CHALLENGING STATUTORY ACCOMMODATIONS FOR RELIGIOUSLY AFFILIATED DAYCARES: AN APPLICATION OF THE THIRD-PARTY-HARM DOCTRINE

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Daycare facilities are subject to a host of regulations that govern matters from basic health and safety requirements, to caregiver training, to maximum caregiver-to-child ratios. In sixteen states, however, legislation exempts religiously affiliated daycares from many of these regulations, with six states extending particularly broad exemptions. Supporters of the exemptions have justified them on constitutional grounds, arguing that state oversight of religiously affiliated daycares violates the Free Exercise Clause of the First Amendment. Recent reporting has revealed that though children have been seriously injured or have died while in the care of religiously affiliated daycares exempted from regulations, challenges to the exemptions have been unsuccessful.

This Note proposes an alternative strategy for challenging the statutory accommodations extended to religiously affiliated daycares. Both judicial exemptions under the Free Exercise Clause and statutory accommodations under the Establishment Clause have historically been limited by the doctrine of harm to third parties. Invoking a balancing test, this Note argues that courts ought to weigh the free exercise burden imposed on the religiously affiliated daycare against the harm to third parties caused by accommodation. As such, this Note suggests that parents of children harmed in exempt facilities invoke the balancing test to argue that the harm to third parties outweighs the free exercise burden imposed by regulations.

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INTRODUCTION

In 2012, one-year-old Carlos Cardenas wandered away from his caregivers at Praise Fellowship Assembly of God in Indianapolis, Indiana, where four staff members supervised over fifty children, and drowned in the church's baptismal font.[1] In 2010, seven-week-old Dylan Cummings was placed

1. Amy Julia Harris, *Religious Day Cares Get Freedom from Oversight, with Tragic Results*, REVEAL (Apr. 12, 2016), https://www.revealnews.org/article/religious-day-cares-operate-with-little-oversight-and-accountability [https://perma.cc/39PH-V6MP]. A recent story by the Center for Investigative Reporting uncovered dozens of similar incidents in religiously affiliated childcare centers across the country: from infants being left in dirty

facedown on a mattress covered with a loose-fitting sheet in an electrical storeroom at Bethel Temple Church of Deliverance daycare in Norfolk, Virginia, and was discovered two hours later, dead, the sheet covered in vomit and blood.[2] Indiana and Virginia are among sixteen states that exempt religiously affiliated childcare centers from state licensing requirements and regulations.[3] The scope of the statutory accommodations varies from the minor (waiving registration fees) to the major (excusing facilities from nearly all regulations and oversight requirements, including requirements that workers know CPR, refrain from corporal punishment, and maintain a maximum ratio of children to caregivers).[4] These statutory accommodations not only free religiously affiliated daycares from state regulations but also, when tragedies do occur, leave parents with little legal recourse: in the absence of regulations, no rules have been broken.[5]

Though the statutory accommodations have been challenged by secular daycare facilities, these challenges have never been successful for two reasons.[6] First, courts have found that the statutes are consistent with the Establishment Clause under the test developed in *Lemon v. Kurtzman*[7] and known as the *Lemon* test. Second, courts have rejected the secular daycares' argument that the economic advantage that accrues to religious daycares as a result of their freedom from regulatory requirements is sufficient to establish standing.[8] This Note proposes an alternative approach for challenging statutory accommodations afforded to religiously affiliated daycares: drawing on the recently reinvigorated idea of third-party harm, this Note argues that courts ought to balance the free exercise burden imposed on the daycare against the harm to third parties caused by accommodation.

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diapers for so long that they developed sores on their bottoms, to children being whipped and paddled to the extent that they developed bruises and welts. *See id.*

2. *Id.*

3. The six states that grant the broadest exemptions are Alabama, Florida, Indiana, Missouri, North Carolina, and Virginia. *See* ALA. CODE § 38-7 (2017); FLA. STAT. §§ 402.301–402.319 (2017); IND. CODE 12-17.2-6-1 (2016); MO. REV. STAT. § 210.211 (2016); N.C. GEN. STAT. § 110-106 (2017); VA. CODE ANN. § 63.2-1716 (2017). States with narrower exemptions include Arkansas and Illinois. *See* ARK. CODE ANN. § 20-78-209(b)(4) (2017); 225 ILL. COMP. STAT. 10/2.09 (2015).

4. *See, e.g.*, ALA. CODE § 38-7-3 ("[T]he provisions of this chapter shall not apply to preschool programs which are an integral part of a local church ministry or a religious nonprofit elementary school . . . ."); FLA. STAT. § 402.316 ("The provisions of ss. 402.301–402.319, except for the requirements regarding screening of child care personnel, shall not apply to a child care facility which is an integral part of church or parochial schools . . . .").

5. In several cases, daycare workers were charged with child neglect and homicide in connection with the deaths of children in their care. For example, in *Commonwealth v. Futrell*, No. CR11-0211, 2012 WL 8261797, at *1–2 (Va. Cir. Ct. Sept. 30, 2011), a child died of Sudden Infant Death Syndrome (SIDS) in a crib that was not sleep safe. The judge dismissed the homicide charges, however, noting that "[t]he Commonwealth quite accurately argued that had Little Eagles Day Care been subject to the regulation and inspection required of secular day care centers, many of the SIDS risk factors would not have been present." *Id.* at *7.

6. Though tort actions are likely available, they have not been widely brought. The advantages and disadvantages of bringing such actions are beyond the scope of this Note.

7. 403 U.S. 602 (1971).

8. Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 264 (4th Cir. 1988); Forte v. Coler, 725 F. Supp. 488, 491 (M.D. Fla. 1989).

Part I describes the development of judicial exemptions under the Free Exercise Clause and of statutory accommodations under the Establishment Clause. Though these two regimes were developed in response to different clauses, they are deeply imbricated such that an understanding of one is impossible without an understanding of the other. Part I.A examines the rise and fall of judicial exemptions developed under the Free Exercise Clause in a line of cases starting with *Reynolds v. United States*,[9] through *Employment Division v. Smith*,[10] and culminating in the Religious Freedom Restoration Act[11] (RFRA) and its state cousins. Part I.B turns to the statutory accommodation regime developed under the Establishment Clause and examines two principal tests for evaluating claims under the Establishment Clause: the *Lemon*[12] test and the *Texas Monthly*[13] test.

Part II takes up the doctrine of harm to third parties as a tool for challenging the statutory accommodations granted to religiously affiliated daycares. Part II.A considers the development of the doctrine of third-party harm in the context of religious freedom, and Part II.B considers the invocation of the third-party-harm doctrine in *Burwell v. Hobby Lobby Stores, Inc.*[14]

Part III examines the statutes freeing religiously affiliated daycares from state regulations in the framework of statutory accommodations and judicial exemptions developed in Part I and explores how these accommodations have fared in the courts when they have been challenged by secular daycares.

Finally, Part IV evaluates the opportunities and challenges the doctrine of third-party harm poses for advocates seeking to limit statutory accommodations for religiously affiliated daycares.

I. FREE EXERCISE CLAUSE AND ESTABLISHMENT CLAUSE JURISPRUDENCE IN CONVERSATION: JUDICIAL EXEMPTIONS AND STATUTORY ACCOMMODATIONS

While the Free Exercise Clause and the Establishment Clause protect different rights, these rights are closely connected, leading to significant overlap in their interpretation and application. Broadly speaking, the organizing principle of free exercise jurisprudence is that of

9. 98 U.S. 145 (1878). The Court denied a Mormon man engaged in plural marriage an exemption from the law against bigamy. *Id.* at 167.

10. 494 U.S. 872 (1990). The Court denied adherents of the Native American Church who used peyote as part of a religious ritual an exemption from the Controlled Substances Act. *Id.* at 890.

11. 42 U.S.C. § 2000bb (2012), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

12. *Lemon*, 403 U.S. at 615. The three-pronged test asks (1) whether the statute has a secular legislative purpose, (2) whether the statute's primary effect is to inhibit or advance religion, and (3) whether the statute results in excessive government entanglement with religion. *Id.*

13. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–15 (1989). This two-step test builds on *Lemon*, asking first whether the law in question confers a benefit only on religious organizations and, if so, proceeding to two questions: (1) whether the benefit can be justified as lifting a preexisting government-imposed burden on free exercise and (2) whether the benefit imposes significant burdens on third parties. *Id.*

14. 134 S. Ct. 2751 (2014).

antidiscrimination,[15] with the question of judicial exemptions dominating the case law. Under a judicial-exemptions regime, religious individuals or organizations bring suit alleging that a neutral law of general applicability disproportionately affects religious persons.[16] The organizing principle of a significant portion of Establishment Clause jurisprudence, by contrast, is that of statutory accommodation.[17] Under a statutory-accommodation regime, the legislature enacts a law that confers some benefit on religious persons or organizations, often by freeing them from some regulation or tax.[18] Distinguishing judicial exemptions from statutory accommodations—and thus Free Exercise Clause claims from Establishment Clause claims—is more difficult in practice than this schema might lead one to believe. This is particularly evident in the imprecision of the language used to discuss the two Clauses: statutory accommodations, for instance, are often referred to as exemptions, which leads to analytical confusion. Thus, while this Note focuses on statutory accommodations granted to religiously affiliated daycares, it is necessary to consider the history and development of both judicial exemptions and statutory accommodations.

A. The Rise and Fall of Judicial Exemptions: From Reynolds *to* Smith

Exemptions for religious persons and institutions from generally applicable laws under the First Amendment's Free Exercise Clause emerged only in the 1960s, and its brief history has been a tumultuous one. Prior to the 1960s, the U.S. Supreme Court forcefully rejected the concept of exemptions on free exercise grounds. Indeed, in *Reynolds*, the Court's first engagement with the Free Exercise Clause, the Court famously found that to permit exemptions from generally applicable laws on the grounds of religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[19] From 1878 until the 1960s, the rejection of exemptions purely on free exercise grounds remained firmly in place. On those rare occasions that religious claimants prevailed at the Court, they did so by

15. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious belief or regulates or prohibits conduct because it is undertaken for religious reasons.").

16. *See generally* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994).

17. A separate element of Establishment Clause jurisprudence pushes back against the dominant religion's use of power by limiting prayer in schools, Engel v. Vitale, 370 U.S. 421, 424–25 (1962), financial assistance to religious bodies, *Lemon*, 403 U.S. at 602, and the display of religious symbols, Lynch v. Donnelly, 465 U.S. 668, 704–05 (1984).

18. *See* Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1708–09 (1988).

19. Reynolds v. United States, 98 U.S. 145, 167 (1878).

pairing their free exercise claim with another right, such as freedom of speech.[20]

Tracing the path of judicial exemptions under the Free Exercise Clause, Part I.A.1 describes their emergence in the 1960s and 1970s as articulated in *Sherbert v. Verner*.[21] Part I.A.2 describes the Court's radical narrowing of judicial exemptions, in form if not in function, in the 1990 *Smith* decision. Congress's response to *Smith*, RFRA, is examined in Part I.A.2.a, while Part I.A.2.b considers the Court's response to RFRA in *City of Boerne v. Flores*[22] and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[23] Finally, Part I.A.2.c takes up state analogues to RFRA.

1. The Inauguration of Exemptions: *Sherbert* and *Yoder*

Starting in the 1960s, the Warren Court's liberal majority inaugurated a new era in free exercise jurisprudence, rejecting the Court's reasoning in *Reynolds* and embracing exemptions as a way to preserve religious liberty in an increasingly pluralistic society. The Court announced exemptions on free exercise grounds in its 1963 decision in *Sherbert*, in which the Court held that denying a woman unemployment benefits because her religious beliefs prevented her from working on Saturday violated her constitutional right to the free exercise of religion.[24] Scholars have since argued that *Sherbert* and two related cases[25] constitute a special and discrete set of cases limited to unemployment benefits.[26] Even if one accepts that *Sherbert* is so limited, the three-prong test for evaluating free exercise claims introduced in *Sherbert* nevertheless laid the groundwork for the seminal judicial exemptions case, *Wisconsin v. Yoder*.[27]

Briefly, the three-prong test runs as follows: First, the court asks whether the government's actions burden a person's free exercise of religion.[28] This

20. Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 49 (2015) (noting that the Court tended to grant exemptions where the due process rights of parents to direct their child's upbringing were burdened, as in *Meyer v. Nebraska*, 262 U.S. 390, 399–402 (1923), or free speech rights were infringed, as in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634–35 & n.15 (1943)).

21. 374 U.S. 398 (1963). The Court held that a law denying unemployment compensation to a person fired because her job requirements conflicted with her religious beliefs violated the Free Exercise Clause. *Id.* at 406.

22. 521 U.S. 507 (1997).

23. 546 U.S. 418 (2006).

24. *Sherbert*, 374 U.S. at 410.

25. *See generally* Hobbie v. Unemployment Appeals Cmm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

26. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1254 (1994); Lupu, *supra* note 20, at 49; *see also* Emp't Div. v. Smith, 494 U.S. 872, 883 (1990) (noting that the *Sherbert* test has been cabined to claims about unemployment compensation.).

27. 406 U.S. 205 (1972). The Court granted Amish parents who sought, for religious reasons, to withdraw their children from school after eighth grade, an exemption from a Wisconsin law requiring children to attend school until age sixteen. *Id.* at 235–36.

28. *Sherbert*, 374 U.S. at 403.

burden must be substantial: a trivial burden would not survive this prong.[29] If the first prong is met, the state must then meet the second and third prongs. The second prong asks whether the state has a compelling interest generally in the law at issue.[30] Finally, under the third prong, the burden must be narrowly tailored; that is, there must be no alternative regulation that would both achieve the state's interest and avoid infringing on free exercise.[31] Thus, under the third prong, the state must demonstrate that it truly requires uniform adherence to the law in question. If the claimant satisfies the first prong, and the state fails to satisfy the second and third prongs, then the individual is entitled to an exemption from the otherwise generally applicable law at issue.[32] Thus, though the *Sherbert* test arguably would come to be confined to unemployment cases, at the time it was decided, it signaled a radical new openness to exemptions on free exercise grounds.

The Court's new approach to exemptions on free exercise grounds is exemplified in *Yoder*, in what some have characterized as the first—and perhaps only—true exemption case in which the claimant prevailed.[33] In *Yoder*, Amish parents sought to withdraw their children from school after eighth grade though state law required attendance in public or private school until age sixteen.[34] Applying the three-prong *Sherbert* test, the Court held that the Amish were entitled to an exemption from the generally applicable law on free exercise grounds. First, the Court found that compelling Amish children to remain in school past eighth grade constituted a burden on the respondents' religious practices that was "not only severe, but inescapable."[35] Second, the Court determined that the state lacked a compelling interest for imposing said burden.[36] With the state having failed the second prong, the Court did not discuss the third prong—whether the law in question was narrowly tailored. Framed in the terminology of the *Sherbert* test, the *Yoder* decision resembled a simple balancing test, with the interests of the Amish parents in perpetuating the community weighed against the state's dual interests in ensuring uniform adherence to the law and in producing an educated citizenry.[37] Curiously, the question of exactly whose interests—the parents' or the children's—were properly considered in the balancing test was addressed only cursorily. In his dissent, Justice William

29. *Id.* at 406.

30. *Id.* at 407 (noting that the state's professed fear of "unscrupulous claimants feigning religious objections" is not a sufficiently compelling interest).

31. *Id.*

32. Lupu argues that *Sherbert* is not properly read as an exemptions case because the appellant was not technically exempted from anything. Rather, he argues, "*Sherbert* is a decision about a constitutionally mandatory extension of benefits, rather than an exemption from general norms." Lupu, *supra* note 20, at 50.

33. *Id.* ("*Wisconsin v. Yoder* . . . is the true and only lynchpin of a doctrine of free exercise exemptions.").

34. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

35. *Id.* at 218.

36. *See id.* at 222 (noting that although the state has an interest in producing educated and engaged citizens, there is no evidence that the two additional years of schooling the state seeks to impose is necessary to achieve this interest).

37. *See* Lupu, *supra* note 20, at 50–51.

Douglas argued powerfully that the interests of the children ought also to be considered.[38] Though it is the parents who suffer the legal consequences of keeping their children out of school, it is the children who suffer the social and academic consequences of leaving school before the age of sixteen. Douglas thus argued that the case should be remanded and that each of the affected students be canvassed.[39] Douglas's dissent illustrates that the impulse to weigh third-party harms in the balance when evaluating judicial exemption cases arose quite early in the life of the exemption regime.

After a strong initial showing in the 1960s through the 1970s, the exemptions regime suffered setbacks in a trio of cases in the 1980s.[40] The balancing language of *Yoder* was invoked in *United States v. Lee*,[41] in which the Court held that the interest of the state in maintaining a uniform social security system outweighed the harms the social security program, anathema to Amish religion, imposed on the Amish plaintiffs.[42] Though it was "sensitive to the needs flowing from the Free Exercise Clause," the Court held that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."[43] Further challenges followed, but the judicial exemptions regime hobbled along until, in 1990, it was dealt a mortal blow in *Employment Division v. Smith*.[44]

2. The Narrowing of Judicial Exemptions: *Smith* and Its Progeny

In a deeply controversial decision, the Court rejected the exemption regime in language lifted straight from *Reynolds*.[45] In *Smith*, two individuals were denied unemployment benefits after they were dismissed from their jobs because they had ingested peyote.[46] The claimants, who were active members of the Native American Church, ingested the peyote as part of a religious ritual and asserted that the general prohibition on peyote under Oregon's controlled substance law violated the Free Exercise Clause when

38. *See Yoder*, 406 U.S. at 242 (Douglas, J., dissenting) ("[N]o analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children.").

39. *Id.* at 246 & n.4 ("Canvassing the views of all school-age Amish children in the State of Wisconsin would not present insurmountable difficulties. A 1968 survey indicated that there were at that time only 256 such children in the entire State." (citing Norman R. Prance, Comment, *The Amish and Compulsory Schools Attendance: Recent Developments*, 1971 WIS. L. REV. 832, 852 n.132)).

40. *See* Bowen v. Roy, 476 U.S. 693, 700 (1986) (holding that the requirement that an individual have a social security number in order to obtain government benefits did not violate free exercise); Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (holding that Air Force regulations mandating the removal of headgear indoors, including yarmulkes, did not violate free exercise); United States v. Lee, 455 U.S. 252, 258 (1982) (holding that religious employers are not exempt from paying social security tax).

41. 455 U.S. 252 (1982).

42. *Id.* at 258.

43. *Id.* at 261.

44. 494 U.S. 872 (1990).

45. *Id.* at 890.

46. *Id.* at 874.

applied to the sacramental use of peyote.[47] The Court roundly rejected this claim and observed that the balancing test developed in *Sherbert* had never been used to grant an exemption from a generally applicable criminal law.[48] Justice Antonin Scalia, writing for the majority, noted that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense."[49] Indeed, the majority observed that anarchy could result from applying a compelling government interest standard in free exercise cases.[50]

a. Congress Responds to Smith*: The Religious Freedom Restoration Act*

This full-throated evisceration of judicial exemptions on free exercise grounds was met with sustained public outcry, and Congress's response to the public uproar over *Smith* was swift and decisive.[51] In 1993, a unanimous House of Representatives and a nearly unanimous Senate passed RFRA.[52] In a statement before the Senate Judiciary Committee, Senator Ted Kennedy, who introduced the bill along with twenty-three other Senators, characterized RFRA as simply restoring the "compelling government interest" requirement for evaluating free exercise claims using pre-*Smith* standards.[53] Indeed, the purposes of RFRA are enumerated as follows:

> (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

47. *Id.* at 876.

48. *Id.* at 882–83. This does not capture *Yoder*, however, which cannot be understood as a hybrid rights case.

49. *Id.* at 885 (citation omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

50. *Id.* at 888 ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

51. Condemnation of the *Smith* decision crossed ideological and political lines, and RFRA was supported by a coalition of unlikely bedfellows, including the National Association of Evangelicals, the American Civil Liberties Union, and People for the American Way. *See Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102nd Cong. 2 (1993) (statement of Sen. Edward M. Kennedy).

52. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

53. *See Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, *supra* note 51, at 2 (statement of Sen. Edward M. Kennedy) ("In essence, the act codifies the requirement for the Government to demonstrate that any law burdening the free exercise of religion is essential to furthering a compelling governmental interest and is the least restrictive means of achieving that interest.").

> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[54]

RFRA thus straddles the divide between judicial exemptions and legislative accommodations; operating as a legislative accommodation intended to restore the jurisprudence of judicial exemption. In practice, RFRA authorizes judges to apply strict scrutiny and to determine whether a neutral law of general applicability has imposed a substantial burden. In other words, RFRA instructs courts to continue their pre-*Smith* practices but to do so as a matter of statutory, rather than constitutional, interpretation.[55] Though the likely impact of RFRA in its 1993 form on free exercise jurisprudence is debatable,[56] its decisive passage and overwhelming public support signaled a popular openness to judicial exemptions. The Court's schizophrenic response to RFRA, however, underscored a profound uncertainty on the Supreme Court regarding judicial exemptions.

b. The Court Responds to RFRA: Boerne *and* O Centro

In *City of Boerne v. Flores*, the Archbishop of San Antonio sought an exemption under RFRA from city zoning laws.[57] The Court held that RFRA exceeded Congress's enforcement power under Section 5 of the Fourteenth Amendment and so was unconstitutional.[58] Indeed, the Court concluded that RFRA's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[59] Congress lacks the power to

54. 42 U.S.C. § 2000bb(b) (2012), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

55. Curiously, among the most vocal opponents of RFRA were prolife groups, who feared women would use RFRA to advocate for a religious right to an abortion. Though their fear never materialized, this underscores the complexity and bipartisanship of the third-party-harm doctrine in the free exercise jurisprudence. *See* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 534 (1993).

56. Heated scholarly debate arose over whether Congress intended a return to the robust exemption regime of *Sherbert* and *Yoder* that dominated the 1960s and 1970s, or the weakened exemption regime of the 1980s exemplified in *Lee*, *Bowen*, and *Goldman*. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 445–47 (1994); Lupu, *supra* note 20, at 54–55; *see also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998) (observing that RFRA litigation, particularly outside of the prison context, was largely unsuccessful).

57. 521 U.S. 507 (1997). Local zoning authorities denied the Archbishop of San Antonio a building permit to enlarge a church under an historic preservation ordinance. *Id.* at 512.

58. *See id.* at 536. Congress's power under Section 5 of the Fourteenth Amendment is limited to enforcing the provisions of the Amendment. The Court found that the Enforcement Clause is remedial, rather than substantive, such that RFRA, which altered the meaning of the Free Exercise Clause and imposed this reading on the states, exceeded Congress's powers under the Enforcement Clause. *See id.* at 519 ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce', not the power to determine what constitutes a constitutional violation.").

59. *Id.* at 532.

change or determine the scope of constitutional protections, but, with RFRA, Congress changed the meaning of the Free Exercise Clause.[60] Indeed, Congress not only overstepped its Section 5 power under the Fourteenth Amendment but also intruded into the proper domain of the judiciary, rendering RFRA unconstitutional as applied to states.[61] Nearly ten years after the Court had severely hobbled RFRA as it applied to the states, it affirmed RFRA as it applied to the federal government.[62] In *O Centro*, the Court upheld a preliminary injunction granting a religious group an exemption from the Controlled Substances Act in order to import hoasca, a hallucinogenic drug used in the group's religious rituals.[63] Applying the compelling-interest test detailed in the statute, the Court found that the government failed to show that hoasca was dangerous to human health and that importation by the group posed a risk of drug trafficking.[64] Although the Court maintained that RFRA could not require the Court to adopt the *Sherbert* test, it supported RFRA's commitment to a balancing approach.[65] The heavy burden of persuasion that the Court identified points to a reinvigoration of strict scrutiny as applied to the actions of the federal government. That the decision was unanimous is a strong signal that, by 2006, the Court was once again open to statutory accommodations on free exercise grounds.

c. RFRA at the State Level

With RFRA gutted at the federal level, a number of states responded by passing their own versions of RFRA ("state RFRAs").[66] All states protect religious freedom in some way, and the vast majority of state constitutions contain both free exercise and establishment provisions.[67] The language of these provisions, though, differs across states and differs from the language of the First Amendment. Many state constitutions, for instance, contain superstrong establishment clauses that go beyond the federal Establishment Clause and are primarily directed at limiting financial aid to sectarian

60. *Id.*

61. *Id.* at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

62. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

63. *Id.* at 425.

64. *Id.* at 432–33.

65. *Id.* at 439 ("Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.").

66. As of 2016, twenty-one states had enacted RFRA through legislation: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 607 n.4 (1999).

67. *See generally* Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951) (surveying religious freedom protections in state constitutions).

schools.[68] While the language of free exercise clauses in state constitutions differs from that of the U.S. Constitution, state courts have generally followed the Supreme Court's lead in interpreting their own free exercise clauses.[69] On the heels of the public outcry over *Smith* and *Boerne*, however, many state legislatures followed Congress's lead and passed state RFRAs, often as constitutional amendments. In an additional ten states, RFRA-like provisions have become law through state court decisions.[70] Where state RFRAs have been enacted through legislation, the language often draws verbatim from RFRA. Consider, for instance, Virginia's legislation:

> No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.[71]

Despite the rush to pass state RFRAs, many have languished largely unused and unchallenged for twenty years.[72] As the free exercise landscape

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68. *See, e.g.*, MO. CONST. art 1, § 7 ("[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and . . . no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.").

69. *See, e.g.*, ALA. CONST. art I, § 3 ("[T]he civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles."); N.D. CONST. art. I, § 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."); VA. CONST. art I, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.").

70. States with RFRA-like provisions enacted through judicial decisions include Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin. Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom [https://perma.cc/GFV9-V7AT].

71. VA. CODE ANN. § 57-2.02(B) (2017). The Virginia Code goes on to address the complex relationship between judicial exemptions and both the U.S. Establishment Clause and the state establishment clause:

> Nothing in this section shall be construed to (i) authorize any government entity to burden any religious belief or (ii) affect, interpret or in any way address those portions of Article 1, Section 16 of the Constitution of Virginia, the Virginia Act for Religious Freedom (§ 57-1 et seq.), and the First Amendment to the United States Constitution that prohibit laws respecting the establishment of religion. Granting government funds, benefits or exemptions, to the extent permissible under clause (ii) of this subsection, shall not constitute a violation of this section. As used in this subsection, "granting" used with respect to government funding, benefits, or exemptions shall not include the denial of government funding, benefits, or exemptions.

Id.

72. Where state RFRAs have been decisive, state courts followed the federal courts' lead in interpretation. *See, e.g.*, Rupert v. City of Portland, 605 A.2d 63, 65–66 (Me. 1992) (finding that confiscation of a marijuana pipe did not violate free exercise, even though the pipe's owner used marijuana for religious purposes); Attorney Gen. v. Desilets, 636 N.E.2d 233, 236

shifts once again in the aftermath of *Hobby Lobby*, state RFRAs present an opportunity to revitalize the balancing test of the earliest free exercise judicial-exemption cases, particularly if read in tandem with recent developments in Establishment Clause statutory accommodations.[73]

B. Statutory Accommodations and the Establishment Clause

While Free Exercise Clause jurisprudence involves judicial exemptions, Establishment Clause jurisprudence is centered on legislative accommodations. Though both create carve-outs from neutral laws of general applicability, exemptions are ordered by the judiciary by virtue of the Free Exercise Clause, while accommodations are written into the law by legislative discretion.

Whether and how accommodation can be distinguished from establishment is hotly contested. Advocates for statutory accommodation argue that the distinction is straightforward and turns on whether the statute in question promotes a favored form of religion or allows religious individuals the free exercise of religion.[74] Opponents of statutory accommodation, by contrast, argue that any accommodation of religion is tantamount to the establishment of religion. Indeed, as a reflection of Enlightenment values, the Establishment Clause is suspicious—and not protective—of religion.[75]

The following sections examine the development of legislative accommodations and the relationship between such accommodations and judicial exemptions, starting with an examination of the *Lemon* test in Part I.B.1 before moving to an analysis of the *Texas Monthly* test in Part I.B.2. Finally, Part I.B.3 takes up the special place of ministerial exceptions under

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(Mass. 1994) (reversing and remanding a lower court decision that rejected a landlord's claim that renting to unmarried couples violated his free exercise); State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) (denying Amish plaintiffs an exemption from generally applicable traffic laws sought on religious freedom grounds); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000) (denying a Native American correctional officer an exemption from the grooming police of the Department of Rehabilitation and Correction sought on free exercise grounds); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992) (finding that city landmarks ordinances restricting a church's ability to alter its exterior violated the First Amendment).

73. *See generally* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589 (2000); Lupu, *supra* note 20; Toni M. Massaro, *Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-*Hobby Lobby, 92 DENV. U. L. REV. 325 (2015); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25 (2015).

74. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992) ("The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action. . . . The hallmark of establishment is that the government uses its authority and resources to support one religion over another, or religion over nonreligion.").

75. Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 185 (1990) ("[A]id to religion in all its forms is fundamentally inconsistent with the secular nature of democratic principles embodied in the Constitution.").

the Establishment Clause by looking at two central cases: *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[76] and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[77]

1. The *Lemon* Test and the Entanglement Prong

As we have seen, the development of judicial exemptions has been marked by false starts and doctrinal shifts. The development of statutory accommodations under the Establishment Clause has been no different. Though the *Lemon* test has been challenged repeatedly, it remains the touchstone for assessing the constitutionality of statutory accommodations under the Establishment Clause. In *Lemon*, state monies were paid to religiously affiliated schools to supplement the salaries of teachers of secular subjects.[78] The Court held that the state aid violated the Establishment Clause, concluding that "[t]he Constitution decrees that religion must be a private matter . . . and that while some involvement and entanglement are inevitable, lines must be drawn."[79] The Court set out a three-pronged test for determining where these lines should be drawn. First, the statute must have a secular legislative purpose; second, the statute's primary effect must not advance or inhibit the practice of religion;[80] and third, the statute must not result in excessive government entanglement with religion.[81] Of these three, the entanglement prong raises particularly difficult interpretive questions, especially with regard to statutory accommodations for religiously affiliated daycares.

The Court opened its analysis of the entanglement prong by acknowledging that total separation of church and state is neither practical nor desirable.[82] Nor is it possible to construct a precise set of rules for determining whether a statute creates excessive entanglement.[83] Rather, a more nuanced approach is required, one that examines the "character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and

76. 483 U.S. 327 (1987).

77. 565 U.S. 171 (2012).

78. Lemon v. Kurtzman, 403 U.S. 602, 607–10 (1971).

79. *Id.* at 625.

80. A key primary-effects case is *Estate of Thornton v. Caldor, Inc.*, 474 U.S. 703, 710-711 (1985). There, the Court found that a Connecticut statute that extended to Sabbath observers an "absolute and unqualified right" not to work on the Sabbath impermissibly advanced religion, citing Judge Learned Hand's observation in *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58 (2d Cir. 1953), that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities," *id.* at 61.

81. *Lemon*, 403 U.S. at 612–13. The Court imports the entanglement prong from *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). Excessive entanglement is characterized by "comprehensive, discriminating, and continuing state surveillance of religion." Vernon v. City of Los Angeles, 27 F.3d 1385, 1399 (9th Cir. 1994).

82. *Lemon*, 403 U.S. at 614 (noting that fire inspections and building and zoning regulations are examples of "necessary and permissible contacts").

83. *Id.*

the religious authority."[84] In *Lemon*, the Court found that the schools in question were of a substantial religious character.[85] Indeed, recognition of this led the state to implement careful government controls and oversight of the aid to ensure that the funds were used only to support secular purposes.[86] The monitoring needed to guard against the use of funds to support the religious mission of the schools, however, resulted in the unacceptable entanglement of church and state.[87] In addition to requiring the direct intervention of the state into the affairs of a religious institution, the Court worried that state aid to religious schools would be dangerously divisive.[88]

While the application of the *Lemon* test has shifted since it was established in 1971, the contours of the entanglement prong have remained largely intact. Concerns about administrative entanglement, the type of entanglement at issue in *Lemon*, remain particularly prominent. In *Lemon*, the test was used to invalidate state aid to religion, yet religious groups seeking statutory accommodations have also invoked excessive entanglement to argue for the right to be free of state oversight.[89]

Statutory accommodations that restrict state inspection of the religious content of a religious organization do not extend, however, to all secular government activity.[90] For example, courts have held that religious organizations must comply with fire inspections and building and zoning regulations,[91] as well as record-keeping requirements.[92] The excessive-entanglement test, developed to address the issue of when, if ever, state funds may be used to support the secular activities of a religious group, raises as many questions as it answers. As such, while the excessive-entanglement test stands as one of the chief interpretive approaches to the Establishment Clause, the Court has developed other approaches, principally the three-step framework in *Texas Monthly, Inc. v. Bullock*.[93]

2. The *Texas Monthly* Test: Free Exercise Burdens and Harm to Third Parties

In *Texas Monthly*, the Court considered whether a statutory accommodation granted to religious groups violated the Establishment Clause.[94] The Court struck down a Texas law that exempted religious

84. *Id.* at 615.
85. *Id.* at 616.
86. *See id.* at 619–20.
87. *Id.* at 619.
88. *Id.* at 622 ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.").
89. *See* Brief of Constitutional Law Scholars as Amici Curiae Supporting Respondents at 11–13, Sebelius v. Hobby Lobby, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 356639, at *11–13.
90. *See infra* Part III.B.
91. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985).
92. *Id.* at 305–06.
93. 489 U.S. 1 (1989).
94. *Id.* at 5 (plurality opinion).

periodicals from paying sales tax as an "unjustifiable award[] of assistance to religious organizations" that "convey[s] a message of endorsement" to those excluded organizations.[95] In its analysis, the Brennan plurality developed a three-step framework for determining whether a legislative accommodation is appropriate under the Establishment Clause.[96] The threshold question is whether the benefits are available to a broad array of recipients, secular and religious alike.[97] If the benefits flow exclusively to religious recipients, the threshold is met, and the Court moves to the second step, which consists of two prongs.[98] In the first prong of the second step, the Court asks whether the benefits lift an obstacle imposed by the government on the free exercise of religion, while in the second prong, the Court asks whether the accommodation imposes harm on third parties.[99]

As to the threshold question, while not every nonreligious group need benefit, enough nonreligious groups must benefit to demonstrate that the benefit is not targeted to religious groups. Thus, a government program that is neutral in its offerings such that benefits do not flow exclusively, or nearly so, to religious institutions or persons may "withstand Establishment Clause scrutiny without further analysis."[100]

As to the first prong, if a benefit flows only to religious groups or persons, this benefit can be justified if it lifts a preexisting government-imposed free exercise burden. The deep entanglement of free exercise jurisprudence and establishment jurisprudence is evident. Indeed, it has been observed that the Court has not yet "flesh[ed] out the operational meaning of this principle,"[101] thereby sidestepping the interpretive difficulties that arise when the two Clauses appear to be at odds. In these so-called mixed-effect cases, granting a legislative accommodation would alleviate a free exercise burden, but such an accommodation may also create establishment problems where it imposed significant harm on third parties.[102]

As to the second prong, the Court asks after harms to third parties. Religion-only benefits granted through statutory accommodations may be appropriate only if they do not impose "substantial" burdens on third parties. The Court offers little guidance, however, for determining when a burden on

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95. *Id.* at 15 (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor J., concurring)).

96. *Id.* ("[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement to slighted members of the community.'" (third and fourth alterations in original) (quoting *Amos*, 483 U.S. at 348)).

97. *Id.* at 14.

98. *Id.*

99. *Id.* at 15–16.

100. *See* McConnell, *supra* note 74, at 699.

101. *Id.* at 700.

102. Consider, for example, the catch-22 posed by Sunday-closing laws. Judicial exemptions from such laws lift a burden on Saturday Sabbatarians. Because most stores are not operated by Saturday Sabbatarians, however, the exemption effectively imposes an economic cost on Sunday observers. *See id.* at 701–02.

a third party is so substantial that it would militate against an accommodation.[103] Thus, while harm to third parties as a limiting factor on establishment claims is within the *Texas Monthly* framework, the contours of what constitutes a harm to third parties sufficient to defeat statutory accommodation remains largely unexplored. It is not clear in the Brennan plurality whether the two prongs in step two are properly read as disjunctive (i.e., a religion-only benefit is appropriate if it lifts a free exercise burden or imposes significant harm on a third party) or as conjunctive (i.e., a religion-only benefit is appropriate if it lifts a free exercise burden and also does not impose a significant harm on a third party).

3. Harm to Third Parties: The Ministerial Exception in *Hosanna-Tabor* and *Amos*

Under the ministerial exception, some of the internal affairs of religious organizations may be exempt from generally applicable laws.[104] Within Establishment Clause jurisprudence, the ministerial exception line of cases occupies the muddy middle ground between judicial exemptions under the Free Exercise Clause and legislative accommodations under the Establishment Clause. Religious organizations arguing for a ministerial exception, then, do so from both Clauses: to be free to practice their religion, there must be limits on state oversight of religious matters.

Two justifications for the ministerial exemption are relevant to the question of statutory accommodations for religiously affiliated daycares: (1) to protect religious rules of ministry that would otherwise be prohibited in a secular context and (2) to protect the right of religious organizations to evaluate its employees according to religious standards.[105] As such, the ministerial exception is an explicit grant intended to benefit only religious organizations. The complexity of the ministerial exception in action as a legislative accommodation is illustrated in a pair of cases: *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[106] and *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[107]

Hosanna-Tabor stands as the paradigmatic application of the ministerial exception. At issue in *Hosanna-Tabor* was whether a teacher who had sought

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103. *Id.* at 703–04. McConnell argues that in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court implied that a burden was substantial when it was significantly disproportionate to the benefit that accrued to the religious person or group. McConnell, *supra* note 74, at 703–04. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), by contrast, the Court implied that even a de minimis burden on third parties triggered establishment concerns. McConnell, *supra* note 74, at 703–04.

104. Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. L. REV. 973, 977–78 (2012) (arguing that the ministerial exception emerged from the institutional separation of church and state that has been at the foundation of American civic thought since colonial times).

105. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 848–49 (2012).

106. 565 U.S. 171 (2012).

107. 483 U.S. 327 (1987).

and received the designation of "called" teacher, meaning she understood herself as being called to her vocation by God, could be fired for violating the religious teachings of the Church.[108] Upholding the Church's right to fire the teacher, the Court held that the ministerial exception shielded the church-operated school from liability under the Americans with Disabilities Act (ADA),[109] which would otherwise have protected the interests of a school employee.[110] Indeed, failing to grant the ministerial exception would violate both the Free Exercise Clause and the Establishment Clause.[111]

The Court's holding in *Hosanna-Tabor* was narrow, finding only that the ministerial exception precluded an employment discrimination suit brought by a minister.[112] Evaluating the claim under the *Texas Monthly* test, however, would likely result in a similar outcome. First, the benefit—exemption from certain ADA provisions—would flow only to religious institutions. Having met the threshold requirement of the first step, the analysis would then consider the two prongs of the second step. First, does this religion-only benefit lift a preexisting government-imposed free exercise burden? The ministerial exception underscores the great deference shown to religious groups in the appointment of religious personnel. As such, the church would likely prevail on this first prong of the second step.

Considering how the accommodation might fare under the second prong of the *Texas Monthly* test is instructive. The Court acknowledged that its ruling imposed harms on a third party—namely, the teacher who lost her job.[113] Having done so, the Court laid out a three-part test for evaluating third-party harm: (1) the magnitude of the harm imposed on the third party, (2) the likelihood of the harm occurring, and (3) the magnitude of the belief impacted. In *Hosanna-Tabor*, the magnitude of the harm imposed on the third party was significant: the teacher lost her job. The likelihood of the harm occurring, or that other teachers would be fired for violating a religious stricture, was also high. Further, it is unlikely that threatening to sue to enforce one's civil rights constitutes legitimate grounds for dismissal. Finally, the magnitude of the impacted belief was also high, as it cut to the quick of the Church's expectations of its ministers. With all three elements of the *Texas Monthly* framework raising strong concerns, and two of the three elements militating against a statutory accommodation, the Court's decision in *Hosanna-Tabor* thus underscores the arguably outsized weight given to

108. *Hosanna-Tabor*, 565 U.S. at 179–81. The Lutheran Synod believes that Christians should resolve disputes internally. *Id.* at 180. The teacher's threat to sue the Church for firing her in violation of the ADA violated that belief. *Id.* at 204–05.

109. The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability as well as from retaliating against an employee who charges her employer with violating the ADA. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12112(a), 12203(a) (2012).

110. *Hosanna-Tabor*, 565 U.S. at 179–80.

111. *Id.* at 188–89 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. . . . [It] also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

112. *Id.* at 188.

113. *Id.* at 179, 196.

the ministerial exception. Whether and to what extent proponents of statutory accommodations for religiously affiliated daycares can successfully argue that the accommodations fall under the ministerial exception, then, will likely have a significant outcome on a court's decision if these accommodations are challenged.

If *Hosanna-Tabor* represents a relatively straightforward application of the ministerial exception, *Amos* underscores the Court's capacious understanding of the exception's scope. In *Amos*, a building engineer at a gymnasium owned and operated by the Church of Jesus Christ of Latter-Day Saints (LDS) was fired when he failed to secure a certificate from the LDS authorities that he was a member in good standing.[114] The employee sued, alleging religious discrimination under Title VII of the Civil Rights Act of 1964.[115] The Court rejected the employee's argument, finding that § 702, which permits religious organizations to discriminate on religious grounds, applied to the secular nonprofit activities of said organizations.[116] Thus, though *Amos* ostensibly addresses whether a statutory accommodation violates the Establishment Clause, judicial exemptions and the free exercise concerns they address also played an important role in the Court's reasoning.

Acknowledging the deep connection between the Free Exercise and Establishment Clauses, the Court concluded that properly curtailing government interference in religious life disfavors not only positive statutory mandates to which a religious group must conform its practices but also statutes that would force a religious organization to defend its beliefs and practices before a judge who "would not understand its religious tenets and sense of mission," as so doing places a "significant burden on a religious organization."[117] The wall of separation between church and state thus appears particularly impregnable, with religious organizations effectively shielded from having to defend practices forbidden to secular organizations.

As an extension of the ministerial exception to employees whose ministerial function was tenuous at best, *Amos* underscores the complexity of the exception.[118] For some, the ministerial exception is fundamental to protecting religious institutions from state dominance.[119] Others endorse ministerial exceptions less because they fear state overreach in religious affairs and more because they are skeptical of the courts' ability to properly distinguish religious from non-religious job functions.[120] Still others argue

114. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).

115. *Id.* at 331; *see also* 42 U.S.C. § 2000e-2(a)(1) (2012).

116. *Amos*, 483 U.S. at 335–36.

117. *Id.* at 336.

118. For an excellent survey and critique of different scholarly assessments of the ministerial exception, see generally Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 LEWIS & CLARK L. REV. 1265 (2017).

119. *See, e.g.*, Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 542 (2015).

120. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) ("[C]ourts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs." (second alteration in original) (quoting

that reading the ministerial exception too broadly allows religious organizations to engage in pernicious discrimination.[121] *Amos* and *Hosanna-Tabor*, when read together, demonstrate the need for a balancing test, and the third-party-harm doctrine provides just such a test.

II. THE THIRD-PARTY-HARM DOCTRINE AS A TOOL TO CHALLENGE EXEMPTIONS FROM STATE REGULATIONS

The third-party-harm doctrine is both implicit in the strict scrutiny analysis developed with regard to judicial exemptions[122] and is, or should be, used by legislators in the creation of statutory accommodations.[123] While the institutional question of who is best positioned to evaluate third-party harm claims is complex, abandoning the responsibility entirely to the legislators is not advisable.[124] Rather, there is an important role for courts to intervene when statutory accommodations impose significant harms on third parties.[125]

As a balancing test, the third-party-harm doctrine counsels that "[r]ather than subordinating all religious conduct to laws of general application (or vice versa), . . . enforcement of, or exemption from, a law should be determined by reference to the effect such decisions have on third parties."[126] Not all statutory accommodations of religious practices impose burdens on third parties, and some burdens are insignificant because they are widely distributed.[127] The notion of harm to third parties as a limiting factor on

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Thomas v. Review Bd., 450 U.S. 707, 715 (1981))); *see also* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1787–89 (2008).

121. *See, e.g.*, Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 399, 399–400 (Micah Schwartzman et al. eds., 2016).

122. While the premise that free exercise should be limited when it causes harm to third parties runs throughout *Sherbert*-era jurisprudence, perhaps its most famous articulation predates *Sherbert*. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), Justice Robert H. Jackson noted that the "limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public," *id.* at 177.

123. That legislators will consider the harm to third parties imposed by statutory accommodations—and indeed are in a better place to evaluate these harms—is central to much scholarly analysis. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 205–10 (2d ed. 2014).

124. The extent to which the compelling interest, narrowly tailored approach captures harm to third parties is, however, debatable. For instance, where the state's compelling interest is in helping one party and the narrow tailoring focuses on that party, the possible impact on third parties may not be properly taken into account.

125. *See* Nelson Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 217 (Elizabeth Sepper et al. eds., 2017) (proposing that the undue hardship standard used in the context of employment law may guide our intuitions about how much harm is too much).

126. *See* Lipson, *supra* note 73, at 638.

127. *See* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 56–57 (2014). The authors note that in *O Centro*, the Court observed that the sect's drug use did not impose a burden on third parties outside the sect, and that in *Walz*, tax exemptions for churches do not impose a significant burden on third parties because the burden is distributed across a large and indeterminate class. *Id.*

religious freedom is entrenched in both Free Exercise and Establishment Clause jurisprudence. Comporting with the intuitions of both religion clauses, then, the doctrine of harm to third parties is uniquely positioned to ease the tensions that arise when free exercise and establishment concerns abut one another. Statutory accommodations for religiously affiliated daycares raise both free exercise and establishment concerns, and as such the third-party-harm doctrine illuminates a new—and potentially more successful—strategy for challenging these accommodations. The following Part sketches the core concerns of the doctrine of third-party harms and key moments in the emergence of the third-party-harm test.

A. The Doctrine of Third-Party Harm: Definitions and Developments

The idea that harm to third parties might function as a limiting factor on judicial exemptions and statutory accommodations in the name of religious freedom was implicit in many of the Court's earliest First Amendment cases.[128] Recently, the doctrine reemerged in *Cutter v. Wilkinson*,[129] with the Court observing that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries."[130] In all these cases, the doctrine of third-party harm is used, whether implicitly or explicitly, as a balancing test: a judicial exemption or statutory accommodation is appropriate if and only if the religious interests at stake outweigh the magnitude of the burden and the likelihood of harm occurring. While in one line of cases, the Court has expressed profound suspicion of balancing tests when it comes to religious freedom,[131] in another equally prominent line of cases, the Court has employed a balancing test wherein harms to third parties are weighed against the benefit to the religious group.[132] As the third-party-harm test becomes more prominent, scholars have grappled with the proper structure and function of the test. Analyzing the third-party-harm test as a balancing test, this Part examines how the third

128. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 19–20 (1989) (plurality opinion) (noting that the state's interest in the uniform collection of sales tax must be weighed against the interests of publishers of religious periodicals to spread the word without the burden of sales tax); Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (observing that the interests of the state in a well-educated citizenry must be weighed against the religious interests of the Amish parents in keeping their children from school); Reynolds v. United States, 98 U.S. 145, 166–68 (1879) (noting that the interest of the state in laws that apply uniformly to all citizens must be weighed against the interests of the LDS in practicing plural marriage).

129. 544 U.S. 709 (2005).

130. *Id.* at 720.

131. *See* Emp't Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

132. There is a school of thought, represented by Marci Hamilton, that any harm is too much harm, such that exemptions ought to be granted only where religious organizations can prove they will do no harm to others. *See* HAMILTON, *supra* note 123, at 205–10. This argument has been criticized as reductionistic and implausible in a crowded society where harm can be defined capaciously. *See* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1171 (2007) (reviewing MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 205–10 (2005)).

party ought to be identified and how the scales in the balancing test ought to be calibrated, before finally turning to the invocation of the third-party-harm doctrine in *Hobby Lobby*.

1. Third-Party Harms as a Balancing Test

To assess whether a given action imposes impermissible harms on a third party, the Court in *Texas Monthly* laid out a three-factor balancing test: first, the magnitude of the burden; second, the likelihood of the feared harm occurring; and third, the magnitude of the religious interest at stake.[133] First, as the Court stated in *Estate of Thornton v. Caldor, Inc.*,[134] the burden in question must be substantial. In *Thornton*, Connecticut's Sabbath observance statute granted a benefit exclusively to religious persons, namely, the right not to work on whatever day of the week that person observed the Sabbath.[135] This religion-only benefit imposed a significant burden on employers and non-Sabbatarian employees by requiring them to conform their business practices to the particular religious practices of the employee.[136] The significance of the burden on third parties was central to the Court's rejection of the statute as a violation of the Establishment Clause. Determining when a burden is substantial is often challenging, however, and does not admit of a bright line analysis.[137] While there will be difficult cases at the margin, there will also be cases in which the substantiality of the harm, such as death or serious injury, is unquestionable.

Second, scholars argue that courts ought to carefully scrutinize the likelihood of the harm occurring.[138] Where the risk of that harm is vanishingly small, an exemption should not be denied simply because it might impose harm on a third party. For example, in *Holt v. Hobbs*,[139] the state cited security concerns related to hiding contraband in denying a Muslim inmate's request to grow a half-inch beard as part of his religious observance.[140] The Court rejected this argument. The likelihood that the inmate would conceal a dangerous weapon in his half-inch beard was so vanishingly small that the burden on third parties was not only not substantial, it was nearly nonexistent.[141] Courts have extended this analysis to situations in which the likelihood of occurrence is less remote and the potential harm is very severe. For example, in custody disputes in which one

133. For an excellent discussion of the three-factor test, see Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV 1375, 1376–81 (2016).

134. 472 U.S. 703 (1985).

135. *Id.* at 706.

136. *Id.* at 709–10.

137. *See* Lund, *supra* note 133, at 1377 ("[T]he significance of a burden is more of a spectral variable than a dichotomous one, and there will be no clear boundary between significant and insignificant burdens.").

138. *Id.* at 1378.

139. 135 S. Ct. 853 (2015).

140. *Id.* at 861.

141. *Id.* at 864–65. *Holt* was decided under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and not the Free Exercise Clause. *Id.* at 86–62.

parent is a Jehovah's Witness (and thus opposed to blood transfusions for religious reasons), where the child is healthy and the likelihood that he or she would require a transfusion is low, courts have refused to award custody to the non-Witness parent solely because of the threat of harm.[142] The likelihood of a healthy child falling so ill as to require a blood transfusion is, courts have concluded, too remote to be relevant.[143]

Finally, scholars argue that courts ought to consider the magnitude of the religious interests at stake. Measuring the magnitude of a religious interest is, however, quite difficult. The ministerial exception is the paradigmatic instance of courts considering the magnitude of the religious interest at stake.[144] The ability of religious bodies to choose their leaders free from state interference is so central to the full and free functioning of these bodies that judicial exemptions or statutory accommodations to allow this functioning are appropriate.[145] Even where this causes real and significant harm to third parties (such as the loss of employment in both *Hosanna-Tabor* and *Amos*), the significant religious interests at stake in the appointment of ministers outweigh the harm to the fired employees. The extension of the ministerial exception in *Amos* to employees engaged in nonreligious work in secular affiliates of a religious organization, however, raises concerns that the once-narrow exception is now much more capacious. Beyond the ministerial exception, courts have struggled to arrive at a method for assessing the magnitude of the religious belief, proffering various criteria, such as the centrality of the belief and the sincerity of the belief.

Courts have long resisted evaluating the truth of a religious claim,[146] and at times this resistance has been extended to evaluations of the sincerity of a religious claim.[147] By and large, however, courts have distinguished between assessing the truth of a religious claim on the one hand and its centrality or sincerity on the other, and they have been willing and able to evaluate the latter fairly and effectively.[148] Of the three factors for evaluating whether an accommodation impermissibly imposes harm on a third party, then, the

142. *See* Harrison *ex rel.* J.D.H. v. Tauheed, 256 P.3d 851, 866–67 (Kan. 2011); Garrett v. Garrett, 527 N.W.2d 213, 221 (Neb. Ct. App. 1995).

143. *See* Varnum v. Varnum, 586 A.2d 1107, 1112 (Vt. 1990) ("We are also concerned about the use of the finding that defendant would not allow her children to have blood transfusions even if medically necessary, in the absence of any evidence that such an eventuality is likely and cannot be resolved in ways other than depriving defendant of custody.").

144. *See supra* Part I.B.3.

145. *See supra* note 111 and accompanying text.

146. Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.").

147. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (noting that there is an overriding interest in "keeping the courts 'out of the business of evaluating' . . . the sincerity with which an asserted religious belief is held" (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))).

148. *See* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 60–62 (2014) (observing that courts have evaluated the sincerity of religious claims on questions ranging from conscientious objection, to drug use, to bankruptcy proceedings).

magnitude of the religious interest at stake appears to be the most challenging to apply.

2. Identifying the Third Party

Identifying who, precisely, counts as a third party for purposes of the third-party-harm test has significant implications for how such claims can be litigated. Determining who, if anyone, has standing to challenge a judicial exemption or statutory accommodation can be difficult.[149] When identifying the harmed third party, two overarching questions emerge. First, how identifiable must the third party be? Second, ought the harm to "internal" third parties be treated differently from the harm to "external" third parties?

First, here is significant disagreement as to the degree of specificity with which courts ought to identify the harmed third party. There is a line of cases, exemplified by *Reynolds* and *Smith*, in which the identity of the third party is defined quite capaciously, seeming to encompass the entire body politic.[150] That the Court implicitly identified the state as the harmed third party rather than, for example, wives or children living in polygamous households, is perhaps surprising.[151] Likewise, in *Yoder*, the harms that the Court weighed were the harm to the state of having an uneducated citizen and the harm to the parents' free exercise of religion.[152] As Justice Douglas notes in his dissent in *Yoder*, however, the Court arguably did not correctly identify the third party most directly harmed by the exemption: the Amish children.[153] Further, Jonathan Lipson has argued that where the harmed party is the state as an abstraction, the ability to interfere with the internal affairs of a religious organization ought to be strictly curtailed.[154]

Second, where the harmed third parties are individuals, rather than the state, should it matter whether the harmed party is a member of the same religious community? One might argue that harms imposed on third-party insiders, such as members of the religion, ought to be given less weight, provided that the insiders have a real ability to exit the offending organization, than harms imposed on third parties who are removed from the religious organization.[155] Even were one to accept the insider versus outsider

149. For example, secular daycares that have challenged statutory accommodations granted to religiously affiliated daycares have had great difficulty establishing standing. *See infra* Part III.B.

150. In both cases, the key concern was the damage an exemption would do to the cohesion of the body politic were individuals allowed to become laws unto themselves. *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990); Reynolds v. United States, 98 U.S. 145, 167 (1878).

151. By contrast, the invocation of a depersonalized body politic in *Smith* is perhaps more understandable, as it is difficult to imagine who would suffer individualized harm were Native Americans granted an accommodation to use peyote in ritual settings.

152. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

153. *Id.* at 245 (Douglas, J., dissenting) ("It is the future of the student, not the future of the parents, that is imperiled by today's decision.").

154. *See* Lipson, *supra* note 73, at 670 (citing Watson v. Jones, 80 U.S. 679, 727–29 (1871)).

155. *See generally* Emile Lester, *The Right to Reasonable Exit and a Religious Education for Moderate Autonomy*, 68 REV. POL. 612 (2006) (noting the central importance of freedom

dichotomy, determining who qualifies as an insider can be challenging. For example, are children "insiders" for the purposes of analysis if they lack a meaningful ability to exit the community?[156] How to identify the relevant party for the purposes of the third-party-harm test remains unsettled, and the ultimate resolution of this question will have a significant effect on how questions of standing in cases invoking the test are resolved.

3. Calibrating the Scales for the Balancing Test

Even where scholars agree that harm to third parties ought to be the test for determining whether a statutory accommodation or judicial exemption for religious practice is legitimate, how to calibrate the test poses additional challenges. Opinions run the gamut from setting the scales evenly to allowing religious communities a "thumb on the scale." Proponents of setting the scales evenly offer both practical and principled reasons for so doing. In his analysis of *Yoder*, Ira Lupu argues that, despite the language of substantial burden and compelling interest, the Court was actually engaged in an even-handed balancing of the interests of both parties, factoring in the harms for each side at the margin.[157] This fact-intensive analysis, where there was no presumption either in favor of or opposing an exemption and where the benefits and harms of an exemption were carefully weighed, best serves the interests of both parties. Indeed, as Lupu notes, the ability to balance benefits and harms accurately is so important that it should be solely the province of the legislature, such that judicial exemptions should be abandoned in favor of statutory accommodations.[158]

Adopting a slightly different approach, Jonathan Lipson advocates for the scales to be evenly set when the religious exercise harms third parties but for a thumb to be on the scale for religious persons or organizations when it does not.[159] As such, "[t]he thumb should rest on the scales in favor of religious actors in inverse proportion to the presence of third parties."[160] By contrast, Michael McConnell would grant religion a thumb on the scale even where the practice in question imposes harm on third parties.[161] For McConnell, religion has a special constitutional status, and as such, while legislatures may consider economic and other harms to third parties when considering accommodations, they are not required to do so.[162] Though there is

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of exit, particularly where exemptions may impair a person's ability to function outside of the religious community).

156. *See supra* notes 38–39 and accompanying text. The same logic also applies to the children of Jehovah's Witnesses who may be too young to effectively exit the church in order to receive a life-saving blood transfusion.

157. *See* Lupu, *supra* note 20, at 50.

158. *Id.* at 101.

159. *See* Lipson, *supra* note 73, at 671.

160. *Id.*

161. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 37. McConnell does recognize one caveat, namely where the accommodation would impose a burden on a third party's religious liberties. *Id.* at 23.

162. *Id.* at 38 ("[T]he legislature is [not] required to treat religious conviction as if it had no greater weight or dignity under the Constitution than economics or similar interests.").

disagreement in the scholarly community about how to set the balance and which kinds of harms count,[163] there is broad agreement that a third-party harm balancing test is consistent with the Free Exercise and Establishment Clauses of the Constitution.[164]

B. The Resurgence of the Third-Party-Harm Test: Hobby Lobby

Though the idea that harm to third parties ought to limit judicial exemptions and statutory accommodations has run throughout Free Exercise and Establishment Clause jurisprudence, in recent years the third-party harms test has enjoyed a new prominence. The Court's discussion of harm to third parties as a limiting factor on religious accommodations in *Hobby Lobby* points to a new strategy for the parents of children who died or were injured in religiously affiliated daycares excepted from state regulations to challenge these accommodations.[165]

In *Hobby Lobby*, a for-profit, closely held corporation sought an exemption from the Affordable Care Act's (ACA) mandated contraceptive coverage for drugs or devices that operate after the moment of conception because contraception contravenes the owners' sincere religious belief that life begins at conception.[166] Under RFRA, a government action that imposes a substantial burden on religious exercise must (1) serve a compelling government interest and (2) be the least restrictive means of serving that interest.[167] In a five-to-four decision, the Court assumed arguendo that the government has a compelling interest in ensuring that people have access to contraceptive coverage as part of their health insurance but found that the mandate failed the second prong, as there are less restrictive ways to achieve the same goal.[168] Indeed, Department of Health and Human Services (HHS) regulations already excepted nonprofit organizations with religious objections from the contraceptive mandate.[169] The group-health-insurance issuer for such organizations must exclude contraceptive coverage from the employer's plan and issue separate contraceptive payments for plan participants without imposing the costs on the organization.[170] The decision had significant implications for religious liberty jurisprudence, chief among them weakening the "substantial" in "substantial burden."[171] Though the

163. *See, e.g.*, Gedicks & Koppelman, *supra* note 127, at 56–57; Lipson, *supra* note 73, at 635–50.

164. *See, e.g.*, Lund, *supra* note 133, at 1375; Lupu, *supra* note 20, at 100–01.

165. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 n.37 (2014).

166. *Id.* at 2766.

167. *Id.* at 2759.

168. *Id.* at 2758–59.

169. *Id.* at 2763. HHS has effectively exempted certain religious organizations from the mandate, namely eligible organizations, defined under 45 C.F.R. § 147.131(b) (2016) as nonprofit organizations that hold themselves out as a religious organization and oppose providing some or all contraceptive coverage because of religious objections. To qualify for an accommodation, an organization need only certify that it is a religious organization.

170. *Id.*

171. Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 179–80 (2015) (noting that the majority decision

doctrine of third-party harm does not figure prominently in the majority's decision, it appears in a modified form in the Court's discussion of the government's argument that the plaintiff is seeking an exemption from a legal obligation to confer a benefit on a third party.[172] Indeed, the assumption that the government would provide an alternative mechanism for female employees to obtain free contraception and thus to suffer no harm is key to the holding. Though the Court (rightly) rejected HHS's argument that RFRA does not permit the state to burden one party's free exercise so long as the burden confers a benefit on another party,[173] it noted that impeding women's receipt of healthcare benefits harms women and is not what Congress contemplated.[174]

Though the question of harm to third parties was dismissed rather cavalierly in the majority decision, Justice Ginsburg raised it forcefully in her dissent: "No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect."[175] The harms imposed on third parties—here, female employees of corporations exempted from the ACA mandate—are significant, from increased contraceptive costs, to the risk of unplanned pregnancies, to the denial of contraceptives used to treat other diseases such as menstrual disorders.[176] Writing for the majority, Justice Alito acknowledged that the denial of contraceptive coverage burdened third parties but concluded that HHS, by creating an accommodation for certain nonprofit religious organizations whereby the costs for contraceptive coverage would be borne not by the organization but by the plan issuer, had already developed a work-around to alleviate this burden.[177]

Indeed, had the Court applied the three-factor third-party-harm test, the outcome would likely have been different. First, the magnitude of the harm to third parties is high: the inability to control one's reproductive life imposes significant burdens on women. Second, the likelihood of harm is high: excluding contraceptive coverage from the employer health plan would have an immediate and noticeable effect on women.[178] Though the fact of a work-

simply deferred to Hobby Lobby's assertion that the mandate imposed a substantial burden); *see also* Alex J. Luchenitser, *A New Era of Inequality?:* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 68 (2015). Luchenitser notes that the religious organization need show only that the claims that the governmental action imposes a substantial burden reflects its honest conviction. *Id.*

172. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

173. *Id.*

174. *Id.* at 2782–83.

175. *Id.* at 2801 (Ginsberg J., dissenting).

176. For a discussion of the myriad burdens that reduced access to contraceptives imposes on women, see Gedicks & Koppelman, *supra* note 127, at 57–59.

177. *Hobby Lobby*, 134 S. Ct. at 2763, 2782 (majority opinion). Critics have challenged this assessment, arguing that the majority fails to appreciate the significant practical difficulties of achieving the work-around. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1492–95 (2015).

178. The harm to third parties cannot be effectively alleviated by requiring women to obtain contraceptive-only coverage, as the attendant statutory, regulatory, and practical barriers this entails create significant hurdles for women seeking contraception. Contraception-only

around to accommodate religious nonprofits may diminish the likelihood of harm somewhat, these work-arounds have been challenged repeatedly and their continued existence is somewhat precarious.[179] Finally, the magnitude of the affected belief is also high. Courts, in recognition of the importance of these beliefs to many different religious communities, are particularly sensitive to religious views about when life begins. Thus, though the *Hobby Lobby* majority did not address the question of third party harms in any depth, the issue was raised, and with especial force in Justice Ginsburg's dissent. Had the third-party-harm balancing test been applied, it is likely that the harm imposed on the female employees would outweigh the burden imposed on the employer's religious beliefs. With this account of the third-party-harm doctrine as it intersects with the religion clauses in place, this Note brings the doctrine to bear on the difficult question of legislative accommodations for religiously affiliated daycares.

III. STATUTORY ACCOMMODATIONS FOR RELIGIOUSLY AFFILIATED DAYCARES: ESTABLISHMENT AND FREE EXERCISE CONCERNS

As the preceding Parts demonstrate, the jurisprudence of the Free Exercise and Establishment Clauses is complex and contradictory. Some states,[180] perhaps noting the Court's shifting interpretation of these Clauses and seeking to protect religious institutions from state interference, enacted statutes excusing religiously affiliated daycares from complying with certain state regulations.[181] Even after *Smith*, when the Court adopted a deep suspicion of judicial exemptions, the statutes remained in force.[182] Indeed, where these statutes were challenged, the challenges were wholly unsuccessful.[183] Part III.A considers several such statutes, while Part III.B examines various (failed) efforts to challenge these statutes.

A. Statutory Accommodations for Religiously Affiliated Daycares

All states regulate daycare facilities. Though the precise scope of the regulations, the mechanisms for ensuring compliance, and the penalties for failure to comply vary from state to state, there are significant similarities.

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policies are not permitted under the ACA, as they are not qualified health plans that offer all essential health benefits. *See* Brief of Health Policy Experts as Amici Curiae in Support of Respondents at 15–20, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Nos. 14-1418 et al.), 2016 WL 675863, at *15–20. In the alternative, requiring women to leave their employer-sponsored health plans would likely disrupt the important relationships women have with their healthcare providers as they would almost certainly face a different provider network. *Id.* at 18.

179. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam). The Court, down to eight members, remanded the case for further proceedings. *Id.* at 1561.

180. *See supra* note 3.

181. Alabama amended its code in 1981 to exempt religiously affiliated daycares from many regulations. *See* 1981 Ala. Laws 396. Indiana extended exemptions to religiously affiliated daycares in 1993. *See* 1993 Ind. Acts 106.

182. *See supra* Part I.A.2.a.

183. Where the statutes were challenged, courts found either that (1) the exemptions satisfied the *Lemon* test and so were acceptable statutory accommodations; (2) the challengers, secular daycares, lacked standing as they failed to show that the exemptions resulted in actual economic harm; or (3) both of the preceding. *See infra* Part III.B.

Broadly speaking, states prescribe a rigorous set of regulations for daycare facilities that cover a wide range of topics including character and qualifications of the caregivers, minimum child-to-caregiver ratios, acceptable disciplinary practices, health and safety standards, and record-keeping requirements.[184] The definition of "daycare facility" is quite capacious in many states, such that the regulations cover a broad range of childcare arrangements, from formal preschools to in-home care.[185] A number of states have enacted statutes exempting religiously affiliated daycares from many of the regulations that govern secular facilities. The scope of these accommodations ranges widely, from near-total exemption from state regulation in Alabama[186] to more limited exemptions in North Carolina, with other states, including Florida and Virginia falling somewhere in between. The accommodations address issues of health and safety, staff qualifications and training, and reporting requirements. Considering the scope of the statutory accommodations granted to religiously affiliated daycares provides valuable insight into the internal logic of the accommodations.

Before turning to a close examination of the statutes regulating daycares and the accommodations extended to religiously affiliated daycares, a brief note on the complicated history of establishment clauses in state constitutions underscores the complex place of religiously affiliated educational institutions in state legislative schema. In response to the influx of Roman Catholics to the United States in the mid-nineteenth century—and their attendant efforts to establish Roman Catholic schools—a significant number of states adopted so-called Blaine amendments into their state constitutions.[187] Blaine amendments prohibit all financial support of religious institutions by the state.[188] Though the Blaine amendments are

184. *See, e.g.*, ALA. CODE § 38-7-7 (2017); FLA. STAT. § 402.305 (2017); IND. CODE § 12-17.2-6-2 (2016); MO. REV. STAT. § 210.211 (2016); N.C. GEN. STAT. § 110-106 (2017); VA. CODE ANN. § 63.2-1716 (2017).

185. *See* ALA. CODE § 38-7-8. The Alabama Administrative Code defines childcare facility capaciously, requiring any facility that provides care for one or more children unrelated to the provider for more than four hours a day to be licensed whether or not the provider is compensated. *Id.*

186. Alabama's sweeping accommodations have received some scrutiny recently, and there is currently a bill before the Alabama House of Representatives that would rescind nearly all of the current accommodations and require religiously affiliated daycares to submit to the same licensing requirements as secular daycares. *See* H.R. 548, 2016 Reg. Sess. (Ala. 2016). The bill, however, has languished in the state house since it was introduced on April 19, 2016, and its prospects for passage are dim at best. *See Alabama House Bill 548*, LEGISCAN, https://legiscan.com/AL/bill/HB548/2016 [https://perma.cc/N8GW-2B8D] (last visited Nov. 19, 2017).

187. Efforts to pass a Blaine amendment at the federal level were very nearly successful, with the proposed amendment passing in the House of Representatives and failing to meet the required two-thirds majority in the Senate by only four votes. *See* Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 510 (2003).

188. *See, e.g.*, FLA. CONST. art. 1, § 3 ("No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."); MO. CONST. art I, § 7 ("[N]o money shall ever be taken from the public treasury, directly or indirectly, in

limited to financial support, the strong separation between church and state that the amendments call for may be read as support for state disengagement from religion.[189] This reading was dealt a serious blow, however, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[190] in which the Court held that withholding a public benefit from a church simply because it was a church was "odious to our Constitution."[191] The impact of this decision on arguments that exemption from state regulation amounts to de facto state aid for religious bodies has yet to be felt, and the question remains a live one. With this caveat, this Note turns to the statutory schema exempting religiously affiliated daycares from regulation.

Though the process by which a daycare facility is recognized as religiously affiliated, and so not bound by the full panoply of regulations that apply to secular facilities, differs from state to state, in no state is the process particularly onerous. For example, in Alabama, churches seeking accommodations for their preschool programs must merely file a notice with the Department of Human Resources indicating that they meet the definition of a "local church ministry"[192] along with a notice of intent to operate with the appropriate fire and health departments.[193]

The accommodations that states provide can be organized into several categories: first, basic health and safety; second, teacher qualifications and ratios; and third, child discipline. First, although some states require religiously affiliated daycares to comply with the same health and safety regulations as secular daycares, not all do.[194] In Alabama, for instance, in which close to half of all daycare facilities are currently excepted from regulations, the Department of Human Resources requires only that religiously affiliated daycares file notices of intent to operate with the appropriate health and fire departments but does not provide a mechanism for collecting or overseeing these evaluations.[195] Virginia, by contrast, requires exempt facilities to file documentation certifying that the facility has been inspected by the local health department and fire marshal and is in compliance with all applicable health and safety laws and regulations.[196] Likewise, while Florida exempts religiously affiliated daycares from the

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aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and . . . no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.").

189. *See generally* Brief of American Civil Liberties Union, ACLU of Missouri, American Humanist Association, Center for Inquiry, Freedom from Religion Foundation, and People for the American Way Foundation as Amici Curiae Supporting Respondent, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 3640468.

190. 137 S. Ct. 2012 (2017).

191. *Id.* at 2025.

192. *See* ALA. CODE § 38-7-3 (2017) (exempting religiously affiliated daycares whether or not they are attached to a religious elementary school).

193. *Id.*

194. ARK. DEP'T OF HUMAN SERVS., MINIMUM LICENSING REQUIREMENTS FOR CHILD CARE CENTERS (2015), http://humanservices.arkansas.gov/dccece/licensing_docs/2014%20A1%20CCC%20clean%20copy%20final%20filing.pdf [https://perma.cc/4WB2-YPPS].

195. ALA. CODE § 38-7-3.

196. VA. CODE ANN. § 63.2-1716(A)(2) (2017).

statewide health and safety regulations that govern secular daycares, it requires excepted facilities to meet the minimum standards set by the relevant local agency.[197]

Second, while even those states with the most far-reaching exceptions require compliance with basic health and fire regulations, many states grant broad exceptions from standards regulating teacher qualifications and staff ratios. For example, in Florida, personnel working in nonexempt facilities must meet a host of requirements, from screening for "good moral character" to training in child development.[198] Personnel in religiously affiliated facilities, however, are exempted from all training requirements and must merely demonstrate that they meet screening requirements related to past criminal activity.[199] Similarly, in Virginia, personnel in religiously affiliated daycares that choose to be exempt from licensure need not meet any training requirements. They are required only to obtain "a search of the central registry . . . on any founded complaint of child abuse or neglect and a criminal records check" and to provide a sworn statement disclosing whether the applicant has ever been "the subject of a founded complaint of child abuse or neglect," convicted of a crime, or the subject of pending criminal charges.[200]

Not only is the staff of exempted facilities not held to the same standards with regards to training and background, but some states also exempt religiously affiliated daycares from minimum staff-to-student ratios. Of all the statutory accommodations, exemption from minimum ratios is perhaps the most significant in terms of both differential costs imposed on secular and religious facilities and a facility's ability to adequately supervise and protect the children in its care. In Alabama, exempted facilities are not required to meet any minimum staffing requirements, with the caveat that they "make available" to parents the adult-to-child ratio.[201] In Florida, daycares are

197. FLA. STAT. § 402.316 (2017). The penalty for failure to comply with local requirements is the loss of exemption from licensure. *Id.* The penalties provision that applies to nonexempt facilities in Florida does not, however, extend to exempt facilities. *See id.* § 402.319(1).

198. *Id.* § 402.305(2)(a). Personnel are required to take a forty-hour course covering topics including child safety and development and to demonstrate competency by passing an examination. *Id.* The course covers important safety information, including how to recognize and prevent shaken baby syndrome, prevention of sudden infant death syndrome, and the recognition and care of infants and toddlers with developmental disabilities. *Id.* Personnel are additionally required to take an annual continuing education course, including a course specifically devoted to early literacy and language development. *Id.*

199. FLA STAT. § 435.04 (2017) (excluding persons found guilty of a series of offenses such as murder, sexual assault, and drug crimes).

200. VA. CODE ANN. § 63.2-1724 (2017). Those convicted of "barrier crimes," defined at § 19.2-392.02, and including murder, obscenity and sexual abuse, are wholly prevented from working at daycare facilities, both licensed and unlicensed. *Id.* § 63.2-1724.

201. ALA. CODE § 38-7-3 (2017) ("The following information shall be available to parents or guardian prior to enrolling their children in said church ministry; staff qualifications; pupil-staff ratio; discipline policies; type of curriculum used in the learning program; the religious teachings to be given each child; and the type of lunch program available."). Having done this, exempt programs are almost wholly relieved of any state oversight. They are required only to inform the department that they are providing this information to the parents and that

required to maintain strict maximum child-to-adult ratios, while religiously affiliated facilities are wholly exempted from these requirements.[202] By contrast, in Virginia, religiously affiliated facilities are required to comply with maximum adult-to-child ratios, requiring one adult for every four children under two, one for every ten children six and younger, and one for every twenty-five children over six.[203]

Finally, religiously affiliated daycares are routinely granted accommodations from state laws governing the discipline of children in daycare facilities. Arkansas requires exempt facilities to comply with state standards on corporal punishment unless alternative compliance is granted by the Division of Child Care and Early Childhood Education at the Department of Human Services.[204] Other states, including Alabama, excuse exempt facilities from state standards on discipline.[205]

B. Legal Challenges to Statutory Accommodations

Secular daycares in several states have challenged the statutory accommodations extended to religiously affiliated facilities but have been unsuccessful at every turn.[206] Three common issues arise. First, courts find that requiring religiously affiliated daycares to submit to state regulations would result in impermissible entanglement of the state in internal church affairs.[207] Second, courts reject equal protection challenges, finding that secular and religiously affiliated daycares are not similarly situated and that the accommodations are not only constitutionally appropriate but also possibly constitutionally required.[208] Third, the courts routinely find that the secular providers lack standing to bring their claims.[209]

Concerns about excessive entanglement between the state and religious organizations—and attendant Establishment Clause concerns—are at the heart of each of the decisions on statutory accommodations for religiously

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they are maintaining fire and health inspection reports, immunization records and medical history forms. *Id.*

202. FLA. STAT. § 402.305(4). There must be one childcare professional for every four children under the age of one; one professional for every six children between the ages of one and two; one professional for every eleven children between the ages of two and three, and so on. *Id.*

203. VA. CODE ANN. § 63.2-1716.

204. ARK. CODE ANN. § 20-78-209(b)(4) (2017).

205. ALA. CODE § 38-7-3.

206. *See, e.g.*, Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 264 (4th Cir. 1988); Kid's Care, Inc. v. State of Ala. Dep't of Human Res., No. 01-T-453-N, 2001 WL 35827965, at *2 (M.D. Ala. June 14, 2001); Forte v. Coler, 725 F. Supp. 488, 491 (M.D. Fla. 1989).

207. Courts recognize that some contacts between church and state, including fire inspections and building and zoning regulations, are not only unavoidable but desirable. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305 (1985); Lemon v. Kurtzman, 403 U.S. 603, 614 (1971).

208. *See Kid's Care*, 2001 WL 35827965, at *3.

209. Although courts have found that secular daycares lack standing, in many decisions they also, surprisingly, consider the merits of the case. *See id.* at *2.

affiliated daycares.[210] In *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*,[211] the Court applied the *Lemon* test as interpreted by *Amos*, which had been decided while the case was on remand to the district court.[212] Moving quickly over the first, or purpose, prong of the *Lemon* test to the second prong, the Court found that the accommodation not only does not promote religion but also that denying the accommodation would effectively inhibit religion.[213] In its discussion of excessive entanglement, the Court relied on the *Amos* Court's finding that requiring a religious group to defend its beliefs in free exercise litigation before a judge who may be ignorant of the group's religious mission and purpose implicates establishment concerns.[214] To deny religiously affiliated daycares exemptions from certain state regulations would be to require the kind of issue-by-issue free exercise litigation that *Amos* eschews.[215] This would both "chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity and centrality of the religious beliefs of others."[216]

In *Forte v. Coler*,[217] in which a secular daycare likewise challenged the constitutionality of statutory exemptions for religiously affiliated daycares, the court drew directly on the Fourth Circuit's decision in *Forest Hills*, characterizing it as "highly persuasive."[218] Noting that the accommodation satisfies the first and second prongs of the *Lemon* test, the court then noted that not only does the statute not promote the entanglement of church and state, it also effects more complete separation of the two than would obtain in the absence of the accommodation.[219] Further, as in *Forest Hills*, the accommodation eases the burden on the court system by obviating the need to litigate each and every free exercise claim that would be brought under the state RFRA by a religiously affiliated daycare, thereby avoiding entanglement concerns.[220]

In addition to challenging the statutory accommodations for entanglement concerns, many secular daycares have asserted equal protection claims. In such cases, secular providers' claims that the accommodation improperly discriminates between religious and secular facilities have not been successful. Courts have routinely rejected these equal protection claims,

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210. *See id.* at *4. The Court also considered entanglement under the aegis of substantive due process, finding that the state's interest in limiting church-state entanglement and respecting free exercise could provide a rational basis for the accommodations, resulting in the dismissal of the due process claim. *Id.* at *5.

211. 846 F.2d 260 (4th Cir. 1988).

212. *Id.* at 263.

213. *Id.* ("Absent the exemption [for religiously affiliated daycares], some church leaders would immediately be forced to violate their convictions against submitting aspects of their ministries to state licensing, or face legal action by the state.").

214. *See supra* notes 114–16 and accompanying text.

215. *Forest Hills*, 864 F.2d at 263.

216. *Id.* at 264.

217. 725 F. Supp. 488 (M.D. Fla. 1989).

218. *Id.* at 490.

219. *Id.* at 491.

220. *Id.*

finding that the statutes are motivated by a permissible purpose (namely, to avoid excessive entanglement) and that the exemptions are rationally related to these permissible ends. In *Kid's Care, Inc. v. State of Alabama Department of Human Resources*,[221] for instance, the court rejected the secular providers' argument that the accommodations violated the Equal Protection Clause because they were "a form of 'arbitrary and capricious' discrimination among similarly situated daycare providers that lacks any rational basis in violation of the Equal Protection Clause."[222] Rather, the court observed that not only were secular and religious daycares not similarly situated as a matter of constitutional law but also that, in passing the statutory accommodation, the state acted with a "rational and permissible purpose."[223] The court then offered several rationales as to why the state would structure the accommodation as it does.[224] Likewise, in *Forte*, the court noted that the statute was motivated by the permissible purpose of limiting interference with free exercise and that the accommodations were rationally related to this permissible end.[225]

Finally, courts have been unsympathetic to the secular providers' ability even to challenge the accommodation, with many courts finding that the secular daycares lack standing to bring their claims. In *Kid's Care*, a group of secular daycares asserted that the freedom from onerous regulations gave religiously affiliated daycares a competitive advantage and inflicted economic harm on secular facilities.[226] Specifically, the secular facilities contended that, were the accommodations removed, more state subsidies for childcare would flow to the secular daycares.[227] The court rejected this argument, however, concluding that the plaintiffs had offered only highly general allegations of harm and that a facial attack on the law fails because "it is apparent that the statute is not 'unconstitutional in all its applications.'"[228]

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221. No. 01-T-453-N, 2001 WL 35827965 (M.D. Ala. June 14, 2001).

222. *Id.* at *3.

223. *Id.* Indeed, the accommodations were justified by the state's twin interests in limiting church-state entanglement and respecting free exercise. *Id.*

224. *Id.* at *5 ("For example, the State might want to avoid the higher financial expense that would result if it conducted independent evaluations of providers, or, it might find it more efficient to monitor the bad-faith conduct of exempted day-care providers through means other than its licensing decisions. Or, the State might have fashioned its certification process so as to keep the State out of the business of defining what counts as religion and to limit the possible intrusions on the free exercise of religion that could result if religious certification depended upon bureaucratic discretion.").

225. *Forte*, 725 F. Supp. at 491.

226. *Kid's Care*, 2001 WL 35827965, at *2.

227. *Id.*

228. *Id.* at *9 (quoting Williams v. Pryor, 240 F.3d 944, 953 (11th Cir. 2001)). Further, the Court rejected the Plaintiffs' procedural due process claim, finding that not only did the plaintiffs have no colorable allegation of a property interest at issue, but, even were it true that more money would flow to secular daycares, this would still not rise to the level of a legitimate entitlement. *See id.* at *4 ("Even if, for the sake of argument, the plaintiffs were entitled to operate in a regulatory world without religious exemptions, their hope and expectancy in the extra funds that might later be determined to be due them in a post-exemption world still would not amount to a present constitutionally cognizable property interest.").

The Fourth Circuit, by contrast, found that secular daycares did have standing to challenge the accommodations.[229] Whereas the Alabama court found that religiously affiliated and secular daycares were not similarly situated, the Fourth Circuit found that they were. Citing the Supreme Court's decision in *Arkansas Writers' Project v. Ragland*,[230] the Fourth Circuit thus found that the secular daycares had standing to bring the challenge.[231]

The challenges secular daycares have faced with regard to standing are instructive and counsel in favor of identifying a litigation strategy in which the plaintiffs are not secular daycares. If the harm-to-third-party doctrine is used to challenge these accommodations, the parties who would bring the cases would be the parents of the children who were injured or died while in the care of understaffed and underregulated religiously affiliated facilities.

IV. USING THE DOCTRINE OF THIRD-PARTY HARM TO CHALLENGE STATUTORY ACCOMMODATIONS FOR RELIGIOUSLY AFFILIATED DAYCARES

Given recent developments in Establishment Clause jurisprudence, particularly the renewed attention paid to the doctrine of harm to third parties, the time is ripe to revisit statutory accommodations granted to religiously affiliated daycares. Where statutory accommodations for religiously affiliated daycares have been challenged, the daycares have asserted that regulations create excessive entanglement, invoking both free exercise and establishment arguments.[232] Supporters of accommodations assert that free exercise would be limited were religiously affiliated daycares forced to comply with, for example, regulatory oversight of disciplinary methods, such as corporal punishment.[233] Likewise, regulations that dictate staff qualifications raise both free exercise and establishment concerns under the ministerial exception.[234] Underlying both arguments is the question of who has standing to challenge these accommodations. Even were plaintiffs to demonstrate standing, they would then need to demonstrate that their interests outweigh the burdens on free exercise. The *Texas Monthly* test,

229. Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 262 (4th Cir. 1988).

230. 481 U.S. 221 (1987).

231. *Forest Hills*, 846 F.2d at 262. The court noted that the facts and positions of the case were closely analogous to those in *Arkansas Writers' Project*, and so the "same principle must govern." *Id.* (citing *Ark. Writers' Project*, 481 U.S. at 221).

232. *See supra* Part III.B.

233. Greg J. Matis, *Dilemma in Daycare: The Virtues of Administrative Accommodation*, 57 U. CHI. L. REV. 573, 585 (1990). States courts differ in their application of the Free Exercise Clause to corporal punishment. In Michigan, for example, although a court upheld regulations governing corporal punishment on the ground that the state's compelling interest in protecting children justified the burden, it still found that the regulations violated the religious exercise of a religiously affiliated daycare. Dep't of Soc. Servs. v. Emmanuel Baptist Preschool, 388 N.W.2d 326, 334 (Mich. Ct. App. 1986). By contrast, a California court found that the state's much more restrictive corporal punishment provision did not burden the religious exercise of a religiously affiliated daycare. N. Valley Baptist Church v. McMahon, 696 F. Supp. 518, 520 (E.D. Cal. 1988).

234. *See supra* Part I.B.3.

incorporating a sensitivity to both free exercise concerns in the first prong of its second step and establishment concerns in the second prong of its second step, may fruitfully be applied. Taking up first the question of standing and then the two steps of the *Texas Monthly* test, this Note argues that, by using the third-party-harm test, the parent of a child injured in a religiously affiliated daycare that is exempted from complying with state regulations may successfully challenge these statutory accommodations.

First, where statutory exemptions for religiously affiliated daycares have been challenged, the plaintiffs have been owners of secular daycares.[235] Courts have found, across the board, that these plaintiffs failed to show that the exemptions resulted in actual economic harm and so lacked standing to bring the challenges.[236] With courts finding that the plaintiffs lacked standing, many of these cases have been dismissed early in the litigation process. Were the parents or guardians of children who suffered injury or death in facilities exempt from some or most state regulations to bring a case, however, clearing the initial hurdle of standing—demonstrating that they suffered a direct, cognizable injury—should be easier.[237] Though the parents may face difficulty proving causation between the lack of state oversight and the child's injury, were they able to demonstrate standing, they would at least advance further in the litigation process.

Second, the first prong of the *Texas Monthly* test's second step asks whether exemption from state regulations lifts a free exercise burden that would otherwise be imposed by the government.[238] Here, most regulations, including fire and safety inspections, food preparation, and record keeping, do not appear to implicate free exercise concerns. The concerns raised in *Forte* and *Forest Hills* thus seem overinclusive.[239] Excusing religiously affiliated daycares from basic health and safety regulations risks sacrificing state interests in the protection of its most vulnerable members on the altar of religion.

Some regulations, however, including those touching on discipline and corporal punishment, may implicate free exercise concerns under the *Texas Monthly* test. Of the states that offer statutory accommodations, many explicitly extend the exception to disciplinary procedures.[240] Corporal

235. *See generally* Kid's Care, Inc. v. State of Ala. Dep't of Human Res., No. 01-T-453-N, 2001 WL 35827965 (M.D. Ala. June 14, 2001); Forte v. Coler, 725 F. Supp. 488 (M.D. Fla. 1989).

236. *See supra* note 228 and accompanying text.

237. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

238. *See supra* Part I.B.2.

239. *See supra* Part III.B.

240. *See, e.g.*, ALA. CODE § 38-7-3 (2017) (providing that exempt facilities are not bound by the disciplinary guidelines that apply to nonexempt facilities but instead must provide information on disciplinary procedures to parents); ARK. CODE ANN. § 20-78-209(b)(4) (2017) (providing that exempt facilities may be granted alternative compliance by the Division of Child Care and Early Childhood Education regarding corporal punishment); FLA. STAT. § 402.316 (2017) (providing that regulations addressing discipline do not apply to exempt facilities).

punishment of children has deep roots in several religious traditions,[241] and exempting religiously affiliated facilities from regulations concerning discipline lifts a free exercise burden that would otherwise be imposed.[242]

Regulations governing the qualifications of daycare staff raise separate concerns about excessive entanglement.[243] If a religiously affiliated daycare considers itself an extension of the group's ministry, then the staff would be engaged in ministerial work.[244] Though the ministerial exception is typically invoked by religious organizations as a defense against a Title VII violation,[245] it is conceivable that a religiously affiliated daycare may invoke the ministerial exception were it forced to comply with state regulations concerning staff qualifications. Indeed, here the ministerial exception is, in effect, sanctioned by the state through the statutory accommodation freeing the facilities from regulation.[246]

The likelihood that an *Amos*-like ministerial exception would extend to staff at religiously affiliated daycares is, however, unclear post-*Hosanna-Tabor*. Deploying the familiar three-step analysis, the magnitude of the harm imposed on the third party—job loss—is high; the likelihood of the harm occurring is high; and the magnitude of the belief affected is minimal. Critics of *Amos* might go further, arguing that *Amos* marked a significant—and inappropriate—extension of the ministerial exception from persons engaged in preaching and teaching to employees whose jobs have no confessional dimension and thus ought not be extended to daycare workers.[247] The extent to which exceptions from training requirements for staff in religiously affiliated daycares is required or desirable is, then, difficult to resolve, with

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241. Alan N. Braverman, Recent Decision, Glaser v. Marietta, *351 F. Supp. 555 (W.D. Pa. 1971)*, 12 DUQ. L. REV. 645, 647 n.6 (1974) (noting that the Bible sanctions corporal punishment).

242. For a discussion of First Amendment arguments for corporal punishment, either by parents or, via in loco parentis, by schools, see Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 457–61 (1998).

243. Many states with statutory accommodations exempt religiously affiliated daycares from complying with regulations concerning staff qualifications. *See, e.g.*, ALA. CODE § 38-7-3 (2017); N.C. GEN. STAT. § 110-91(8) (2017).

244. The Court extends deep deference to religious organizations on matters of internal church organization. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012) ("[O]ur opinion in *Watson* 'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" (second alteration in original) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 116 (1952)).

245. *See* Helfand, *supra* note 119, at 544.

246. Following *Amos*, for example, courts may be deferential to religious organizations' claim to staff their facilities with minimal oversight by the state. *See supra* notes 114–16 and accompanying text.

247. The ministerial exception has traditionally been applied narrowly to persons whose primary duties are "important to the spiritual and pastoral mission of the church." Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985). Though determining which positions qualify under this test may occasionally raise free exercise concerns, it is possible to draw distinctions without so doing. *See also Hosanna-Tabor*, 565 U.S. at 205. *See generally* Note, *supra* note 120.

the argument that the accommodations are necessary because of the ministerial exception not wholly implausible.

Finally, though some of the exemptions extended to religiously affiliated daycares may raise free exercise concerns, post-*Texas Monthly* the analysis would continue.[248] Applying the same three-factor test but switching the identity of the affected party to a child in the care of a religiously affiliated daycare, the same test yields different results.[249] First, the magnitude of the harm imposed on the third party may be extremely high. As the Center for Investigative Reporting found, children in the care of religiously affiliated daycares have suffered serious injury and even death.[250] Proving that the lack of regulation led to a particular child's injury or death is necessarily a fact-based inquiry. It is conceivable, however, that a parent-plaintiff could demonstrate that the lack of a minimum staff-to-child ratio contributed to a child's wandering off or the lack of safe-sleep training contributed to an infant's crib death. Second, it is difficult to determine the likelihood of the harm occurring.[251] While a statistical comparison of injuries sustained in regulated daycares and exempt daycares would be the gold standard, in the absence of such a study, evaluating likelihood would be challenging. Third, the magnitude of the belief affected may be low. While religiously affiliated daycares would likely argue that state regulations interfere with free exercise and promote excessive entanglement, these arguments are weak. Few of the regulations, with the possible exception of some requirements for staff qualifications and corporal punishment, touch directly on matters of religious doctrine, and state oversight of nonexempt facilities is not particularly intrusive. Under a fact-sensitive balancing test, then, parent-plaintiffs might successfully demonstrate that the magnitude of the harm to third parties outweighs the magnitude of the belief impacted, particularly where the exemption in question was only tenuously related to religious doctrine.

Even were parent-plaintiffs to successfully demonstrate that the religiously affiliated daycare's free exercise concerns were minimal and that the harm to third parties was substantial, one final hurdle would remain: distinguishing the facts from those of *Hobby Lobby*. The outcome in *Hobby Lobby*, brought under RFRA, is particularly relevant in those states that have adopted a version of RFRA in their state constitutions.[252] Though the majority in *Hobby Lobby* recognized that an exemption from the contraception mandate burdened third parties, it rejected the application of the mandate because it

248. *See supra* note 96 and accompanying text.

249. *See supra* note 133 and accompanying text.

250. *See* Harris, *supra* note 1.

251. Depending on the relief sought, the likelihood of the harm occurring is more or less important. Where the plaintiff seeks damages for a harm that has already occurred, the likelihood that it will occur again is not relevant. Where the plaintiff seeks an injunction, however, the likelihood of the harm occurring again is central. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). Were parent-plaintiffs to bring a case against a religiously affiliated daycare, they would likely seek an injunction in addition to damages.

252. Among the states with statutory accommodations for religiously affiliated daycares that also have state RFRAs are Alabama, Florida, Indiana, Missouri, and Virginia. *See* ALA. CONST. art I, § 3.01; FLA. STAT. § 761.03 (2017); IND. CODE § 34-13-9-8 (2016); MO. REV. STAT. § 1.302 (2016); VA. CODE ANN. § 57-2.02 (2017).

was not the least restrictive means of serving the government's compelling interest in providing women access to contraception.[253] Here, several states have adopted alternative registration requirements that require exempted facilities to self-report their compliance with a limited number of regulations.[254] Supporters of statutory accommodations for religiously affiliated facilities may argue that, even were parent-plaintiffs to demonstrate the exemption imposed harm on third parties, direct state oversight would not be the least restrictive means and the alternative self-reporting system would be sufficient. The findings of the Center for Investigative Reporting seem to belie this, however, and the forceful dissent in *Hobby Lobby* may support imposing more rigorous oversight where harm to third parties is significant.[255] Indeed, as the Court recognized in *Cutter v. Wilkinson*, where a statutory accommodation imposes significant harms on third parties, the accommodation itself might violate the Establishment Clause.[256]

CONCLUSION

The broad exemptions from regulations, including basic health and safety regulations, that some states grant religiously affiliated daycares have repeatedly survived challenges brought by secular competitors.[257] As more light is shone on the dangerous conditions in too many exempt daycares,[258] the need to strike the appropriate balance between the free exercise rights of the religiously affiliated facilities and the children in their care is ever more pressing. The recently reinvigorated third-party-harm test, developed most fully in *Texas Monthly* and recognized as imposing some limit on free exercise claims in *Hobby Lobby*, may prove a useful tool for parents whose children were harmed in exempt facilities to challenge the statutory accommodations that may have contributed to the injury or death of their children.

253. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

254. *See*, *e.g.*, ALA. CODE § 38-7-3 (2017); 225 ILL. COMP. STAT. 10/2.09 (2015); MO. REV. STAT. § 210.254 (2016).

255. *See supra* note 175 and accompanying text; *see also Hobby Lobby*, 134 S. Ct. at 2800 (Ginsburg, J., dissenting).

256. Cutter v. Wilkinson, 544 U.S. 709, 722 (2005) ("Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."); *see also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985).

257. *See*, *e.g.*, Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church, 846 F.2d 260, 262 (4th Cir. 1988); Kid's Care, Inc. v. State of Ala. Dep't of Human Res., No. 01-T-453-N, 2001 WL 35827965, at *1 (M.D. Ala. June 14, 2001); Forte v. Coler, 725 F. Supp. 488, 491 (M.D. Fla. 1989).

258. *See supra* note 1 and accompanying text.