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THE *HOBBY LOBBY* "MINEFIELD" IN THE TRUMP ERA:

CONTINUED HARM, MISUSE, AND UNWARRANTED EXPANSION

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Introduction

The legal and political landscape has changed dramatically since the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.* five years ago, allowing for-profit companies to use the Religious Freedom Restoration Act (RFRA) to secure an exemption from the Affordable Care Act's birth control coverage requirement. Now, those who would use religion to discriminate control the reins of power in our federal government, as well as the governments of several states. The Trump-Pence Administration and some state governments have distorted *Hobby Lobby* and RFRA to justify extremist policies that encourage discrimination and threaten public health and safety. And private individuals and entities continue to use RFRA to discriminate and to evade laws, notwithstanding the harm to others – a trend that the Trump-Pence Administration has encouraged through its own harmful actions and policies.

Justice Ruth Bader Ginsburg authored a vigorous dissent in the *Hobby Lobby* case, with a prescient warning: "The Court, I fear, has ventured into a minefield"[1] by opening the door for individuals and companies to use religion to claim that any number of laws do not apply to them. This report documents precisely how the Trump-Pence Administration, some state governments, and private individuals and entities have doggedly pursued an agenda that uses religion as a justification for discrimination in a multitude of contexts.

This report updates one issued by the National Women's Law Center one year after the Hobby Lobby decision, The Hobby Lobby "Minefield": The Harm, Misuse, and Expansion of the Supreme Court Decision. That report highlighted the multitude of ways individuals and entities attempted, with some success, to use *Hobby Lobby* and RFRA to avoid having to comply with the nation's laws and to deny the rights of others. RFRA says that the government cannot "substantially burden" religious exercise unless the government has a very important reason for doing so—a so-called "compelling interest." Even then there must be no less burdensome way for the government to advance that interest.

RFRA was intended as a shield to protect religious exercise from governmental interference, but *Hobby Lobby* opened the door for people to use RFRA as a sword to get out of existing legal requirements and impose their personal beliefs on others. The *Minefield* report documented cases where people pointed to *Hobby Lobby* to claim that because of their religious beliefs they could discriminate against others, refuse to comply with labor laws and laws that protect public health, and escape criminal prosecution.

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THE GOVERNMENT IS EXPANDING AND MISUSING *HOBBY LOBBY* AND RFRA TO JUSTIFY HARMFUL NEW POLICIES

In May 2017, President Trump issued an Executive Order directing federal agencies to "vigorously enforce" federal protections for "religious freedom."[2] The Attorney General at the time, Jeff Sessions, subsequently issued a memorandum instructing all federal departments and agencies to adopt an expansive interpretation of RFRA.[3]

Under the auspices of this policy, the Trump-Pence Administration has taken the extreme position that RFRA gives federal agencies the right to create exemptions to federal laws however they see fit, and even if it harms others. Several states have expressed agreement with this position. Using this flawed reasoning, the Trump-Pence Administration has aggressively invoked RFRA to justify harmful policies and undermine critical civil rights protections.

THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE GOVERNOR OF SOUTH CAROLINA RELIED ON RFRA TO ALLOW FOSTER CARE AGENCIES IN SOUTH CAROLINA TO TURN AWAY NON-CHRISTIAN FAMILIES.

A South Carolina foster care agency relied on *Hobby Lobby* and RFRA to claim that it has the right to refuse to place children in homes if the foster parents do not practice Protestant Christianity.[4] South Carolina Governor Henry McMaster then stepped in to support the foster care agency, issuing an executive order prohibiting the state from penalizing the agency. Governor McMaster also asked the U.S. Department of Health and Human Services (HHS) to grant all religiously-affiliated foster agencies in the state an exemption from federal regulations that prohibit discrimination.[5]

In January 2019, HHS granted the exemption for all South Carolina foster agencies that use "religious criteria" in selecting foster care placements. This revealed a sweeping and dangerous misinterpretation of RFRA, as it set the precedent that entities can invoke RFRA to claim the right to use federal funds in a discriminatory manner.[6] As a result of this decision, children in need of placement with a foster family in South Carolina may be denied an appropriate placement simply because the family does not hold one particular set of religious beliefs. The exemption has since been challenged in court.[7]

THE TRUMP-PENCE ADMINISTRATION CITED AND MISINTERPRETED *HOBBY LOBBY* TO JUSTIFY A PROPOSED RULE ALLOWING FEDERAL CONTRACTORS TO DISCRIMINATE.

In August 2019, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a proposed rule that would allow federal contractors to assert religious beliefs to justify discriminatory employment actions, including, for example, firing an employee because they are pregnant and unmarried, because they are LGBTQ, or because they have used birth control or fertility services.[8] The Department relies heavily on *Hobby Lobby* to justify its harmful proposed rule, but distorts the case in order to support its expansive religious exemption.[9] In particular, the Administration ignores the harm that the proposed rule would have on employees across the country, and it ignores the government's compelling interest in ending workplace discrimination.[10] If finalized, this rule both invites and sanctions discrimination against women and LGBTQ people.

THE TRUMP-PENCE ADMINISTRATION CITED RFRA IN ITS PROPOSED RULE ROLLING BACK ANTI-DISCRIMINATION PROTECTIONS IN HEALTH CARE.

In June 2019, HHS issued a proposed rule rolling back the regulations implementing the Health Care Rights Law, otherwise known as Section 1557 of the Affordable Care Act.[11] The Health Care Rights Law prohibits discrimination on the basis of race, color, national, origin, age, disability, and sex, including pregnancy, gender identity, and sex-stereotyping. In the proposed rule, HHS attempts to add a sweeping religious exemption to the Health Care Rights Law's protections.[12] The proposed rule explicitly attempts to subordinate the Health Care Rights Law's protections to RFRA, giving health care providers a free pass to evade the law and use their religious or personal beliefs to discriminate against patients.[13]

THE TRUMP-PENCE ADMINISTRATION CITED RFRA TO UNDERMINE THE TITLE X FAMILY PLANNING PROGRAM.

In March 2019, HHS Office of Population Affairs cited RFRA in its final rule attacking the Title X family planning program and limiting Title X-funded health centers from referring patients for abortion care. Title X-funded health centers provide care to over four million people each year and are an essential resource for low-income women and women of color. Although the final rule is currently being challenged in court, in July 2019 it was allowed to go into effect while the litigation proceeds. As a result, Planned Parenthood health centers

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and other health centers have been forced to leave the Title X program, with potentially devastating consequences for the health of individuals and families nationwide.[14]

THE TRUMP-PENCE ADMINISTRATION CITED RFRA TO SUPPORT A RULE ALLOWING HEALTH CARE PROVIDERS TO USE RELIGION TO DICTATE PATIENT CARE.

In May 2019, HHS issued a rule attempting to create new rights for individuals and institutions in the health care field – from a hospital's board of directors to a receptionist – to refuse to provide patients care. When HHS first proposed the rule, it argued that the same values and justifications that underlie RFRA also justify the rule.[15] When the rule was finalized, HHS pointed to RFRA and the Supreme Court's *Hobby Lobby* decision,[16] and used a distorted interpretation of *Hobby Lobby* to respond to public comments raising serious constitutional concerns about the rule.[17] Several states, municipalities, and health care providers filed legal challenges to the final rule,[18] and in response HHS agreed to put the final rule on hold until November 2019 while those lawsuits are being decided.[19]

THE TRUMP-PENCE ADMINISTRATION AND A HANDFUL OF STATES ARE ARGUING THAT RFRA GIVES FEDERAL AGENCIES SWEEPING AUTHORITY TO CREATE NEW EXEMPTIONS TO FEDERAL STATUTES AND LETS PRIVATE INDIVIDUALS AND ENTITIES PUT PERSONAL BELIEFS ABOVE THE LAW.

In late February 2019, a coalition of states—Texas, Alabama, Arkansas, Georgia, Idaho, Louisiana, Missouri, Nebraska, Oklahoma, South Carolina, and West Virginia—filed a brief to a federal appeals court. In the brief, the states embrace the Trump-Pence Administration's novel argument that federal agencies have virtually limitless power under RFRA to unilaterally declare exemptions to federal laws, even if they harm others.[20] The states argue that under RFRA, courts and the federal government must simply defer to religious adherents' determinations that they need not comply with laws they find objectionable. In other words, they are essentially claiming that individuals' subjective personal beliefs and moral codes supersede the rule of law.[21]

THE TRUMP-PENCE ADMINISTRATION IS USING RFRA TO DENY BIRTH CONTROL COVERAGE TO EMPLOYEES AND STUDENTS.

After President Trump took office, the federal government reversed the position it took in *Hobby Lobby* and subsequent cases on how RFRA applies to employers and universities that want to refuse to provide birth control coverage. Based on its new position, the Trump-Pence Administration has taken several actions to undermine the ACA's contraceptive coverage requirement, including:

- Issuing new rules allowing virtually any employer or university to refuse to provide birth control coverage.[22]
- Entering unlawful private settlement agreements that allow employers and universities to deny birth control coverage to their employees and students.[23]
- Refusing to defend in court the Affordable Care Act's requirement that insurance plans include coverage of birth control.[24]

The Trump-Pence Administration is willing to leave the individuals who work for these employers and who attend these universities without seamless access to contraception, completely disregarding the U.S. Supreme Court's instructions in *Hobby Lobby* and *Zubik v. Burwell*.[25]

PRIVATE INDIVIDUALS AND ENTITIES ARE MISUSING *HOBBY LOBBY* AND RFRA TO DISCRIMINATE AND EVADE THE LAW

In *Hobby Lobby*, the majority of the Court took pains to clarify that the decision did not go so far as to shield those who would engage in discrimination "cloaked as religious practice."[26] But, as Justice Ginsburg predicted, this has not stopped people from trying to use religion as a pretext for discrimination.

In the past few years, individuals and entities have claimed that they need not comply with a host of laws because of their religious beliefs and have cited religion to discriminate against others. The Trump-Pence administration's misuse of *Hobby Lobby* and RFRA has only emboldened these efforts, both by setting a dangerous example of how RFRA can be abused and by signaling to these individuals and entities that the federal government will not oppose lawsuits raising RFRA claims in court.

FOR-PROFIT CORPORATIONS ARE CLAIMING THAT THEY HAVE RELIGIOUS BELIEFS AND INVOKING THOSE BELIEFS TO AVOID COMPLYING WITH STATE ANTI-DISCRIMINATION LAWS.

In three recent cases, for-profit businesses (two bakeries and a florist) refused their services to same-sex couples,[27] citing *Hobby Lobby*.[28] In one of the cases, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the U.S.

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Supreme Court ruled in favor of the bakery, but only because of concerns that the Colorado Civil Rights Commission had acted improperly when it decided this particular case before it got to the Supreme Court. The Supreme Court correctly reiterated the "general rule" that business owners cannot use religious objections to deny people equal access to goods and services.[29] Following *Masterpiece Cakeshop*, the Supreme Court of Washington concluded that the florist unlawfully discriminated against a same-sex couple by refusing to provide a custom floral arrangement for their wedding.[30] The florist recently asked the U.S. Supreme Court to review the case.[31] The other bakery case is still working its way through the courts.

INDIVIDUALS AND ENTITIES ARE USING RFRA TO UNDERMINE FEDERAL CIVIL RIGHTS STATUTES THAT PROTECT PEOPLE FROM DISCRIMINATION IN EMPLOYMENT, EDUCATION, AND OTHER CONTEXTS.

In two recent cases, private individuals and entities have relied on RFRA to undermine protections for LGBTQ+ people under Title VII of the Civil Rights Act if 1964, which prohibits discrimination in the workplace.

- In *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, a for-profit funeral home company fired an employee soon after she informed the owner that she is transgender.[32] The Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing laws that prohibit workplace discrimination, filed suit on her behalf under Title VII, challenging her termination as discrimination on the basis of sex. The funeral home defended the lawsuit in part by arguing that it did not have to comply with Title VII's prohibition on sex discrimination because the owner has a religious objection to transgender people, and RFRA allows him to fire someone just for being transgender.

  The lower court accepted the funeral home's claim.[33] The appeals court reversed, rightly explaining that compliance with Title VII does not substantially burden the funeral home owner's religious exercise, and even if it did, enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination.[34] The U.S. Supreme Court granted *certiorari* and the case will be heard during the fall 2019 term. Although the funeral home is no longer advancing the RFRA argument, it did argue to the Supreme Court that enforcing Title VII to prohibit employers from discriminating against transgender people would violate "freedom of conscience."[35]

- In *U.S. Pastor Council v. E.E.O.C.*, a for-profit business is arguing that RFRA prevents the EEOC from enforcing Title VII's sex discrimination prohibition to protect LGBTQ+ people against employers that "hold sincere religious objections to homosexual or transgender behavior."[36] The Department of Justice (DOJ) is responsible for defending the EEOC in this lawsuit. Although DOJ filed a brief seeking to dismiss the lawsuit for jurisdictional reasons, it took the opportunity to stress that suit "set[s] forth legal issues of great interest and importance concerning the scope of Title VII and the need to protect the foundational principles of religious freedom enshrined in the First Amendment, RFRA, and elsewhere."[37] In June 2019, DOJ asked the court to put the case on hold while the Supreme Court decides *R.G. & G.R. Harris Funeral Homes, Inc.* and two related cases.[38]

Others have attempted to use RFRA to avoid complying with Title IX of the Education Amendments Act of 1972, which prohibits discrimination, harassment, and sexual assault in education.

- A group of Oregon parents unsuccessfully attempted to use RFRA to argue that a school district had to force transgender students to use bathrooms inconsistent with their gender identity, even though Title IX prohibits school districts from engaging in such sex discrimination.[39]

- A religiously-affiliated school in Maryland unsuccessfully claimed that RFRA allowed it to fire a teacher in retaliation for reporting a student's sexual abuse, even though Title IX prohibits such retaliation.[40]

ENTITIES AND INDIVIDUALS ARE USING RFRA TO GET OUT OF REQUIREMENTS THAT GUARANTEE REPRODUCTIVE HEALTH CARE.

- In *Vita Nuova Inc. v. Azar,* a nonprofit organization incorporated the day before filing suit is arguing that RFRA allows it to receive Title X family planning funds without having to comply with the program's requirement that Title X recipients provide referrals for abortion care to patients who need them.[41] It seeks to block any entity that refers for abortion care or that provides abortions in the same building as other health services from receiving Title X funds.[42] The lawsuit also alleges that HHS regulations that require recipients of federal grants (including Title X) to recognize same-sex marriage violate RFRA and should be blocked.[43] And, the suit brings a class action claim under RFRA contending that neither Vita Nuova nor any *other present or future entity nationwide* with a religious objection

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to abortion should have to comply with a federal statute that protects abortion providers from discrimination.[44] It remains to be seen whether HHS will defend the lawsuit.

- In *DeOtte v. Azar,* a for-profit business and handful of individuals filed a class action lawsuit in a Texas federal court claiming that RFRA allows every objecting business in the United States to refuse to comply with the ACA's contraceptive coverage requirement.[45] The federal government opposed certification of the class but refused to defend the birth control benefit on the merits. The judge granted an injunction permitting all existing *and future* employers nationwide claiming a religious objection to birth control coverage to deny coverage to employees. Because this lawsuit is a class action, it threatens to amplify RFRA's reach and could leave people nationwide at risk of losing birth control coverage.

INDIVIDUALS AND ENTITIES ARE USING RFRA TO EVADE CRIMINAL PROSECUTION AND COMMIT BANKRUPTCY FRAUD.

- Criminal defendants continue to attempt to use RFRA to evade prosecution for crimes, although these attempts have had little success. In the past few years, individuals have unsuccessfully argued that RFRA is a defense to kidnapping,[46] food stamps fraud and money laundering,[47] tax evasion,[48] possessing and distributing drugs,[49] and trespassing on a naval submarine base and destruction of government property.[50]

- In a bankruptcy case, a couple gave away over $16,000 to a church before declaring bankruptcy to avoid paying off creditors and argued, unsuccessfully, that RFRA allowed them to commit fraud in violation of the bankruptcy code.[51]

INDIVIDUALS AND COMPANIES HAVE ATTEMPTED TO USE STATE-LEVEL VERSIONS OF RFRA TO DISCRIMINATE.

While this report, like the Hobby Lobby decision itself, focuses on the use of the federal version of RFRA, some states have their own state-level versions of RFRA. Some of those state RFRAs are similarly being used to justify discrimination.

- **Relying heavily on *Hobby Lobby,* the Arizona Supreme Court recently held that under the state constitution and a state law version of RFRA, a calligraphy business could refuse to make custom wedding invitations for same sex couples.[52]**

- **In Kentucky, former clerk Kim Davis tried unsuccessfully to use a state law version of RFRA to refuse to issue same-sex marriage certificates.[53]**

- **A Missouri for-profit corporation, its owner, and two religiously-affiliated nonprofits challenged a St. Louis law that protects people from being discriminated against in employment and housing based on their personal reproductive health care decisions or pregnancy status, relying in part on Missouri's state RFRA and *Hobby Lobby.* Although the court denied their request to have the law fully struck down, it prevented the city from enforcing the law against them.[54]**

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PRESIDENT TRUMP PACKING THE JUDICIARY RAISES THE STAKES OF THESE HARMFUL LEGAL CLAIMS

The effort to expand *Hobby Lobby* and RFRA exists alongside President Trump's appointment of federal judges who are willing to allow religion to override existing legal requirements. For example, the two Supreme Court justices nominated by President Trump, Justices Gorsuch and Kavanaugh, each authored opinions as lower court judges that would have gone further than the Supreme Court did in *Hobby Lobby*.[55] Packing the federal judiciary with judges with expansive visions of how RFRA can be used to avoid complying with the law threatens to allow these meritless claims to go forward, to the harm of individuals across the country.

CONCLUSION

Since the 2016 election, those who would misuse RFRA and *Hobby Lobby* now control the federal government and the governments of several states. The Trump-Pence administration has made it a priority to distort RFRA to justify harmful and discriminatory policies. Private parties continue to misuse RFRA to evade the law and to discriminate. The influx of Trump appointees to the federal judiciary—including the change in composition of the U.S. Supreme Court—increases the risks posed by these dangerous legal claims and governmental policies. Justice Ginsburg was right: the *Hobby Lobby* decision is indeed a minefield, and RFRA is a more dangerous weapon than ever before.

1 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 771 (2014) (Ginsburg J., dissenting).

2 *Promoting Free Speech and Religious Liberty,* Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017).

3 Office of the Attorney General, Memorandum for All Executive Departments and Agencies, Federal Law Protections for Religious Liberty 1, 3–5 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

4 Sarah Posner, *South Carolina Sought an Exemption to Allow a Foster-Care Agency to Discriminate Against Non-Christians,* Nation (June 15, 2018), https://www.thenation.com/article/south-carolina-sought-exemption-allow-foster-care-agency-discriminate-non-christians/.

5 S.C. Exec. Order No. 2018-12 (Mar. 13, 2018), https://governor.sc.gov/ExecutiveBranch/Documents/2018-03-13%20FILED%20Executive%20Order%20No.%202018-12.pdf; Akela Lacy, *South Carolina Is Lobbying to Allow Discrimination Against Jewish Parents,* Intercept (Oct. 19, 2018), https://theintercept.com/2018/10/19/south-carolina-foster-parent-discrimination-miracle-hill-ministries/.

6 Letter from Admin. for Children & Families, Office of the Asst. Sec'y, U.S. Dep't of Health & Hum. Servs., to Gov. Henry McMaster, Re. Request for Deviation or Exception from HHS Regulations 45 CFR § 75.300(c) (Jan. 23, 2019), https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf.

7 Complaint, Docket No. 1, *Maddonna v. U.S. Dept. of Health and Human Services,* No. 6:19-cv-00448-TMC (D.S.C. Feb. 15, 2019); https://www.au.org/sites/default/files/2019-02/Maddonna%20v.%20HHS%20Complaint%202.15.19.pdf

8 Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Proposed Rule, 84 Fed. Reg. 41677 (to be codified at 41 CFR Part 60–1).

9 *See, e,g., id.* at 41679, 41680, 41684–85.

10 *Id.* at 41686–87.

11 18 U.S.C. § 18116; Nondiscrimination in Health and Health Education Programs or Activities, Proposed Rule, 84 Fed. Reg. 27846 (June 14, 2019) (to be codified at 45 C.F.R. Part 92).

12 Nondiscrimination in Health and Health Education Programs or Activities, Proposed Rule, 84 Fed. Reg. at 27892 (to be codified at 45 C.F.R. § 92.6(b)).

13 *Id.* at 27892 (to be codified at 45 C.F.R. § 92.6(b)).

14 *See* Sarah McCammon, *Planned Parenthood Withdraws From Title X Program Over Trump Abortion Rule,* NPR (Aug. 19, 2019, 2:55 PM ET), https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule (last accessed Sept. 20, 2019); Maine Family Planning, It's Official, We're Out of Title X (Aug. 19, 2019), https://mainefamilyplanning.org/title-x/its-official-were-out/ (last accessed Sept. 20, 2019).

15 Protecting Statutory Conscience Rights in Health Care (Proposed Rule), 83 Fed. Reg. 3880, 3881 (Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88).

16 Protecting Statutory Conscience Rights in Health Care (Final Rule), 84 Fed. Reg. 23170, 23194 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).

17 *Id.* at 23225.

18 *See New York v. U.S. Dep't of Health & Human Servs.*, 1:19-cv-04676-PAE (S.D.N.Y.); *Planned Parenthood Federation of America v. Azar, 1:19-cv-05433-PAE (S.D.N.Y.); National Family Planning and Reproductive Health Ass'n v. Azar*, 1:19-cv-05435-PAE (S.D.N.Y.); *City and Cty. of San Francisco v. Azar,* 3:19-cv-02405-WHA (N.D. Cal.); *California v. Azar,* 3:19-cv-02769-WHA (N.D. Cal.); *Santa Clara Cty. v. U.S. Dep't of Health & Human Servs.*, 5:19-cv-02916-WHA (N.D. Cal.); *Washington v. Azar,* 2:19-cv-00183-SAB (E.D. Wash.); *Mayor & City Council of Baltimore v. Azar,* 1:19-cv-01672-GLR (D. Md.).

19 *See, e.g.,* Order Postponing Effective Date, Docket No. 90, *New York v. U.S. Dep't of Health & Human Servs.*, 1:19-cv-04676-PAE (June 28, 2019 S.D.N.Y.).

20 Brief of Amici Curiae Texas et al. in Support of Defendants-Appellants and Reversal, *Pennsylvania v. Trump,* Nos. 17-3752, 18-1253, 19-1129, 19-1189, 5–13 (3d Cir. Feb. 22, 2019). *See also* Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,544-45 (Nov. 15, 2018).

21 *Id.* at 8–9.

22 Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018). There are multiple preliminary injunctions against the Trump Administration's exemptions to the birth control benefit: a nationwide injunction from the court in the Eastern District of Pennsylvania and an injunction from the Northern District of California applicable in over a dozen states. *See Pennsylvania v. Trump,* 351 F. Supp. 3d 791 (E.D. Pa. 2019), aff'd sub nom. *Pennsylvania v. President United States,* No. 17-3752, 2019 WL 3057657 (3d Cir. July 12, 2019), as amended (July 18, 2019); *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019). The U.S. Court of Appeals for the Third Circuit affirmed the nationwide preliminary injunction on July 12, 2019. In October 2019, the Trump administration and intervenors filed petitions for certiorari asking the U.S. Supreme Court to review that decision. See Pet. for Cert., *Trump v. Pennsylvania*, No. 19-454 (U.S. Oct. 3, 2019); Pet. for Cert., *The Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431 (U.S. Oct. 1, 2019).

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23 See Amended Complaint, Docket No. 43, *Irish 4 Reproductive Health v. Azar*, No. 3:18-cv-491 (N.D. Ind. Dec. 4, 2018); see also Nat'l Women's Law Ctr., *Trump-Pence Actions Gut the ACA Birth Control Benefit, Threatening Women's Health and Economic Security 2* (Oct. 2018), https://nwlc-ciw49tixgw5lbab.stackpathdns. com/wp-content/uploads/2018/10/Birth-Control-Rules-3.pdf.

24 Objecting employers and universities continue to pursue litigation challenging the requirement. *See, e.g., Ass'n of Christian Schools Intl. v. Burwell,* No. 14-cv-2966, Docket No. 47 (D. Colo. Sept. 6, 2018) (declining to raise substantive defense to motion for permanent injunction); Ave Maria School of Law v. Sebelius, 13-cv-795, Docket No. 67 (M.D. Fla. July 6, 2018) (same); *Colorado Christian Univ. v. Sebelius,* 13-cv-2105, Docket No. 82 (D. Colo. June 29, 2018) (same); *Ave Maria Univ. v. Sebelius,* 13-cv-630, Docket No. 69 (M.D. Fla. June 22, 2018) (same); *Little Sisters of the Poor v. Burwell,* 13-cv-02611, Docket No. 81 (D. Colo. May 18, 2018) (same); *Dordt College v. Sebelius,* 13-cv-4100, Docket No. 84 (N.D. Iowa May 17, 2018) (same); *Southern Nazarene Univ. v. Burwell,* 13-cv-1015, Docket No. 108 (W.D. Okla. May 7, 2018) (same); *Grace Schools v. Burwell,* 12-cv-459, Docket No. 113 (N.D. Ind. May 3, 2018) (same); *Geneva College v. Sebelius,* 12-cv-00207, Docket No. 146 (W.D. Pa. Apr. 10, 2018) (same); *Reaching Souls Int'l, Inc. v. Burwell,* 13-cv-01092, Docket No. 93 (W.D. Okla. March 5, 2018) (same); *Wheaton College v. Burwell,* 13-cv-8910, Docket No. 117 (N.D. Ill. Feb. 1, 2018) (same); *Sharpe Holdings Inc. v. Sebelius,* 12-cv-92, Docket No. 152 (E.D. Mo. Dec. 22, 2017) (same); *Catholic Benefits Ass'n v. Burwell,* 14-cv-240, Docket No. 174, 14-cv-685, Docket No. 69 (W.D. Okla. Dec. 22, 2017) (same).

25 *See Zubik v. Burwell,* 136 S.Ct. 1557 (2016). In *Zubik,* the Court directed the parties "to arrive at an approach going forward that accommodates petitioners' religious exercise *while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." Id.* at 1560 (internal quotation marks omitted; emphasis added).

26 *Hobby Lobby,* 573 U.S. at 773.

27 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. 1719 (2018); *State v. Arlene's Flowers, Inc.,* 389 P.3d 543, 548, 564 & n.20 (Wash. 2017), *cert. granted, judgment vacated,* 138 S. Ct. 2671 (Jun. 25, 2018); *Klein v. Oregon Bureau of Labor and Industries,* 289 Or. App. 507 (Or. Ct. App. 2017), cert. granted, judgment vacated, 139 S. Ct. 2713 (Jun. 17, 2019).

28 *See, e.g.,* Brief for Petitioners at 38 n.6, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* No. 16-111 (U.S. Aug. 31, 2017).

29 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018).

30 *State v. Arlene's Flowers, Inc.,* 193 Wash. 2d 469, 480, 441 P.3d 1203, 1209 (2019).

31 Pet. for Cert., *Arlene's Flowers, Inc. v. Ingersoll,* No. 19-333 (U.S. Sept. 12, 2019).

32 *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F. Supp. 3d 837 (E.D. Mich. 2016).

33 *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F. Supp. 3d 837, 842 (E.D. Mich. 2016).

34 *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560, 589 (6th Cir. 2018).

35 Pet. for Cert. at 14, 33–34, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm'n,* No. 18-107 (U.S. Jul. 20, 2018).

36 *U.S. Pastor Council v. Equal Employment Opportunity Comm'n,* No. 4:18-cv-00824-O (N.D. Tex. Oct. 6, 2018).

37 Br. in Supp. Of Defs.' Mot. to Dismiss Am. Compl. at 25, Docket No. 29, *U.S. Pastor Council v. Equal Employment Opportunity Comm'n,* No. 4:18-cv-00824-O (N.D. Tex. May 1, 2019).

38 Defs.' Conditional Mot. to Stay Proceedings, Docket No. 35, *U.S. Pastor Council v. Equal Employment Opportunity Comm'n,* No. 4:18-cv-00824-O (N.D. Tex. June 5, 2019).

39 *Parents for Privacy v. Dallas Sch. Dist. No.* 2, 326 F. Supp. 3d 1075, 1111 (D. Or. 2018). In his opinion, Judge Hernandez held that plaintiffs' RFRA claims lack standing, since they only alleged RFRA claims against the U.S. Department of Education, failing to establish causation. Id. Plaintiffs filed an appeal to the 9th Circuit on August 23, 2018 (9th Cir. No. 18-35708).

40 *Goodman v. Archbishop Curley High School, Inc.,* 149 F. Supp. 3d 577, 588 (D. Md. 2016).

41 *Vita Nuova Inc. v. Azar et al,* No. 4:19-cv-00532-O (N.D. Tex. 2019); *see also* Alice Miranda Ollstein and Renuka Rayasam, New Texas anti-abortion group vies for family planning funds, politico.com (July 24, 2019 12:06 PM EDT), available at https://www.politico.com/story/2019/07/24/texas-anti-abortion-group-family-planning-funds-1612795 (last accessed July 29, 2019).

42 Complaint, Docket No. 1, *Vita Nuova Inc. v. Azar et al,* No. 4:19-cv-00532-O (N.D. Tex. Jul. 3, 2019).

43 *Id.*

44 *Id.*

45 *DeOtte v. Azar,* No. 4:18-cv-00825 (N.D. Tex. 2018).

46 *United States v. Epstein,* 91 F. Supp. 3d 573, 580 (D.N.J. 2015), *aff'd sub nom. United States v. Stimler,* 864 F.3d 253 (3d Cir. 2017), *reh'g granted, opinion vacated in part sub nom. United States v. Goldstein,* 902 F.3d 411 (3d Cir. 2018).

47 *United States v. Jeffs,* No. 2:16-CR-82 TS, 2016 WL 6745951, at *1 (D. Utah Nov. 15, 2016).

48 *Tyms-Bey v. State,* 69 N.E.3d 488, 492 (Ind. Ct. App.), *reh'g denied* (Feb. 23, 2017), *transfer denied,* 88 N.E.3d 1076 (Ind. 2017).

49 *See United States v. Christie,* 825 F.3d 1048, 1052–53 (9th Cir. 2016); *United States v. Comrie,* 842 F.3d 348, 349 (5th Cir. 2016); *United States v. Anderson,* 854 F.3d 1033, 1034–35 (8th Cir. 2017), *cert. denied,* 138 S. Ct. 461 (2017); *see also Oklevueha Native Am. Church of Hawaii, Inc.v. Lynch,* 828 F.3d 1012, 1014 (9th Cir. 2016), *cert. denied* 137 S.Ct. 510 (Mem) (2016) (unsuccessfully seeking a declaration that RFRA exempted plaintiffs from federal drug laws in anticipation of prosecution).

50 *United States v. Kelly,* No. CR 2:18-022, 2019 WL 4017424, at *1 (S.D. Ga. Aug. 26, 2019).

51 *In re Crabtree,* 554 B.R. 174, 193 (Bankr. D. Minn. 2016), *rev'd and remanded on other grounds,* 562 B.R. 749 (B.A.P. 8th Cir. 2017).

52 *Brush & Nib Studio, LC v. City of Phoenix,* No. CV-18-0176-PR, 2019 WL 4400328, at *1 (Ariz. Sept. 16, 2019).

53 *Miller v. Davis,* 123 F. Supp. 3d 924, 943-44 (E.D. Ky. 2015), *appeal dismissed as moot, cause remanded,* 667 F. App'x 537, 538 (6th Cir. 2016).

54 *Our Lady's Inn v. City of St. Louis,* No. 4:17-CV-01543-AGF, 2018 WL 4698785, at *7 (E.D. Mo. Sept. 30, 2018).

55 *Hobby Lobby v. Sebelius,* 723 F.3d 1114, 1152–57 (10th Cir. 2013) (Gorsuch J., concurring) (going so far as to hold that the government does not have a compelling interest in ensuring individuals receive birth control coverage, a position that five justices of the Supreme Court rejected in Hobby Lobby); *Priests for Life v. U.S. Dep't of Health & Human Servs.,* 808 F.3d 1, 14 (D.C. Cir. 2015) (en banc) (Kavanaugh J., dissenting) (holding that even the process for *opting out* of the ACA contraceptive coverage requirement violates RFRA).

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