

Untangling the Reproductive Rights and Religious Liberty Knot

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ABSTRACT: *Burwell v. Hobby Lobby* dramatically changed the landscape of religious liberty protections afforded to corporations. The Supreme Court in *Hobby Lobby* held that closely held for-profit corporations are entitled to protection under the Religious Freedom and Restoration Act (RFRA) when their sincerely held religious beliefs are contrary to a law of neutral applicability. Holding this in the context of the Affordable Care Act's contraceptive mandate, which requires almost all employer-sponsored health insurance plans to cover preventative women's health care, including contraception, the Court found that Hobby Lobby and Conestoga Wood Specialties were entitled to a religious exemption from the mandate.

While the decision in *Hobby Lobby* was unprecedented, courts around the country have employed similar rationales when claims of religious liberty rights by employers butt up against claims of gender and pregnancy discrimination by employees. Here, we track the parallels between how courts have evaluated this issue in Title VII pregnancy discrimination cases and the same issue in *Hobby Lobby*. We argue that often courts improperly subsume the employee's personal reproductive and gender discrimination interest into the employer's claim of religious liberty.

We examine how courts in several Title VII pregnancy discrimination cases concluded that a religious employer's religious liberty claim, as supported by a broad morality clause in an employment contract, should trump an employee's civil rights assertion of a pregnancy discrimination claim. Then, we connect our analysis of these cases to the decision in *Hobby Lobby*, noting that the Court accepted so broadly defined religious liberty interests on the part of Hobby Lobby and Conestoga that those interests similarly suppressed their employees' interests in being free from gender discrimination in the workplace. Ultimately, we argue that courts can and need to untangle the religious liberty interests of employers from the gender discrimination interests of their

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employees in order to recognize when an employee's civil rights are being subsumed into an employer's religious liberty right.

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INTRODUCTION

This past summer, the Supreme Court considered the scope of the Patient Protection and Affordable Care Act's (ACA) contraceptive mandate¹ and its exemptions² in *Burwell v. Hobby Lobby Stores*. The controversy before the Court centered on whether the Religious Freedom Restoration Act (RFRA) or the First Amendment's Free Exercise clause allow a for-profit corporation to refuse to comply with the mandate. This paper does *not* directly address the questions before the Court regarding whether for-profit corporations are

1. Section 2713(a)(4) of the Public Health Services Act (1944), as amended by the ACA, states that:

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . additional preventative care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for the purposes of this paragraph.

Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 2713(a)(4), 124 Stat. 131 (codified at 42 U.S.C. § 300gg-13). The corresponding Health Resources and Services Administration (HRSA) guidelines, issued August 1, 2011, explain that women's preventative health services include well-visits, screening for gestational diabetes, HPV and HIV testing, STI counseling, breastfeeding support and supplies, counseling for domestic violence, and contraceptive methods and counseling. These guidelines define contraceptive services as "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Coverage of Certain Preventative Services Under the Affordable Care Act, Final Rules, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) (to be codified at 45 C.F.R. § 147, 156).

2. See 78 Fed. Reg. at 39,871 (exempting "churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order"); see *id.* at 39,892 (providing an "accommodation" for certain non-profit entities).

“persons” under RFRA,³ whether the contraceptive mandate substantially burdens the rights of for-profit corporations under RFRA or the Free Exercise Clause,⁴ or whether the government has a compelling state interest to justify enforcing the mandate and has done so (with regard to employers claiming religious objection to the mandate) through narrowly tailored means.⁵ Instead, this paper uses the *Hobby Lobby* decision as a jumping-off point to examine how courts evaluate gender discrimination claims involving religious employers when those claims stem from “employer’s actions [that are] based on religiously inspired ideas about. . . sex[] and pregnancy.”⁶ Comparing Title VII pregnancy discrimination cases brought against religious employers to the *Hobby Lobby* litigation and decision, we argue that in both sets of cases courts often improperly weigh the employee’s personal reproductive and gender discrimination interests, ultimately subsuming that interest into the employer’s religious liberty claim.

In *Hobby Lobby* the Court held that the contraceptive mandate violates RFRA when the mandate is contrary to certain for-profit corporations’ sincere religious beliefs.⁷ Situating this decision within the larger question of whether “religious organizations [should] be exempt from civil rights laws,”⁸ we argue that the Court improperly accepted *Hobby Lobby* and *Conestoga*’s assertions that their religious beliefs permit them to be exempt from a law—the contraceptive mandate—that seeks, at base, to eradicate “a vestige of gender discrimination.”⁹ While the specific issue in *Hobby Lobby* was one of first impression, we highlight that the Court’s analysis echoes that seen in lower courts’ analysis in Title VII pregnancy discrimination cases brought against religious employers. This paper tracks the parallels between courts’ treatment of employees’ asserted reproductive and gender equity interests in Title VII pregnancy discrimination cases brought against religious employers and the Supreme Court’s treatment of these same interests in *Hobby Lobby*. We then propose alternative ways of examining and weighing the competing religious liberty and gender equity interests.

Part I briefly introduces the parallels by outlining (1) the ACA’s contraceptive mandate and religious employer exemption and accommodation and (2) Title VII’s protections against gender and pregnancy discrimination and

3. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2755 (2014); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129-37 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013).

4. *Hobby Lobby*, 134 S. Ct. at 2755-58; *Hobby Lobby*, 723 F.3d at 1138-41.

5. *Hobby Lobby*, 134 S. Ct. at 2780; *Hobby Lobby*, 723 F.3d at 1143-44.

6. Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 804 (2007). We draw on Minow’s work throughout this article.

7. *Hobby Lobby*, 134 S. Ct. at 2754-55.

8. Minow, *supra* note 6, at 782.

9. Brief for the American Civil Liberties Union as Amici Curiae Supporting Government at 7, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

its exemption for religious employers. Part II examines several Title VII cases brought against religious employers, analyzing how the courts weigh and characterize the competing religious and gender equity/reproductive rights.¹⁰ We argue that the employee's gender equity/reproductive rights are often improperly subsumed into religious organizations' assertions of religious liberty based on the employer's self-defined, broad definitions of religious doctrine. We note that this occurs, in large part, for two reasons: (1) courts fail to determine, as a threshold matter, whether the policies (such as contractual morality clauses) that the employers rely on are themselves discriminatory and (2) courts accept that employers' asserted religious beliefs can trump Title VII protections against gender/pregnancy discrimination. Part III argues that this results in female employees' personal reproductive choices (which may be grounded in the employees' own religious beliefs) being improperly subject to religious and moral scrutiny by their employers, and that "this leaves female employees who are engaging in what, in other contexts, are constitutionally and statutorily protected activities related to reproduction in a much more vulnerable position than it does other employees of the same religious organizations."¹¹ Part III also connects these pregnancy discrimination cases to the recent *Hobby Lobby* decision, arguing that Hobby Lobby and Conestoga similarly (and successfully) so broadly defined their religious liberty interests that the employees' reproductive rights were suppressed. In Part IV, we ultimately argue that courts need to untangle the religious beliefs of employers from employees' reproductive rights and, more fundamentally, need to recognize when the right to be free from gender discrimination is being improperly subsumed by employer claims of religious liberty.

I. THE ACA AND TITLE VII

While the First Amendment and federal law (e.g. RFRA) generally protect the exercise of religious rights, these protections are not absolute; broadly stated, religious individuals and organizations generally are not exempted from secular and neutral laws.¹² This is true of most laws governing employment relationships; religious organizations are generally not exempt from, for

10. By "gender equity right," we mean the right to be free from different treatment in the workplace based on one's gender. By "reproductive right," we mean the right to engage in reproductive decision-making, like accessing contraception, utilizing assisted reproductive technology, or continuing a pregnancy, without consequences for employment.

11. Jessica L. Waters, *Testing Hosanna-Tabor: The Implications for Pregnancy Discrimination Claims and Employees' Reproductive Rights*, 9 STAN. J.C.R. & C.L. 47, 73 (2013). This article very briefly looked at this issue and serves as jumping-off point for this piece.

12. See, e.g., *Oregon v. Smith*, 494 U.S. 872, 879-80 (1990) ("[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate").

example, wage and hour laws.¹³ However, in an effort to accommodate religious beliefs, courts have recognized and some federal laws include limited exceptions for religious employers—such as the exemption and accommodation from the ACA’s contraceptive mandate and Title VII’s exemption for religious employers.

*A. The ACA and the Contraceptive Mandate*¹⁴

The ACA requires employers with fifty or more employees who offer employee health insurance benefits to provide plans that meet a minimum level of comprehensiveness to their employees.¹⁵ The insurance plan must cover preventative health services without cost sharing.¹⁶ These required preventive health services include coverage for contraceptives, as defined by HRSA guidelines.¹⁷ According to the HRSA guidelines, contraceptives include “all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”¹⁸

The ACA’s exemption for “religious employers” is a complete exemption from the contraceptive mandate. Exempted is any organization that, “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code.”¹⁹ Importantly, this exemption only applies to “churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.”²⁰

In addition to the narrow exemption for religious employers, the regulations also have an accommodation for certain non-profit organizations.²¹ The accommodation requires that employees of eligible organizations receive

13. *See, e.g.,* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303-06 (1985) (holding that the minimum wage requirement does not interfere with the non-profit religious organization’s free exercise rights).

14. As we note above, this paper does not address the issue of whether for-profit corporations are persons under RFRA or whether they can exercise First Amendment rights.

15. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1513, 124 Stat. 254 (codified at 26 U.S.C. § 4980H).

16. *Id.*

17. Coverage of Certain Preventative Services Under the Affordable Care Act; Final Rules, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified at 45 C.F.R. § 147, 156).

18. *Id.*

19. *Id.* at 39,871.

20. *Id.*

21. A non-profit seeking the accommodation must demonstrate that it: (1) “opposes providing coverage for some or all of the contraceptive services required to be covered under §54.9815-2713(a)(1)(iv) [of the PHS Act and the companion provisions of ERISA and the Code] on account of religious objections;” (2) “is organized and operates as a nonprofit entity;” (3) “holds itself out as a religious organization;” and (4) self-certifies that it satisfies the first three criteria. *Id.* at 39,892.

contraceptive services benefits, as prescribed by the ACA and the HRSA guidelines, but that the eligible organization need not participate in providing those benefits.²²

In the *Hobby Lobby* case, Hobby Lobby's and Conestoga's owners objected to participating in the provision of certain contraceptive methods on religious grounds,²³ but, because both are for-profit organizations, they did not fall under the exemption or qualify for the accommodation.²⁴ Both corporations thus challenged the ACA's contraceptive coverage provision in federal court.²⁵ In *Conestoga*, the Third Circuit found that "for-profit, secular corporations cannot engage in religious exercise,"²⁶ and thus did not reach the merits of the First Amendment and RFRA claims.²⁷ In *Hobby Lobby*, however, the Tenth Circuit held that for-profit corporations are entitled to RFRA's protection and ultimately enjoined the enforcement of the ACA's contraceptive mandate provisions against Hobby Lobby.²⁸ In doing so, the Tenth Circuit found that the for-profit plaintiffs' exercise of religion was "substantially burdened" by the contraceptive mandate,²⁹ and that the government's asserted interests in "public health and . . . gender equality" were not compelling.³⁰ The Tenth Circuit also held that that any burden placed on female employees was an "economic burden" that did not create a compelling interest.³¹

Before the Supreme Court, Hobby Lobby and Conestoga challenged the contraceptive mandate as running afoul of their religious beliefs under RFRA³² and, in Conestoga's case, the First Amendment's Free Exercise Clause.³³ Ultimately, a majority of the Court held that the Health and Human Services regulations requiring for-profit corporations to include contraceptive coverage in employer-sponsored health insurance plans violates RFRA when providing such coverage is contrary to the corporation's sincere religious beliefs.³⁴

First, the Court addressed whether closely-held for-profit corporations, such as Hobby Lobby and Conestoga, were intended to be beneficiaries of RFRA protections. Relying on the Dictionary Act's definition of "person," the Court determined that corporations are people, explaining that the "purpose [of

22. *Id.* at 39,874.

23. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123-25 (10th Cir. 2013) (objecting to Plan B, Ella, and IUDs); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381-82 (3d Cir. 2013) (objecting to Plan B and Ella).

24. *Hobby Lobby*, 723 F.3d at 1124; *Conestoga*, 724 F.3d at 381.

25. *Hobby Lobby*, 723 F.3d at 1125; *Conestoga*, 724 F.3d at 380-81.

26. *Conestoga*, 724 F.3d at 381.

27. *Id.* at 382-388.

28. *Hobby Lobby*, 723 F.3d at 1129-37.

29. *Id.* at 1137-38.

30. *Id.* at 1143.

31. *Id.* at 1144.

32. Brief for Respondents at 34-36, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354); Brief for Petitioners at 17-18, *Conestoga*, 134 S. Ct. 2751 (No. 13-356).

33. Brief for Petitioners at 18-19, *Conestoga*, 134 S. Ct. 2751 (No. 13-356).

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

extending rights to corporations] is to protect the rights of these people.”³⁵ Additionally, the Court found that for-profit corporations are capable of “exercising” the religious convictions of their shareholders.³⁶ Together, these findings allowed the Court to hold that RFRA’s protections apply to Hobby Lobby and Conestoga in the contraceptive mandate controversy.

Next, the Court turned to the question of whether the contraceptive mandate “substantially burdened” Hobby Lobby and Conestoga’s “exercise of religion.” The majority had “little trouble concluding that it does.”³⁷ Speaking solely to the financial burden associated with violating the mandate, the Court explained that “[b]ecause the contraceptive mandate forces them to pay an enormous sum of money . . . the mandate clearly imposes a substantial burden on those beliefs.”³⁸

Finally, the Court evaluated whether the government met the required standard of having a compelling interest and a means of interfering with the exercise of religion that was narrowly tailored to that interest. Despite dicta about the government’s stated interests in public health and gender equality as being “broadly framed,” the Court found it “unnecessary to adjudicate this issue,” and instead decided to “assume” that the government interests met the RFRA compelling interest standard.³⁹ In analyzing the final piece—the narrowly tailored prong of the RFRA standard—the Court held that the mandate failed.⁴⁰ Because Health and Human Services already formulated an accommodation for religious objections, albeit for religious non-profits, the Court opined that a less restrictive means of achieving the government’s compelling interests exists and that it appropriately accommodates exercise of religious beliefs, as protected under RFRA.⁴¹ Finding the mandate failed the narrowly tailored requirement, the Court struck down the contraceptive mandate as applied to closely-held for-profit corporations that believe implementing the mandate violates the sincere religious beliefs of their shareholders.⁴²

B. Title VII and the Religious Organization Exemption

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, and prohibits employers from refusing to hire, discharging, or otherwise discriminating

35. *Id.* at 2767-69.

36. *Id.* at 2772-74.

37. *Id.* at 2775.

38. *Id.* at 2779.

39. *Id.* at 2779-80.

40. *Id.* at 2780-83.

41. *Id.* at 2782-83.

42. *Id.* at 2759.

against an employee on these protected bases.⁴³ The 1978 Pregnancy Discrimination Act amended Title VII to make clear that sex discrimination includes discrimination based on “pregnancy, childbirth, or related medical conditions” and that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same [as other employees] for all employment-related purposes.”⁴⁴

Despite this broad mandate, Title VII’s exemption for religious employers provides that Title VII’s protections do not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities,”⁴⁵ and that educational institutions may “hire and employ employees of a particular religion” under certain circumstances.⁴⁶

The Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, has made clear that the Title VII exemption is a very limited one; the exemption “does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as . . . sex.”⁴⁷ Plainly stated, religious organizations can discriminate in hiring and firing on the basis of religion, but not on (for example) the basis of sex or pregnancy. As illustrated in Part II, however, when courts face determinations of whether pregnancy/sex discrimination took place when a religious organization broadly defines its religious doctrine to include the private reproductive decisions of its employees, the limits of the religious exemption become less clear.

II. TITLE VII CASES: REFRAMING THE INTERESTS

As noted above, we are interested in the narrow question of how the reproductive right and gender equity right are framed when weighed against an employer’s asserted religious liberty interest, be it in the context of RFRA or Title VII.

We begin with Title VII. Martha Minow has outlined how attempts to balance the competing interests—the employer’s religious liberty interest and

43. 42 U.S.C. § 2000c-2(a)(1) (2012).

44. 42 U.S.C. § 2000e(k).

45. 42 U.S.C. § 2000e-1(a).

46. 42 U.S.C. § 2000c-2(c)(2). This paper does not consider the scope of the ministerial exception, which “is a separate judge-made exception rooted in the First Amendment designed to allow religious organizations to hire and fire religious leaders according to any criteria they choose. The ministerial exception is broad—it covers any kind of discrimination—but applies only to religious leaders, or those whose duties are ‘ministerial.’” *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 782 n.1 (2010) (White, J., concurring) (citation omitted).

47. EEOC Compl. Man. (BNA) § 12-1 (July 22, 2008), <http://www.eeoc.gov/policy/docs/religion.html>.

the employee's interest in protection from employment discrimination—tip differently depending on the type of discrimination at issue: “[R]eligious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination.”⁴⁸ That is, under statutory and case precedent, as well as accepted social norms, a religious employer would be hard-pressed to justify—legally or in the public arena—an assertion that its “religious beliefs” permit racially discriminatory hiring. However, these same employers, using the same Title VII statutory exemption, find much more success in arguing that their religious beliefs permit discrimination based on sex, particularly when that discrimination is based on reproductive decisions or status—e.g., pregnancy—that are inextricably linked to one's sex.⁴⁹ The cases discussed in Part II illustrate that courts reviewing religious employers' firing of female employees who become pregnant (or, shockingly, merely attempt to become pregnant) often accept the employer's asserted religious liberty interest as paramount and consider the employee's reproductive decisions to fall within the religious employer's right to regulate through adverse employment actions (e.g. firing the pregnant employee). An employee's statutorily protected right to become pregnant without fear of an adverse employment action—as codified by Title VII and the Pregnancy Discrimination Act—is instead often reframed as the employee's choice to violate an employer's code of conduct or to violate a morality clause in an employment contract. The decision to become pregnant, a decision intricately linked to *personal* moral and religious beliefs, is framed as being subject to the moral and religious scrutiny of the *religious employer*. This leads courts to fundamentally adjudicate these cases as religious liberty cases about the rights of the employer, rather than as pregnancy or gender discrimination cases about the rights of the employee. This reframing allows courts to give greater weight to the employer's asserted religious liberty interest, while virtually disregarding the employee's protections against sex and pregnancy discrimination. It also allows courts to ignore the reality that

48. Minow, *supra* note 6, at 782.

49. See, e.g., *Henry v. Red Hill Lutheran Church of Tustin*, 201 Cal. Rptr. 3d 15 (Cal. Ct. App. 2011) (barring a wrongful termination claim for having and raising a child out of wedlock on the basis of the ministerial exception); *Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130 (3d Cir. 2006) (holding that a Title VII sex discrimination claim for termination of employment after supporting an advertisement in support of *Roe v. Wade* was invalid because Congress did not intend courts to apply Title VII “in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision”); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (holding that, in the firing of a teacher who remarried, Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's “religious activities.”).

morality clauses aimed at sexual activity (and the results of sexual activity) *can* serve as pretext for sex and pregnancy discrimination.

A. *Boyd v. Harding Academy of Memphis*

In *Boyd v. Harding Academy of Memphis*, Andrea Boyd, a preschool teacher at a school associated with the Church of Christ, was fired after becoming pregnant.⁵⁰ When Boyd informed her supervisor that she was pregnant, she was terminated.⁵¹ Her supervisor explained that, “because [Boyd] was pregnant and unwed, she set a bad example for the students and parents”⁵² The supervisor also informed Boyd that, if she married the father of her unborn child, she would become eligible for her position again.⁵³ Upon termination, Boyd brought suit under Title VII for sex discrimination, claiming that she was fired for being pregnant and unwed.⁵⁴ Harding Academy responded that Boyd was legally fired under “the New Testament’s proscription on pre-marital sex.”⁵⁵ By bench trial, the District Court found that Boyd did not experience sex discrimination under Title VII but was fired for the nondiscriminatory reason of violating the extramarital sex policy and that the policy was applied in a nondiscriminatory manner by Harding Academy.⁵⁶ Boyd appealed and the Circuit Court wholly affirmed the District Court’s findings.⁵⁷

The courts in *Boyd* fundamentally framed the question before them as whether the school properly applied its prohibition on premarital sex in Boyd’s case. And framing, of course, matters. The question, as framed, assumes the validity of the morality clause, and asks only whether the way the employer used the policy to fire Boyd was consistent and gender-neutral. By assuming the validity of the prohibition on pre-marital sex, the courts focused primarily on the application of the policy and thus framed the question as one of whether the employer’s religious liberty was adequately safeguarded, rather than if the employee was protected from unlawful pregnancy discrimination. Consequently, the courts never fully examined the morality clause itself, including threshold questions of whether the policy itself was discriminatory.

50. *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 411-12 (6th Cir. 1996).

51. *Id.*

52. *Id.*

53. *Id.* The supervisor described another teacher who was terminated under the same scenario who later married the father of her child and was rehired.

54. *Boyd v. Harding Acad. of Memphis, Inc.*, 887 F. Supp. 157, 158 (W.D. Tenn. 1995).

55. *Id.* at 158. On appeal, the policy was referred to as “Harding’s policy against extramarital sex.” *Boyd*, 88 F.3d at 414-15.

56. *Boyd*, 887 F. Supp. at 158, 162 (noting that both male and female employees had been fired in the preceding 30 years under this policy).

57. *Boyd*, 88 F.3d at 410, 415.

The significant question that was *not* asked—and should be asked—was whether the morality clause could comport with Title VII. The courts’ framing, however, reflects their willingness to subsume the employee’s reproductive right into the employer’s religious liberty interest and assume the validity of a morality clause—a reading that fails to separate out the distinct (and threshold) question of whether the employer policy was itself discriminatory. Indeed, federal regulations interpreting Title VII are explicit that this question must be addressed, as “[a] written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in *prima facie* violation of Title VII.”⁵⁸ When this step is skipped, the application of the employment contract’s morality provisions—rather than the validity of the morality provisions and the question of whether sex/pregnancy discrimination occurred—becomes the controlling question.

In *Boyd*, the only reason the morality policy was triggered and employment termination initiated was because of her pregnancy—indeed, she was explicitly informed that she was being fired because she was “pregnant and unwed.”⁵⁹ This is, of course, *prima facie* evidence of pregnancy discrimination. Perhaps even more startling in *Boyd* were the many questions regarding whether a policy prohibiting extramarital sex even existed or whether Boyd was aware of the policy. The only evidence proffered that there was a prohibition on extramarital sex policy at Harding Academy was a general statement in the staff handbook that said the school “expected [teachers] in all actions to be a Christian example for the students. . . .”⁶⁰ In the absence of clear evidence of a policy the court presumed that the common knowledge that Christianity disapproves of sex outside of marriage,⁶¹ coupled with the Christian nature of the school, amounted to a policy of prohibition on extramarital sex. The District Court explained that Harding Academy used “as its religious tenets the teachings of the New Testament, and one of the . . . principles embodied therein is that sex outside of marriage is proscribed.”⁶² That court repeatedly referred

58. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (2011).

59. *Boyd*, 88 F.3d at 412.

60. *Boyd*, 887 F. Supp. at 158 n.1. While Harding Academy did not have an explicit policy proscribing participation in extramarital sex, the District Court found, and the Circuit Court agreed, that the school’s handbook, which explained that “Christian character” and “professional ability” are the bases of hiring decisions at the school, along with the requirement that teachers act as “Christian example[s]” qualified as an employment policy against participation in extramarital sex. *Id.*; *Boyd*, 88 F.3d at 411. Boyd testified that she was not aware of the policy, but the District Court found that, since Boyd knew Harding Academy was a Christian workplace and since she claimed on her employment application to be Christian, there was no issue of whether the policy existed. *Boyd*, 887 F. Supp. at 158 n.1.

61. *Boyd*, 887 F. Supp. at 158 n.1. (noting that plaintiff testified in her deposition that she did not know of any Christian religious organization that teaches that sexual activity among unmarried persons is appropriate or moral).

62. *Id.* at 158.

to Harding Academy's policy as "the New Testament's proscription on premarital sex,"⁶³ highlighting the doctrinal—and sweepingly broad—nature of the policy. By emphasizing the religious nature of the proscription, rather than looking to the validity of the handbook's content as employment policy, the courts permitted the religious interest of Harding Academy to subsume Boyd's interest in being free from pregnancy discrimination.

Relatedly, Boyd argued that Harding's asserted reason for firing her—the morals clause in the handbook—was pretext for sex discrimination. She argued that the policy was applied inconsistently in her case, as she was not terminated when her supervisor found out that she had a miscarriage soon after she began her employment at Harding and she was told that, if she were to marry the father of her child, she could be rehired.⁶⁴ She also argued that because her supervisor used the language of being "pregnant and unwed" as the reason for her termination, the policy was being used a pretext for discrimination. However, the courts did not agree. They found that the supervisor's inconsistent application of the policy was "isolated"⁶⁵ and did not "invalidate that policy as a legitimate nondiscriminatory reason for plaintiff's termination" and that Boyd's reliance on her supervisor's comments "d[id] not establish the defendant's proffered nondiscriminatory reason for plaintiff's termination was pretextual."⁶⁶

The courts' cursory analysis of the legitimate, non-discriminatory reason and pretext issues implicitly elevated Harding's religious interests over Boyd's reproductive right by ignoring the gendered nature of the morality clause and related policies. Despite that some men and non-pregnant women were terminated under the auspices of the same policy,⁶⁷ the fact that women have an "inability to keep private her extramarital sex resulting in pregnancy" compared to their male counterparts who can keep such a pregnancy private, "gives men a clear upper hand in avoiding morality-based termination."⁶⁸ Simply put, Boyd's premarital sexual activity never would have been discovered but for her pregnancy. "Men and women will never be 'similarly situated' with respect to morality requirements such as the ones these private schools claim to require, because women are biologically more disposed to show the outward manifestations of what a private religious school might view as immoral behavior."⁶⁹ To find that Boyd was fired "not because of her pregnancy per se, but because her pregnancy indicated that plaintiff engaged in sex outside of

63. *Id.*

64. *Boyd*, 88 F.3d at 412, 414.

65. *Boyd*, 887 F. Supp. at 161; *Boyd*, 88 F.3d at 414.

66. *Boyd*, 887 F. Supp. at 161.

67. *Boyd*, 88 F.3d. at 414.

68. Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 529, 556 (2010).

69. *Id.* at 560.

marriage as proscribed by Harding Academy,”⁷⁰ blinks reality and ignores the connections between sexual activity, sex/gender, and pregnancy.

B. *Dias v. Archdiocese of Cincinnati*

In a more recent case, *Dias v. Archdiocese of Cincinnati*, Christa Dias, a computer technology coordinator for two of the Archdiocese of Cincinnati schools, was fired after disclosing to her supervisor that she became pregnant through the use of artificial insemination.⁷¹ Dias’s supervisor explained that she was being fired both for being “pregnant and unmarried” and “pregnant by means of artificial insemination.”⁷² Dias sued for pregnancy discrimination under Title VII and under Ohio Revised Code Chapter 4112, as well as for breach of contract without good cause.⁷³

On cross motions for summary judgment the Archdiocese conceded that Dias made a prima facie case of pregnancy discrimination, but then argued that she could not rebut its legitimate, non-discriminatory reason for firing her: her violation of the morals clause in her employment contract that specified she would, “comply with and act consistently in accordance with the stated philosophy and teaching of the Roman Catholic Church.”⁷⁴ They also argued that Dias could not enforce her employment contract because she had “unclean hands,” as she, knowing it was prohibited by the morality clause, was in a “long-term homosexual relationship . . . that she kept secret from the Defendants.”⁷⁵ In her motion for summary judgment, Dias argued that it was irrelevant whether her pregnancy by means of artificial insemination was included in the morality clause because “her Title VII rights trump any illegal anti-pregnancy provision in a contract.”⁷⁶ The court denied Dias’s motion in full, but granted the Archdiocese’s motion on the issue of Dias’s contract claim, adopting the unclean hands doctrine argument.⁷⁷

Unlike in *Boyd*, the *Dias* court analyzed the validity of the morality clause and whether it comported with Title VII. In denying the Archdiocese’s motion for summary judgment on the issue of the Title VII claim, the court noted that the clause might not have been valid, given the factual dispute as to whether Dias knew that the clause included becoming pregnant by means of artificial insemination.⁷⁸ This was an important step towards recognizing the employee’s

70. *Boyd*, 887 F. Supp. at 159.

71. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio 2013) (order granting Plaintiff’s Motion for Summary Judgment in part).

72. *Id.* at *1.

73. *Id.*

74. *Id.* at *1 n.1.

75. *Id.* at *6

76. *Id.* at *2 (citing “doc 54,” Plaintiff’s Motion for Summary Judgment).

77. *Id.* at *6.

78. *Id.*

reproductive right; however, by adopting the Archdiocese's "unclean hands" argument, the court avoided actually addressing the morality clause's validity. Additionally, when deciding the motions for summary judgment, the court explained, "[t]he morals clause in this case lacks specificity such that only an evaluation of the decision-makers' testimony can show whether their initial reason for terminating Plaintiff was simply enforcement of a policy against premarital sex. This in the Court's view is a factual determination for a jury: to answer why Defendant really terminated Plaintiff."⁷⁹ While the court relied on *Boyd* to imply that firing on the basis of an extramarital sex policy could be a legitimate non-discriminatory reason for termination based on pregnancy, it also said that the facts surrounding the morality clause matter. This is more than the *Boyd* court did for acknowledging the reproductive right involved.

However, on the issue of whether being fired for being "pregnant and unwed" constituted a violation of Title VII as a matter of law, the *Dias* court firmly relied on *Boyd*, stating "the Court cannot adopt Plaintiff's view that terminating an employee for being 'pregnant and unwed' automatically amounts to a violation of Title VII."⁸⁰ Instead, the court explained that a jury must decide whether *Dias* was terminated because she was pregnant or because she violated a policy against extramarital sex.⁸¹ In this way, the court wholly accepted *Boyd's* analysis and ignored the connection between sexual activity, gender, and pregnancy.

Dias's case, however, is unlike *Boyd's* in that her alleged violation of Archdiocese's morality clause was not due to extramarital sex, but to impregnation via artificial insemination.⁸² The *Dias* court acknowledged that this was a "twist" from the *Boyd* analysis and that the *Boyd* court suggested that becoming pregnant by artificial insemination might not constitute a legitimate violation of the morality clause. However, it "nonetheless f[ound] *no reason* that a policy against artificial insemination, like a policy against extra-marital sex, could be upheld so long as it would be enforced in a gender-neutral manner."⁸³ Under this rationale, the court concluded that *Dias's* termination for being pregnant via artificial insemination was not a *per se* violation of Title VII.⁸⁴

This is a significant expansion of the rationale in *Boyd*, where the policy against extramarital sex was the asserted basis of the firing. Becoming pregnant via artificial insemination does not implicate any provision against extramarital sex, as by definition sexual intercourse is not involved. Rather, a firing on these

79. *Id.* at *5.

80. *Id.*

81. *Id.*

82. It is not clear if it would have made a difference if she were married and became pregnant via artificial insemination.

83. *Id.* at *6 (emphasis added).

84. *Id.* at *7.

grounds is an explicit firing for being or attempting to become pregnant—the very form of discrimination Title VII and the PDA seek to prohibit. In this way, the *Dias* court’s application of *Boyd*’s rationale to a pregnancy by artificial insemination enlarges the doctrine and gives enormous deference to the religious liberty interest in claiming that the morality clause (which was never analyzed for legitimacy), rather than the pregnancy, was the reason for the employment termination.

Perhaps most telling is this: when a jury actually engaged in untangling the claims of pregnancy discrimination and religious liberty, it found for *Dias*. The jury awarded *Dias* \$171,000 in back pay, compensatory and punitive damages when the jury found that the Archdiocese “would [not] have made the same decision if Ms. *Dias*’s pregnancy had played no role in the employment decision.”⁸⁵

C. *Herx v. Diocese of Fort Wayne-South Bend*⁸⁶

It is worth briefly noting that we see similar framing in a case that just resolved in December 2014.⁸⁷ In *Herx v. Diocese of Fort Wayne-South Bend*, Emily Herx’s contract to serve as a Language Arts teacher at a religious school was not renewed for “improprieties related to church teachings or law.”⁸⁸ This “impropriety” was Herx’s use of in vitro fertilization.⁸⁹

Herx commenced suit in federal court, alleging, in part, that her non-renewal ran afoul of Title VII.⁹⁰ Here, the employer’s argument regarding Herx’s Title VII claim could not more clearly illustrate the framing and entanglement issue so evident in *Boyd* and *Dias*. The Diocese argues:

It makes no difference that Herx claims she was discriminated against on the basis of her sex or pregnancy status. It cannot reasonably be disputed that the basis of the decision to not renew her Contract was religious. A religious employer’s religiously based decisions are included within the religious employer exceptions to Title VII. *The*

85. Verdict Form at 3-4, *Dias v. Archdiocese of Cincinnati*, No. 1:11-cv-251 (S.D. Ohio June 4, 2013), 2013 WL 2903167.

86. I previously discussed this case with regard to the ministerial exception in an article about *Hosanna*. Waters, *supra* note 11.

87. At trial, the jury found in favor of Herx and awarded her almost \$2,000,000 in general damages, the majority for compensatory damages of pain and suffering. Verdict, Agreement and Settlement at 1, *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No. 1:12-cv-122 (N.D. Ind. Dec. 19, 2014), 2014 WL 7692713. The court later adjusted this award to about \$550,000 due to a statutory cap on compensatory damages. Judgment in a Civil Action at 1, *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No. 1:12-cv-122 (N.D. Ind. Jan. 12, 2015), 2015 WL 355962.

88. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 48 F.Supp. 3d 1158, 1173 (N.D. Ind. 2014) (order granting Plaintiff’s Motion for Summary Judgment).

89. *Id.*

90. *Id.*

*issue is not Herx's sex or pregnancy status, but only the specific medical procedure, proscribed by Church Teachings, in which Herx and her husband engaged.*⁹¹

The court, in deciding motions for summary judgment on the Title VII claim, rejected the Diocese's broad application of the religious exemption, explaining that, "Title VII doesn't give religious organizations the freedom to make discriminatory decisions on the basis of race, sex, or national origin."⁹² However, the court still framed the "triable issue" in a way that accepted the employers' religious beliefs as grounds for firing a woman for her personal reproductive decisions. The court explained that the question for trial would be, "whether Mrs. Herx was nonrenewed because of her sex, or because of a sincere belief about the morality of in vitro fertilization."⁹³ Once again, we see a court framing the reproductive right as subject to employer's moral and religious scrutiny under the auspices of a religious liberty interest. The employer's belief is accepted as a legitimate basis for the nonrenewal; it is accepted that the employer's beliefs, rather the employee's beliefs, control. Framing a Title VII and pregnancy discrimination suit where the employee was explicitly fired for attempting to become pregnant as not about sex or pregnancy, and instead about the employer's asserted religious liberty right, simply turns Title VII on its head.

What is perhaps most striking about these Title VII cases is that there is no question that the employees were fired because of their protected decisions—becoming or attempting to become pregnant. In the traditional Title VII case, that would be the end of the story: Title VII does not permit discriminatory firings. However, in the above scenarios where the supposedly permissible grounds for firing an employee is not solely that she is pregnant but because she is pregnant and unwed, or pregnant by artificial insemination, the firing is considered to trigger questions of protecting the *employer's* religious beliefs as defined by the *employer's* morality clause/policy. The reproductive/gender equity right is entangled with the employer's asserted religious belief. Such a reading cannot, however, be squared with the intent of Title VII. The correct reading of the Title VII religious exemption cannot be that, once an employer claims that its motives are religious it can discriminate against any classification it considers religiously relevant, and be allowed to define the scope of its religious beliefs. If this were the case, then religion would be a blanket exemption from the law. These judicial decisions have allowed the

91. Memorandum of Law in Support of Defendants' Motion for Summary Judgment on the Pleadings Dismissing Plaintiff's Complaint at 12-13, *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No. 1:12-cv-122 (N.D. Ind. Sept. 5, 2012), 2012 WL 3870528 (emphasis added).

92. *Herx*, 48 F.Supp. 3d at 1175.

93. *Id.* at 1179.

employers to define the scope and extent of their religious beliefs to subsume other protected categories—namely, protections against sex and pregnancy discrimination.

III. THE PARALLELS: RECASTING THE REPRODUCTIVE RIGHT IN THE ACA CASES

The comparison between the Title VII and ACA cases is clearly not exact, as in the ACA cases, the Court examined whether the government's enforcement of the contraceptive mandate burdened the employers' religious liberty. By contrast, in the Title VII cases, the courts determined whether the employees' anti-discrimination protections had been violated by the employers' actions. Nonetheless, we see parallel failures in the Title VII cases, the *Hobby Lobby* and *Conestoga* briefing, and the Court's majority opinion. Hobby Lobby, Conestoga, and the Supreme Court majority disregarded the burden imposed upon employees' reproductive decision-making based on an employer's broadly defined religious beliefs. This allowed the employer to assert a religious liberty claim that subsumed any true consideration of the employee's protections against sex discrimination, and, importantly, as we see in the Title VII cases, disregarded the explicitly gendered nature of that burden.

In seeking to defend the mandate, the United States defined its interest in enforcing the mandate by reference to the burden on female employees: it contended that "the exemption respondents seek would deny those individuals the health coverage to which they are legally entitled as part of their employment compensation" and that the contraceptive mandate "serves compelling interests in public health and gender equality."⁹⁴ The United States further argued that "[i]ndividualized religion-based exemptions to that system would directly and materially harm the very individuals the scheme was intended to benefit."⁹⁵

In rebuttal, Hobby Lobby disregarded the burden on female employees, and instead argued that:

First, the government's articulated compelling interests are woefully deficient. Two—public health and gender equality—are defined so broadly that they could never satisfy strict scrutiny. . . . The third . . .

94. Brief for the Petitioners at 14-15, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

95. *Id.* at 38; see also Brief for the Respondents at 10, *Conestoga*, 134 S. Ct. 2751 (No. 13-356) ("The preventive-services coverage provision grants participants and beneficiaries in the Conestoga group health plan privately enforceable benefits as part of a comprehensive insurance system established by law. The exemption petitioners seek would deny those individuals the health coverage to which they are legally entitled as part of their employment compensation—and which Congress intended to make available generally through all forms of coverage available under the Affordable Care Act. The provision also serves compelling interests in public health and gender equality.").

—the promotion of a “comprehensive” scheme of providing benefits to all—actually highlights the most glaring problem with the government’s defense of the mandate: the government has already granted a bevy of exceptions to the mandate⁹⁶

Hobby Lobby also argued that “[w]hile public health and gender equality are noble interests, they provide no better guidance in applying strict scrutiny than the equally noble interest in promoting the general welfare.”⁹⁷ Conestoga similarly asserted that the “interests of ‘equality’ and ‘health’ [that the mandate] ostensibly furthers are generic, inconsistently pursued, and unsupported by evidence showing the Mandate causes them to a compelling degree.”⁹⁸

The Supreme Court’s decision, likewise, virtually disregarded the burden placed on the female employees who would not have contraceptive coverage through their employer-sponsored health insurance plan. Indeed, the Court simply stated that extending the religious accommodation to for-profit corporations would allow female employees to “continue to receive contraceptive coverage without cost-sharing” and “face minimal logistical and administrative obstacles.”⁹⁹ The actual burdens, however, are far from minimal. First, the accommodation has the potential to affect many more women than Hobby Lobby’s and Conestoga’s employees: the U.S. Chamber of Congress notes that more than half of the United States’ workforce is employed by closely-held corporations.¹⁰⁰ As such, even the “minimal” burdens on female employees that the majority acknowledges will be required by the accommodation could have a very broad impact. Second, as amici ACLU argued, “[w]ithout access to contraception, women’s ability to complete an education, to hold a job, to advance in their careers, to care for their existing children, or to aspire to a higher place, whatever that may be, is compromised.”¹⁰¹ The government’s interests in eradicating these burdens on reproductive decision-making are “concrete, specific, and demonstrated by a wealth of empirical evidence.”¹⁰² As Justice Ginsburg made clear in her dissent, “[c]ontraception coverage enables women to avoid the health problems

96. Brief for Respondents at 15, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

97. *Id.* at 46.

98. Brief for Petitioners at 49, *Conestoga*, 134 S. Ct. 2751 (No. 13-356).

99. *Hobby Lobby*, 134 S. Ct. at 2782 (quoting Coverage of Certain Preventative Services under the Affordable Care Act.). Ironically, it was Health and Human Services’ consideration of religious interests that gave the Court the “less restrictive” means of accommodating for-profit religious interests.

100. Venky Nagar, Kathy Petroni & Daniel Wolfenzon, *Ownership and Performance in Close Corporations: A Natural Experiment in Exogenous Ownership Structure*, CORPORATE GOVERNANCE WORKING GROUP 1 (Feb. 2002), <http://web-docs.stern.nyu.edu/salomon/docs/corporategovernance/S-CG-02-06.pdf>.

101. Brief for the American Civil Liberties Union as Amici Curiae Supporting Government at 9, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

102. *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

unintended pregnancies may visit on them and their children . . . helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening . . . [and] secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.”¹⁰³ The burdens of non-coverage are financial as well; as Justice Ginsburg detailed, “[t]he cost of an IUD is nearly equivalent to a month’s full-time pay for workers earning the minimum wage . . . almost one-third of women would change their contraceptive method if costs were not a factor . . . and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be.”¹⁰⁴

While the Court wholly failed to acknowledge both the true burden on protected reproductive decision-making and the concrete (and significant) health and financial burdens on women, the Court instead focused almost solely on the employers’ religious choices to be made under the mandate.¹⁰⁵ As in the Title VII cases, this focus permits the employer to essentially define the scope of the asserted religious right *and* bind its female employees to this same definition. The case then became one focused on religious liberty, and not one focused on a true balancing of the competing rights. The female employee’s ability to make reproductive choices becomes subject to the self-defined religious views of the employer, regardless of whether the employee shares those beliefs. As Justice Ginsburg made plain in her dissent, this is unprecedented: “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.”¹⁰⁶

This unprecedented use of RFRA allowed the Court to ignore that the burden of non-compliance with the mandate is a truly gendered one. In both the ACA briefing and decision we hear echoes of the Title VII cases discussed *supra*: the corporate litigants and Court closed their eyes to the fact that prescription contraceptive methods are only available to women, and that when reliable contraceptive methods are not accessible, women uniquely bear the burden of an unplanned pregnancy. An accommodation from the mandate fundamentally burdens female employees differently than it burdens male employees, and that reality cannot be ignored simply because the employer

103. *Id.*

104. *Id.* at 2800.

105. The majority decision states: “HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.” *Id.* at 2767. It furthermore writes, “[w]e doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.” *Id.* at 2777.

106. *Id.* at 2801 (Ginsburg, J., dissenting).

seeking an exemption is a religious one. Senator Barbara Mikulski, the author of the contraceptive coverage provision, made plain that the provision was explicitly designed to eradicate this gendered burden: “Often those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles. . . .”¹⁰⁷ The government’s interest in eradicating gender discrimination is “an interest of the highest order,” and “[t]hat is what is at stake in this case given that the contraception rule addresses a vestige of gender discrimination.”¹⁰⁸ This interest is not a hypothetical one, but is grounded in the realities of women’s lives. The stark reality for too many women is that “high costs and discriminatory insurance coverage have been a real barrier to effective access and use,” and this lack of access affects women’s ability to pursue education and work opportunities.¹⁰⁹ As amici, the ACLU succinctly argued in *Hobby Lobby*:

The contraception rule addresses a remaining vestige of sex discrimination: the disparities in the cost of health care as between women and men, the longstanding exclusion of services needed only by women from health care coverage, and the need for women to have meaningful access to all forms of contraception if they are to control unintended pregnancies and thus enjoy greater equality in society.¹¹⁰

IV. UNTANGLING THE KNOT

The Title VII cases discussed *supra* involve more than an immutable characteristic such as sex or race; they involve the immutable characteristic of sex plus, as characterized by the courts, an element of *choice*: that is, choosing to become pregnant out of wedlock or using assisted reproductive technology. Implicit in the religious employer Title VII cases are arguments that women *choose* to have sex or to *choose* to attempt to get pregnant or to *choose* to attempt to prevent pregnancy while working for religious employers, and that these choices are ones that implicate the *employer’s* religious beliefs. Because these choices are contrary to the employer’s broadly defined religious beliefs

107. Sarah Lipton-Lubet, *Promotion Equality: An Analysis of the Contraceptive Coverage Rule*, ACLU 6 (Oct. 2012), https://www.aclu.org/files/assets/promoting_cquality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf.

108. Brief for the American Civil Liberties Union as Amici Curiae Supporting Government at 7, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

109. Lipton-Lubet, *supra* note 107, at 6 (noting “the ability to advance in the workplace through education or on-the-job training, because of the ability to control whether and when to have children, has narrowed the wage gap between men and women. One study shows that the birth control pill led to roughly one-third of the total wage gains for women in their forties born in the mid-1940s to early 1950s.”).

110. Brief for the American Civil Liberties Union as Amici Curiae Supporting Government at 9, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

(as articulated in contractual morality clauses or employment policies), the courts seemingly accept that the employee's personal exercise of the reproductive right (one that may well be grounded in the employee's own moral/religious beliefs) can be subject to the employer's scrutiny. This triggers courts to entangle the reproductive liberty interest and the religious interest, and ultimately view these cases as ones where the religious employers' religious liberty interest subsumes the reproductive right of the employee.

Because of this entanglement of personal reproductive rights (and personal moral and religious choices) with the employer's religious liberty right, the statutorily protected right to become pregnant—out of wedlock or through assisted reproductive technology—and not lose one's job is reframed as the employee's choice to break an employer's morality clause. The employer's asserted religious belief is permitted to subsume the employee's choices regarding reproductive activity—choices that may be personally religious for the individual woman. The steps that are missing, of course, are these: (1) recognition that Title VII, as amended by the PDA, explicitly protects this "choice;" (2) the necessity of examining the morality clauses themselves to determine if they are discriminatory; and (3) recognition that the burden of such clauses falls disproportionately on women.

Similarly, the *Hobby Lobby* majority assumed that the employer's asserted religious beliefs permitted an exemption from federal law. What was virtually ignored was that the question at issue was a startlingly gendered one: *Hobby Lobby* and *Conestoga* argued to provide female employees—and only female employees—with health care coverage that was not comprehensive, and argued to deny coverage for widely used and highly effective medications available only to women. The Court assumed, without real question, that an employee's personal religious and moral choices regarding reproductive decisions are within an employer's legitimate scope to regulate. As in the Title VII cases, the employees are forced to comply with the employer's moral or religious beliefs, regardless of whether they share those beliefs.

The problem with these assumptions can be illustrated by substituting "race" for "pregnancy" in any of the Title VII cases: if Boyd, Dias, or Herx had been fired by their religious employers for being African American because the employer asserted that its religious belief prohibited intermingling of the races (the "choice" to intermingle), it is difficult to imagine the firing being blessed by any court.¹¹¹ If a religious employer's morality clause required its employees to refrain from exercising the statutorily protected right to vote under the Voting Rights Act, no court would affirm the validity of the clause. Yet, as illustrated by the above cases, courts are assuming the validity of

111. *See, e.g.,* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that racially-discriminatory school policies, even when rooted in religious doctrine, are contrary to public policy and at odds with the state's compelling interest in eradicating racial discrimination in education).

morality clauses that require female employees to accept the burden of refraining from exercising the statutorily protected right to become pregnant and not lose one's job. Courts assume that employees' reproductive decision making triggers employers' morality clauses or policies. Likewise, had Hobby Lobby or Conestoga asserted that their religious beliefs permitted them to refuse to provide a class of medications only available to a certain race, it is difficult to imagine the Court so blindly accepting the asserted religious interest. And yet the courts in both the Title VII and ACA cases have little problem assuming that *of course* women's personal reproductive decision making could offend an employer's religious beliefs, and have little problem assuming that the employer is permitted to define those beliefs as broadly as it sees fit—even if doing so tramples on other protected rights.

A look at past Title VII cases dealing with contraceptive coverage more broadly (that is, not in the context of religious employers) illustrates that courts' willingness—or unwillingness—to truly examine the gendered nature of the burden on reproductive freedoms can determine the outcome of the case. In 2001, the Western District of Washington addressed the question of whether the selective exclusion of prescription contraceptive coverage from an employer's comprehensive health coverage plan ran afoul of Title VII and the Pregnancy Discrimination Act.¹¹² In finding that this selective exclusion did violate Title VII, the court held "Title VII does not require employers to offer any particular type or category of benefit. However, when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."¹¹³ In coming to this conclusion, the court explicitly recognized that women and men are differently situated with regard to health care needs, and that blindness to this reality could not justify discriminatory treatment:

Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs. Even if one were to assume that Bartell's prescription plan was not the result of intentional discrimination—the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.¹¹⁴

112. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

113. *Id.* at 1272.

114. *Id.* at 1271-72.

Six years later the Eighth Circuit faced precisely the same question; whether an employer's selective exclusion of contraception from a comprehensive health care plan violated Title VII.¹¹⁵ In finding that this exclusion was not discriminatory, the Eighth Circuit found the proper comparators for Title VII purposes were comparisons between the "coverage for female contraception (prescription contraception) [and the coverage for] male contraception (condoms and vasectomies)"¹¹⁶ and stated:

[T]his case concerns Union Pacific's coverage of contraception for men and women. The proper comparator is the provision of the medical benefit in question, contraception. Union Pacific's health plans do not cover any contraception used by women such as birth control, sponges, diaphragms, intrauterine devices or tubal ligations or any contraception used by men such as condoms and vasectomies. Therefore, the coverage provided to women is not less favorable than that provided to men. Thus, there is no violation of Title VII.¹¹⁷

Erickson and *Union Pacific* illustrate that when courts actually consider the realities associated with sex, pregnancy, and contraception, the true nature of the gendered burdens are clear. The Eighth Circuit's analysis, of course, blinks reality on several fronts. First, the only prescription contraceptives available on the market are those for women. Second, only women can get pregnant. Indeed, Judge Bye, writing in dissent, objected to the majority's choice of comparators, and explicitly recognized the gendered nature of the burden, writing, "contraception [is a] gender-specific, female issue because of the adverse health consequences of an unplanned pregnancy (or even the general health consequences of any pregnancy). . . . Women are uniquely and specifically disadvantaged by Union Pacific's failure to cover prescription contraception."¹¹⁸ When courts, such as the Eighth Circuit, do not acknowledge the gendered nature of the burden we end up with strawmen about comparative classes completely divorced from reality. This same pattern is seen in the ACA cases: when the analysis of the need for contraceptive coverage ignores what such coverage actually means for women's lives, it is not surprising that the employer's interests prevailed.

The EEOC recently published updated guidance on sex and pregnancy discrimination that explicitly resolved the *Erickson/Union Pacific* split in decisions on contraceptive coverage and made clear that the exclusion of contraceptive coverage from a comprehensive health care plan is

115. *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 944 (8th Cir. 2007).

116. *Id.* at 948 (Byc, J., dissenting).

117. *Id.* at 944.

118. *Id.* at 948-49 (Byc, J., dissenting).

discriminatory. The EEOC guidance explains that “[e]mployers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as medical costs unrelated to pregnancy.”¹¹⁹ Specifically on contraceptive coverage, the Guidance explains that “[t]he plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.”¹²⁰ The EEOC explains that the reason this must be so is “[b]ecause prescription contraceptives are available only for women,” and “a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage.”¹²¹ As such, the EEOC has adopted the approach to health insurance coverage that is consistent with the *Erickson*’s court’s contextual view of sex, pregnancy, and contraception.

CONCLUSION

The ACA contraceptive mandate cases and the Title VII pregnancy discrimination cases demonstrate the religious liberty and reproductive rights “knot.” In *Boyd*, we see the courts holding that being pregnant and unwed violates the school’s *religious* policy prohibiting extramarital sex, but finding that the policy creates a legitimate, non-discriminatory reason for firing a pregnant employee. In *Dias*, the court extends the logic in *Boyd* to cases where pregnancy was due to artificial insemination rather than extramarital sex, finding that, so long as the *religious* policy against artificial insemination was applied in a gender-neutral way, it could act as a legitimate, non-discriminatory reason for adverse employment treatment. In *Herx*, the employer adapts this argument. Rather than claiming that the non-renewal of Herx’s contract was due to the legitimate, non-discriminatory reason of a violation of a morals clause, the employer asserts that the non-renewal was a religious decision exempted from Title VII under the religious exemption. In *Hobby Lobby*, the Supreme Court explained that the burden on employees of permitting a business to be exempt from all or some of the contraceptive mandate is minimal or even non-existent and implicitly held that the religious corporations’ sincerely held beliefs trump the asserted reproductive or gender equity right.

But, of course, policies that permit firing on the basis of pregnancy, or on the basis of premarital sex, can very rarely be truly gender neutral, even if grounded in religious beliefs. The sexes simply demonstrate and experience the

119. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, No. 915.003, § (i)(A)(4)(a) (July 14, 2014).

120. *Id.*

121. *Id.* at § (i)(A)(1), (i)(A)(3)(d).

effects of sex and pregnancy in different ways, and women, of course, have visible manifestations of sexual activity and pregnancy. The fact that a religious employer has declared a policy neutral does not make it so. The question that must be asked is whether such policies, even when based on the employer's religious beliefs, can be squared with Title VII, or, in the ACA cases, the government's interest in eradicating gender discrimination. The sex discrimination claim must be actually balanced against the employer's assertion of religious liberty. This inquiry cannot be a hypothetical one: it must be grounded in the realities of sex, gender and pregnancy—including effects on educational and work opportunities, health consequences, and considerations of reproductive autonomy. And this inquiry must recognize that simply because an employer has a religious belief about reproductive decision-making (such as the decision to have sex, become pregnant, or use contraception) does not mean that its religious liberty interest can subsume the employees' reproductive and gender equity rights. A genuine inquiry will avoid automatically conflating women's sexuality and reproductive decision making with "moral" or "religious" issues, and thus allow for a true consideration of both rights and the untangling of the reproductive rights and religious liberty knot.

When faced with evaluating those interests and potential burdens in the face of employers' claims of religiously liberty courts all too often view them through the lens of religious liberty, rather than through the lens of sex discrimination. As we see in comparing *Erickson* and *Union Pacific* and in the new EEOC Guidance, when courts do evaluate the interests in gender equity and reproductive autonomy, and particularly when courts evaluate the *actual* effects of policies impacting reproductive rights—such as contraceptive coverage policies—it affects the outcome of cases. This is a practical and tried approach to untangle the reproductive right and religious liberty knot.

