see this as a scandal," he added, "because we are not giving out contraceptives."[63] Despite its president's candor, Notre Dame's lawsuit continues, and the government still has not suggested that it will challenge Notre Dame's sincerity.

These dubious challenges concern even free-exercise maximalists. Professor Laycock, for instance, observes that the accommodation "offer[s] a serious plan to protect religious liberty without depriving women of contraception" and is "utterly inconsistent with the common charge that the Obama administration is engaged in a 'war on religion.'"[64] Yet the accommodation has been rejected and lambasted by its beneficiaries; the government continues to concede sincerity and forgo discovery, even when publicly available information suggests impermissible motivations; and the seemingly never-ending challenges to the contraceptive-coverage regulations and accommodations persist.

V. CONSEQUENCES AND SOLUTIONS

Bad karma aside, politicized free-exercise lawsuits turning on insincere claims of religious burden not only disrupt government programs, but also undermine religious liberty itself.

First and foremost, if free-exercise claims become just another facet of political campaigns against birth control, LGBT rights, or other contentious aspects of modern life, political support for genuine free-exercise claims and religious accommodations will plummet. That support is already eroding. For one, the broad coalition that supported RFRA has split, with many progressives who previously embraced RFRA now calling for reforms.[65] Likewise, wide swaths of the public now

61. *See e.g.*, Statement of Position of Intervenor-Appellee Jane Doe 3 at 7–11, Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015).

62. Matthew Archbold, *Notre Dame Alumni: Fr. Jenkins Comments on HHS Mandate 'Startling*,' CATHOLIC EDUC. DAILY (Apr. 14, 2014, 3:56 PM), http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/3195/Notre-Dame-Alumni-Fr-Jenkins-Comments-on-HHS-Mandate-'Startling'.aspx.

63. *Id.*

64. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 862 (2014).

65. Louise Melling, Op-Ed, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html.

view proposed state RFRAs as vehicles to facilitate discrimination and to undermine LGBT rights.[66] With *Hobby Lobby* foreshadowing that some courts will grant religious exemptions even when they strip others of their rights, support for religious accommodations will likely continue to decline.[67] Nobody should be surprised: Dubious free-exercise claims undermine protection of religious liberty for the same reason that the boy who cried wolf undermined protection against carnivores. So if we want the public and the courts to take genuine free-exercise claims seriously, we have to filter out the dubious ones.

Courts, moreover, should screen insincere claims at the threshold. The more often dubious claims of substantial burden reach the merits, the more often that courts must apply RFRA's strict-scrutiny analysis. Under strict scrutiny, courts must determine whether the challenged policy or program is the least-restrictive means of fulfilling a compelling governmental interest.[68] These determinations inevitably require courts to make quasi-legislative determinations about the importance of a particular policy goal and the effectiveness of other, unenacted (and possibly unstudied) alternatives.[69] For instance, in the event of a RFRA challenge to regulations requiring health plans to cover other forms of oft-objected-to medical care—vaccinations, blood transfusions, psychiatric treatment, and gelatin-covered pills, to name a few—a court might need to determine if those forms of care are more or less important than contraceptives, and whether the accommodation created for contraceptive coverage would be more or less viable for those other forms of care.[70]

Concerns about roping courts into these types of debates—and forcing courts to weigh policy interests and implications against claimed burdens on religious exercise—led the Supreme Court to hold, in the 1990 case of *Employment Division v. Smith*, that the First Amendment's Free Exercise Clause did not require courts to apply strict scrutiny to neutral laws of general applicability that imposed incidental burdens on religious exercise, no matter how substantial those burdens.[71] Although RFRA reinstated the strict-scrutiny test for substantial burdens on

66. Laycock, *supra* note 64, at 871; *see also* Howard Friedman, *Why Is Indiana's RFRA So Controversial? This Blogger's Analysis*, RELIGION CLAUSE (Mar. 30, 2015, 9:05 PM), http://religionclause.blogspot.com/2015/03/why-is-indianas-rfra-so-controversial.html.

67. *See* Frank S. Ravitch, *Be Careful What You Wish For: Why Hobby Lobby Weakens Religious Freedom*, 2015 B.Y.U. L. REV. __ (forthcoming 2016).

68. 42 U.S.C. § 2000bb-1(b) (2012).

69. *See infra* notes 70–76 and accompanying text.

70. *See Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting) (footnotes and brackets omitted) ("Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, 'each one of these cases . . . would have to be evaluated on its own . . . applying the compelling interest-least restrictive alternative test.'").

71. *See* Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

religious exercise arising from such neutral laws,[72] the difficulty of apply-applying strict scrutiny means that only bona fide claims of substantial burdens should get to that stage.

Another related problem develops when too many laws, rules, polices, or programs receive strict scrutiny: The more often that courts apply strict scrutiny, the more likely that courts end up diluting the standard. Indeed, courts that are unwilling to enjoin large portions of the federal code or hamstring numerous federal programs will inevitably make it easier to survive strict scrutiny. This dilution of strict scrutiny, in turn, will make it more difficult for plaintiffs with genuine free-exercise claims to prevail. And if courts water down strict-scrutiny in free-exercise cases, that dilution could compromise other types of cases in which courts apply strict scrutiny to suspicious restrictions or classifications, such as content- or viewpoint-based restrictions on speech or classifications on the basis of race.[73] Thus, in addition to jeopardizing genuine challenges to burdens on religious exercise, diluting strict scrutiny would hinder challenges to censorship, racial discrimination, and more.

To cabin politicized free-exercise litigation, both courts and the government should adjust their approach in several ways.

First, government actors can, and should, be less sheepish about challenging the plaintiffs' sincerity when warranted. Insincere claims ruin free exercise for everyone. And when claims are brought by for-profit businesses or other organizations that tend to keep records, a more robust paper trail may reveal plaintiffs' actual motivations. Courts have long evaluated sincerity in certain contexts (including attempts to use drugs, change prison conditions, or avoid military service); they should be more attentive to ideological motives for religious exercise claims—especially in the modern political environment, when objectors may wish to bring insincere claims for reasons other than money, recreation, or survival.[74]

Of course, too aggressive an inquiry into sincerity would raise other concerns. Courts might dismiss obscure or unfamiliar beliefs or practices, even when their proponents are entirely sincere. Earlier inconsistent conduct might reflect evolution rather than opportunism, and unforgiving inquiries into previous consistency might create unwanted incentives for gratuitous orthodoxy. That said, courts have long evaluated religious sincerity—at least in some contexts—and, more generally, courts regularly find facts and assess witness credibility.[75]

72. 42 U.S.C. § 2000bb-1(a).

73. *See Smith*, 494 U.S. at 888.

74. *See generally* Michael Hiltzik, Op-Ed, *Danger Sign: The Supreme Court Has Already Expanded Hobby Lobby Decision*, L.A. TIMES (July 2, 2014, 12:37 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-expanded-hobby-lobby-20140702-column.html#page=1 ("[H]ow are government agencies or the courts to know when claims of religious piety are just pretexts for some other viewpoint, such as libertarianism or misogyny?").

75. *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 62–64 (2014).

Although sincerity inquiries, like most judicial inquiries, will not be perperfect, judicial solicitude for insincere claims is costly—not least for religireligious liberty itself.

Second, the government needs some leeway to compromise (or attempt to compromise) with religious objectors without those compromises transforming into evidence in other cases that the government can vindicate its compelling interest through less-restrictive means. As Professor Lederman warns, "[i]f the government can always be accused of under-accommodation whenever it grants some religious accommodation to one group but not to others, that creates a huge disincentive to grant it at all."[76] The contraceptive-coverage litigation highlights this paradox: The government accommodated nonprofit organizations; that accommodation doomed the government's ability to enforce the underlying requirement against for-profit corporations; and the government remains mired in legal challenges to the accommodation as well. One could hence forgive the government for concluding that its "concessionary accommodation was foolhardy."[77] And a future administration might well take a harder line at the outset, lest its initial accommodation prevent it from enforcing its regulation against other entities or in other circumstances. That kind of change in incentives would, in turn harm religious liberty.

Other legal doctrines supply precedent for applying legal standards in a manner that encourages voluntary accommodations. For example, the federal evidentiary rules bar the introduction of evidence of later remedial measures to prove that the defendant's previous conduct was negligent.[78] This rule reflects the concern that "[i]f subsequent safety improvements to a product could be used as evidence that prior models were defectively designed, this would discourage manufacturers from continuing to update and improve upon the safety features of their products after initial manufacture."[79] In other words, we want to encourage voluntary steps to reduce risk, and we do not want to punish those who take them, lest we discourage them from taking similar steps in the future. Likewise, we want to encourage the government to provide reasonable religious accommodations, when appropriate, without undermining its litigating position in future cases.

The free exercise of religion is a civil right, not a political weapon. A more flexible doctrinal approach, which acknowledges the practical realities and complicated incentives underlying modern religious-liberty litigation, would help to return free-exercise doctrine to its intended

76. Emily Bazelon, *Nice Try, Obama*, SLATE (Aug. 26 2014, 12:24 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/obama_s_new_contraception_mandate_accommodation_religious_employers_are.single.html.

77. Leslie C. Griffin, *Symposium: The Missing Interest in the Contraceptive Mandate Cases—Catholic Women*, SCOTUSBLOG (Dec. 16, 2015, 11:08 AM), http://www.scotusblog.com/2015/12/symposium-the-missing-interest-in-the-contraceptive-mandate-cases-catholic-women/.

78. FED. R. EVID. 407.

79. Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991).

place and scope and ensure that religious accommodations can be sus-sustained in the long run.