“Defining RFRA: An Implementation Analysis of the Religious Freedom Resoration Act (RFRA) in Healthcare Policy”

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Abstract

The Religious Freedom Restoration Act of 1993 has been a significant source of debate among legal scholars and policymakers in its application to healthcare policy. In particular, the infamous ruling Burwell v. Hobby Lobby (2014) raised the question of whether RFRA should continue to exist if it would result in religious argumentation restricting access to contraception and other forms of healthcare. This paper is an analysis of the implementation of RFRA in healthcare policy. It uses qualitative coding to analyze the argumentation of RFRA to determine how the statute is interpreted and mechanized. The findings from this research explain two issues which I call the "perception problem" and the "facilitation issue". Observing how the issue with RFRA is rooted in its inherently contradictory argumentation, the policy implications point us to an amendment of RFRA.

Introduction

When lawmakers were drafting the Religious Freedom Restoration Act (RFRA) in 1993, some Catholics feared that the bill would be used to create exemptions for women to obtain access to abortion on religious grounds. Thirty years later, the most successful RFRA complaints have been those seeking exemptions from insurance contraception mandates on those very grounds. In December of 2022, however, RFRA came back to its origins as a preliminary injunction was granted blocking Indiana's abortion ban, arguing that there was a high probability of success under the merits of RFRA that women could obtain abortions under RFRA based on beliefs that life did not begin at conception. While it may seem contradictory for there to be a law that allows two directly opposing views on when life begins, a hotly debated question, this form of discretion is exactly what RFRA was set up to do. The larger contradiction, however, lies in the argumentation used to reach these rulings in both cases.

The Religious Freedom Restoration Act of 1993 (RFRA) is a statute passed by Congress to provide religious exemptions from laws of general applicability. RFRA operates under a three prong balancing test: first, plaintiffs must prove there is a "substantial burden" imposed on their religious exercise; if that is proved, the burden shifts to the government to prove that its law defends a "compelling interest". This compelling interest must be enacted using the least restrictive means against the religious beliefs and be narrowly tailored to the specific complaint. This means, the government needs to prove their interest is specific to the religious individual and not overly broad.This legislation was enacted in response to the highly critiqued Supreme Court Decision, *Employment Division v. Smith (1990)*, that did not allow a Native American man unemployment insurance after being fired for violating the Controlled Substance Act. The Plaintiff in *Smith* was fired, and because his religious exercise violated a criminal statute, he was

unable to receive unemployment benefits from the state. RFRA substantially reversed the decision in *Smith* and returned to a balancing test similarly employed in *Sherbert v. Verner (1963)*. In the 1997 ruling of *City of Boerne v. Flores*, RFRA was declared unconstitutional on the federal level.. In the aftermath, 21 states have passed state level RFRAs or substantially equivalent statutes that employ this exact balancing test.

Since then, the most notable case law that has impacted the discourse surrounding the Religious Freedom Restoration Act is *Burwell v. Hobby Lobby (2014)*. *Hobby Lobby* set two precedents: 1) that for-profit corporations were considered legal "persons" capable of claiming free exercise violations, and 2) that employers who did not qualify for religious exemption under the statute itself were entitled to exemption from the Patient Protection and Affordable Care Act's (ACA) contraception insurance mandate under RFRA. The ACA's contraceptive mandate (or "The Mandate") guarantees coverage of women's pregnancy preventative care such as various forms of birth control and related counseling. This coverage would be at no-cost to employees whose employers purchased the group health plan or individual insurance coverage. Apellees in *Hobby Lobby* argued, and were successful in claiming, that The Mandate substantially burdened their religious exrcise because it forced them to facilitate what they considered to be abortions via the purchasing and provision of insuranc coverage that supplied contraception such as IUDs and morning after pills.

The *Hobby Lobby* ruling created an uptick in contraception mandate exemption filings as well as scholarly articles discussing the merits of RFRA, particularly related to healthcare. Law reviews were littered with articles on whether or not RFRA was constitutional, whether RFRA was applied fairly across religions, and whether or not RFRA was being used in a discriminatory manner. While some scholars suggest that RFRA can be used for progressive policies such as

abortion access or immigration rights, the overwhelming success of the contraception mandate exemptions has led most scholars to argue that RFRA will only pose an hindrance to healthcare in general and is either unconstitutional or too loosely defined. Barring destroying it altogether, scholars have suggested that the remedy to RFRA is to more tightly define terms like "substantial burden" or what constitutes religious exercise in general. Despite this, little to none rigorous analysis has been done on the arguments that have created the RFRA rulings themselves, namely the warranting for how these decisions were made.

My initial hypothesis was that once these arguments were analyzed I would obsrve the argumentation itself would not line up from case to case, thus creating inconsistency. If this inconsistency was found across various religions or differen forms of healthcare, there migh have been an argument to be made for RFRA as a tool of discrimination. Upon further inspection, this wasn't the case, and another reason was at play for RFRA's incoherence including n the infamous *Hobby lobby* ruling. *Hobby Lobby* hinges on the idea that contraception is an abortifacient, a clash and contradiction of definitions and how they function. The idea of ambiguous definitions had arisen in the literature beforehand, but typically in argumentation that RFRA was too broadly defined or that specific words such as "substantial" or "compelling" lacked any clear definition. While the latter argumentation may still be true, this paper argues that the justifications as to whether or nothing is substantial are incoherent within their own logic.

I used qualitative coding to rigorously analyze the argumentation used to define RFRA rulings in both permanent court orders and preliminary injunctions. These codes were then used to identify two main lines of argumentation that RFRA cases used. The first outlines the "perception problem", the observation that there only needs to be a perceived violation of a

plaintiff's religious belief and not an actual violation that is consistent with the internal logic of the belief itself. This finding has two subpoints and also collapses into the second finding, "facilitation". This finding examines how there is a distance between the belief and the impact of the belief. Notably, this issue emphasizes how the impacts are typically uncertain or unable to be determined by the plaintiff. I use these findings to discuss the two different ways RFRA could be potentially amended to solve for these contradictions. The first is a direct amendment to the text that focuses on definitions, and the second discusses the usefulness of the proposed Do No Harm Act, legislation that would prohibit RFRA exemptions from being filed for certain types of policy areas such as healthcare and government accommodations.

While there is much discussion in the literature about whether or not RFRA does more harm than good and whether it should be outright abolished or not, the scope of this paper is much more narrow. Before we can have a fruitful discussion on RFRA's overall "success", we must first understand how it actually operates. This paper is a thorough implementation analysis in one policy topic area, healthcare. Using the policy field of healthcare creates an intresting juxtaposition not only between two topics that might seem socially at odds—religion and science—but between one topic that uses strict definitions and one topic whose definitions are purposely vague. The use of healthcare also acts as a lens in which to focus the research in, but it is well established in the paper that because the focus is about argumentation and not content, these findings can be applied to other topic areas that use similar argumentation.

Literature Review

A. Overview

Since its inception in 1993, the Religious Freedom Restoration Act (RFRA) has been studied primarily in law review journals, but more recently in other scholarly publications as it

broadly pertains to several types of policy issues.Specifically, the issue of healthcare was also discussed concerning RFRA before it was signed into law and has continued to become a topic of research after the landmark 2014 case *Burwell v. Hobby Lobby*. In general, RFRA has been studied as a part of the broader conversation of religion's role in public conscience in the United States, and there are two main categories of how RFRA and state RFRA laws have been studied: historical explanations of the implementation of RFRA and empirical analysis of the implementation of RFRA. In regards to healthcare rulings under RFRA, the act has primarily been studied using smaller case studies or analysis of case law pertaining to certain healthcare related issues such as abortion or euthanasia. The gap in this scholarship lies in the lack of specificity of the case law analysis where most scholarship focuses on outcomes such as win/loss rates and constitutionality, whereas I endeavor to analyze the specific legal arguments which characterize RFRA and most strongly impact policy. For example, the analysis of what argumentation has led to contraceptive mandate exemptions is not studied as thoroughly compared to what religious groups have sought these mandates or the history of mandate exemptions in the law and policy sphere.

Analysis of RFRA

The majority of Religious Freedom Restoration Act research consists of law review articles that use historical and legal analysis to make several arguments typically for or against RFRA. Some of this scholarship is more neutral historical accounts such as a legislative history of RFRA or a history of RFRA in general (Drinan 1993, Hammersmith 2016, Harrison 2017, Hodge 2015, Sheehan 2021). All scholarship on RFRA contains some element of a neutral historical analysis, but then uses that historical lens to create argumentation for why RFRA should or should not be supported, retained as constitutional, etc.

Scholarships that many times comes from religious or more conservative legal scholarship will defend RFRA on the ground of constitutionality at the federal level and state RFRA applications or at least make arguments for why "outrage" or "controversy" towards RFRA is unwarranted given an analysis of case-law (Bean 2019, Jipping 2021, Ojserkis 2021). There is also a significant amount of scholarship that discusses the unconstitutionality of RFRA and the harms of the discriminatory nature of its outcomes (Gatta 2016, Sullivan 2005). Most of the scholarship that reprimands the use of RFRA does not have the same generalized historical approach as the proponents of RFRA, instead relying on a more specific analysis of RFRA pertaining to an individual policy issue; this will be discussed in further detail in the next section of this review.

This legal-historical approach is useful for a general overview of RFRA as a law, but tends to lack specificity and policy implications on a more localized level. Even when these articles specifically use case-law analysis (although not empirically), the arguments rest more on general legal intuitions and argumentation than analyzing the law as policy. To be charitable, the goal of most law review articles is not policy or implmentation analysis, but it is odd that when determining the nature of RFRA, scholars tend to treat it more like frst amendment free exercise claims than statutory interpretation. One example of this is the Ojserkis article that argues that the outrage surrounding the passage of the Indiana RFRA (IRFRA) was not warranted because the opponents relied on hypothetical legal arguments to oppose the passage of the law. The article, like many others, sets up a comprehensive historical and legislative history of the IRFRA, specifically studying the *Hobby Lobby* case and its impacts. Still, the articles lack an analysis of *how* the law was implemented (i.e. the arguments that allowed for these rulings to come to fruition) and how that could warrant disapproval by the public and legal scholars. There is also

no clear metric used for whether or not something is an “outrage”, so it is unclear what the author was measuring other than painting a broad historical argument. This pattern of not looking at the case-law itself and having unclear metrics for measuring outcomes is consistent throughout the articles with a historical-legal approach.

The second and less common analysis of RFRA comes from more empirical studies of the Religious Freedom Restoration Act and its specific components. Typically these articles will measure outcomes such as the type of issues or religions that successfully get exemptions (Abram 2016, Shooge 2017). These are statistically motivated articles that look at outcomes across tens or hundreds of case-law to identify factors like parties who filed the case, religious identification, etc. and argue for or against a particular bias in a given category. Some empirically driven research however has looked at more specific components of RFRA rather than outcomes (Bean 2019, Girgis 2019). Bean (2019) and Girgis (2019), for instance, represent the two camps of analysis for the components of RFRA: the balancing test and the legal person. There are dozens of articles on these subjects, and these two are some of the most comprehensive literature from this methodology of research.

Abrams 2016 is the most empirically rigorous, analyzng 115 cases using descriptive statistics and tests of correlation. I will detail the bulk of her research in the next subsection, but for RFRA in general, she analyzes the explanatory power of several variables. One interesting and perhaps enlightening finding is the correlation between religion and success. Abrams discss the “secular disadvantage” which describes how Christians have a higher win rate compared to that of other religions, and particularly how being secular has a strong prdictive factor of losing a RFRA claim. This may seems intuitive since RFRA protects “religious” beliefs as opposed to “secular” beliefs, but Abrams notes how this distinction is not as well defined as one might think.

She particularly describes a case where white supremacy was considered to be a religious beleif rather than a secular political or philosophical ideology. She links this into her recommendation of redefining religion to include atheism and agnosicism to create consistency across cases, but does not go into much detail about what the actual inconsistencies between treatment of different religions entailed other than win and loss rates.

The balancing test research deals with the "substantial burden" and "compelling interest" test that lies in the statute itself. The question of most articles is the specificity of these terms and how governments should weigh one over the other. Girgis (2019) outlines different interpretations for the "substantial burden" aspect of the balancing test, and then provides three tests for a substantial burden. Girgis conducts analysis on the categories of "type of exercise" and "type of impact" that substantial burdens fall under. Other categories such as "obligatory" and "periphery" religion are used to analyze what it means to substantially burden religion. While the paper successfully analyzes RFRA on its conceptual level and identifies the rules it is operating under by using several categories of analysis, it still lacks specificity, in that it does not look at the argumentation used in the case-law to help refine these categories.

The legal person refers to who RFRA applies to: an individual or a corporation. There has been a general uptick in this research after the *Hobby Lobby* ruling which ruled corporations could exercise religious freedom. Bean's research empirically analyzes whether the "to the person" aspect of RFRA is applied equally between individuals and corporations. This specific article also provides a clear methodology of analyzing case-law and a dataset of case law. There are very few compiled databases of sorted RFRA case law, so this specific article already created a way of analyzing RFRA complaints more systematically.

B. RFRA and Healthcare

With abortion being one of the first concerns legal scholars took with RFRA's passing, healthcare applications of RFRA in general have widely been studied. When the bill was still in congress, Catholics and anti-abortion groups feared that RFRA would allow individuals to get religiously-based abortion. There was a competing bill in the House, the Religious Freedom Act, that mirrored the RFRA, but did not allow RFRA to be used in issues regarding abortion (Drinan 1993). This same exception has been proposed and expanded, but this time by pro-abortion rights activists, in bills introduced such as the Equality Act and the Do No Harm Act, the latter of which prevents RFRA from being used in any healthcare related issue. Neither bill has made it out of committee.

Going back, again, to Abrams, two associations were statistically significant: 1) an association between "context and outcome", and 2) "exemption and outcome". This meant that "context" and "exemption" had strong correlative determination of the success of the RFRA claim. In particular, healthcare related claims, which Abrams uses the Health and Human Services (HHS) descriptor for, had a 78% chance of success, higher than any other category. Correlation does not imply causation, and so it is not certain whether the type of claim was the sole determinant of success. One particular finding Abram notes is that for HHS claims, the majority are contraception exemption claims, and so the *Hobby Lobby* precedent could be the correlative variable instead of healthcare claims in general. This is the idea that settled law, precedent, is a powerful explanatory variable. This particular article will be especially important to link my own analysis back to given much of it will also focus on RFRA exemptions from The Mandate. Most of the literature on the contraception mandate argues that these exemptions are unconstitutional, discriminatory, or dangerous precedent for policy (Alias 2017, Case 2017, Gedicks 2014, Strasser 2016). Norma 2016 does make the argument that RFRA could be

potentially used to limit religious challenges against the Affordable Care Act, but this is a rarity in the literature.

This type of research highlights the impacts of RFRA, but also highlights inconsistencies in the argumentation used in the case-law. Most of this literature either advocates declaring RFRA unconstitutional due to this inconsistency or harmful outcome or advocates for having a stricter definition of some term in the law. For example, Gedicks 2014 makes arguments about RFRA's ruling on The Mandate to be unconstitutional but also specifically inconsistent with other free exercise claims due to the cost-shifting element of its application to the ACA. Geddicks argues that because the third party harms are only present in the contraception claims, RFRA is inconsistent in its idea of what it considers an exercise of religion. Along these similar lines, because the discrimination is found to skew to a particular religion, Christianity, many authors have advocated having a stronger definition of religion to avoid inconsistent application across religions. This resonates with the empirical analysis of substantial burdens and what is considered substantial categorically. These types of claims led me to believe that this was the core issue with RFRA, but without examining the argumentation I could not determine what was causing the alleged skew. This was a motivating factor for my approach to examining argumentation which I will describe soon.

Finally, RFRA has been researched related to non-contraception healthcare issues such as transgender healthcare, euthanasia, and abortion (Florczak 2018, Harbaugh 2021, Myrick 2022, Smolin 1995, Urch 2013). These articles look at a specific case study or set of similar cases regarding one specific healthcare related issue. This literature tends to have a general overview of the issue at hand, how it has been moralized in the religious sphere, and then how it has been interpreted under RFRA. This literature also advocates for a stance of pro or anti-RFRA, but

some articles such as Smolin 1995 highlight the law to be inconsistent on purpose due to the complexities of balancing religion and the state. In his analysis of euthanasia and RFRA, he makes arguments that whether religion should be allowed in the public conscience or not is a complex matter and depends on the definition of religion being internal or external. Euthenaia tends to be an outlier in time frame, as many of these applications to other healthcare, such as transgender healthcare and vaccines, are relatively recent phenomena. Because there is so little case law relative to contraception mandates, these issues have just begun to be closely examined, and it is unclear whether or not RFRA operates in a similar way with these topic areas as it does with contraception.

C. Lack of Argumentation Analysis

The gap in the literature is a lack of analysis of the arguments that shape RFRA outcomes themselves. Most literature surrounding healthcare makes claims for or against religious arguments being used for insurance contraception mandates, but does not actually analyze the arguments themselves to determine their religiosity or discriminatory nature even though they claim to want to more strictly define religion. While some research does examine specific case-law, it is also in the context of outcomes rather than the warrants for the ruling itself. Analyzing these arguments are especially important in examining exactly where RFRA becomes incoherent. It is not enough to say that RFRA is discriminatory without first examining the warranting that led to the presumed discriminatory argumentation. In the case of healthcare, and what will be for the most part contraception mandate exemptions, I will be examining what types of arguments are actually being used to create these contentious outcomes.

While much of the literature argues for or against the merits of certain legal arguments, the specific gap is not to analyze the opinions from a legal perspective but a policy perspective.

What I mean by this distinction is that instead of rooting argumentation on precedent or ideas of constitutionality or certain judicial philosophies, I will be trying to understand exactly what the statute says and how it has been implemented by examining the arguments in opinions. While this does contain a certain aspect of legal analysis, it will have a greater focus on the mechanisms of the law itself, how exactly we get to the ideas that form legal precedent and how that precedent then interacts with future cases.

Specifically, the reason for taking a policy approach is to more clearly link it to policy recomendations for RFRA beyond claiming its constitutionality or lack thereof. To take a policy oriented route means to have policy oriented recomendations that point toward making changes to the statute itself. One benefit to RFRA as opposed to other free exercise cases, is that because it is statutory, state legslaturess and Congress can pass laws to amend RFRA instead of using the courts to strike down certan interpretations of RFRA. The approach of analyzing arguments that lead to certain outcomes will help for us to better understand what exactly needs to be amended so that these forms of argumentation are either clarified or avoided entirely.

Methods

The goal of this paper is to analyze the implementation of the Religious Freedom Restoration Act. Because RFRA operates through lawsuits, its implementation exists in the orders and opinions produced by courts. This paper establishes patterns among dozens of case law to identify the contradictions in argumentation that determine RFRA rulings. In order to clearly identify these patterns, I used qualitative coding using Dedoose research software to create a broad picture of how RFRA is implemented. The focus on arguments specifically irrespective of religious affiliation will show that the findings are descriptive of RFRA in general and not as applied to a specific religious group and claim type.

To start the qualitative coding process, I created a database of RFRA complaints related to healthcare. To procure case law, I used a mix of legal databases: NexisUni, Findlaw, and Harvard Law School's Case Law Project. The use of three databases ensured I gathered the maximum number of relevant data for my dataset. I was also sure to refer to the literature and gather any relevant case law discussed in previous research to include if relevant. I startedwith LexisUni as it is the most comprehensive of the databases, and then I will proceed to cross check with Findlaw, Harvard, and the literature respectively. My search method was, "Search>Legal>US Cases for 'RFRA' since 1993". I repeated this similar method of captioning and timespacing for each database. This NexisUni search yielded 3,380 results. To narrow down the RFRA cases to those only related to healthcare, I experimented with several different keywords to refine my search: "HHS", "Health and Human Services", "Health", and "Healthcare". "Health" yielded the most results of 1,525 cases, but upon a cursory search this was revealed to be overly broad.

I settled for "Healthcare" as the narrowing keyword because it reflected the core terms listed by Nexis. This subsearch yielded 464 results which also encompassed the results for "HHS" (213 results) and "Health and Human Services" (320 results). I Shepardized—sorted the case law by whether or not they were in good standing using the Shepard Signals in NexisUni—the 464 cases to examine which of the cases would be used for my initial dataset. I removed all results with a red or orange Shepard's citation leaving 368 viable cases. Of the 368 viable cases, I knew not all of them were going to be useful since keyword searches tend to be overly broad. I then went through the cases to determine if they met the criteria for this study which were cases that 1) were decided on a RFRA claim or included a RFRA claim in the decision making, 2) were pertaining to a healthcare or health insurance policy, and 3) where the RFRA claim was not

used to further the ruling of another legal issue. This resulted in 82 viable cases, the final count for my dataset.

Once I collected viable cases, I read through the initial complaint and opinion of the court. Through this initial "scrape-through" I was looking for key themes and keywords to build the code tree from. I constructed several groups of codes that I thought encompassed the focus of the study or would be useful in later analysis such as: "Religion", "Healthcare", "Argumentation", and "Case Type". From these broader categories, I created smaller subcodes. For example, codes related to "Argumentation" were: "definitions of life", "facilitation", "perceived violation", and "actual violation". I would use these codes for my analysis. I organized these codes into a code tree that I then replicated in Dedoose, a qualitative coding software. With a complete code tree, I was able to more thoroughly and more consistently code the opinions than I would have if I was inductively coding by hand or using Excel.

I uploaded the text of each of the 82 opinions into Dedoose as media files to analyze. During my analysis, I utilized the NexisUni headnotes feature to help guide where the RFRA analysis was taking place in each opinion. I marked off these sections before reading the opinion in full. Oftentimes opinions would have miscellaneous legal claims such as broader first amendment or Title IX claims, but because it was outside the scope of the research, I did not code these parts unless the claims directly related to the RFRA claim as well. This was especially common in preliminary injunctions where a large part of the opinion would be dedicated to extraneous legal analysis such as standing and jurisdctionl.

I included both preliminary injunctions and permanent injunctions or orders in my dataset, and they were denoted using the "case type" code with subcodes "preliminary injunction" and "permanent injunction/summary judgement". The reason for this is that although

they operate differently in the courts, they both include the RFRA balancing test. In a permanent injunction, order, or summary judgement, the RFRA balancing test would decide the outcome of the case meaning it creates the strongest and most clear implementation of RFRA. These cases are typically the type to be appealed to higher courts and create stronger case law. Preliminary injunctions judge RFRA on the merits of success. The same argumentation is used as would be in a permanent injunction or summary judgement, but it does not decide the outcome of the lawsuit but rather argues for its ability to succeed in the future. These cases are especially important to include because they make up a large portion of the dataset but also because preliminary injunctions create direct policy implications such as blocking the implementation of an abortion ban trigger law, as is currently the case in Indiana. I viewed preliminary injunctions as weaker forms of evidence for research purposes, but observed that because they share incredibly similar if not identical argumentation to permanent injunctions, they provide valuable information on RFRA's general implementation at the lower level.

Once all of the media files in the dataset were coded, I focused on codes that were the most prevalent: "perceived violation", "belief", "actual violation", "facilitation", "correctness" and "individual". The frequency in the arguments was already the beginning of showing their centrality to RFRA itself, but their actual function within the cases still requires explanation. Because of their prevalence and centrality to the opinion, I focused on "perceived violation" and "facilitation" the most, and these ended up as my main findings. From there I went into greater detail to compare the sub-codes that were associated with these two codes and how they functioned. I analyzed the interaction between the codes and wrote findings based on these observations using logical reasoning to bridge the connections between codes. When writing the

findings section I compiled a list of excerpts based on their code type to easily identify quotes to use as raw data and evidence within the findings section.

Because many of the arguments were repeated throughout the dataset, I mainly used quotes from cases that were decided in a higher court (Supreme Court of the United States or Unted States Court of Appeals) and were in good legal standing, as indicated by their Shepard's signal. This means that almost all of the findings use higher appealed cases with a green Shepard's signal, but these are representative of the larger themes in the lower courts and preliminary injunctions. If a theme of a finding came from a case from a lower court or with a weaker Shepard's signal, this would be noted in the analysis and also supported with evidence from a stronger case. I did not use findings that were one-off ideas as I wanted to focus on the main structures of how RFRA claims are argued; if these claims popped up, they came from preliminary injunctions from district courts, so they are not weighed as significantly in the dataset. Overall I favored cohesion and depth of findings over fitting in every small facet of argumentation into my analysis.

Data

Below is the dataset Shepardized using the NexisUni Shepardize feature. In my analysis I took Green cases to be more revealing than Blue or Yellow, but it was always common for Blue and Yellow cases to reflect the argumentation used in Green cases, so they still held weight even if they had been questioned within the legal community. Even though *Hobby Lobby* is one of the most cited cases in RFRA complaints, it is Sheperdized as Yellow instead of Green because of its highly questioned reputation by the legal community[1]. Green Shepard Signals were mainly used as the examples in the findings section since they are the strongest case law.

Dataset:

[1] See Appendix A for the Shepard's Signal Indicator Key

	Green	Blue	Yellow
1	DeOtte v. Azar (2019)	Roth v. Austin (2022)	Liberty Univ. Inc. v. Lew (2013)
2	La. College v. Sebelius (2014)	Poffenbarger v. Kendall (2022)	Burwell v. Hobby Lobby Stores Inc. (2014)
3	Howe v. Burwell (2015)	Beckwith Elec. Co. v. Sebelius (2013)	Univ. of Notre Dame v. Sebelius (2013)
4	Catholic Benefits Ass'n LCA v. Sebelius (2014)	Geneva College v. Sebelius (2013)	Franciscan Alliance Inc. v. Burwell (2016)
5	Religious Sisters of Mercy v. Azar (2021)	Ass'n of Christian Schs. Int'l v. Burwell (2014)	Real Alternatives Inc. v. Sec'y of HHS (2017)
6	Diocese of Cheyenne v. Sebelius (2014)	Brandt v. Burwell (2014)	Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania (2020)
7	Legatus v. Sebelius (2013)	Newland v. Burwell (2015)	Grote Indus. LLC v. Sebelius (2012)
8	Franciscan All., Inc. v. Becerra (2021)	Dobson v. Sebelius (2014)	California v. Azar (2018)
9	Williams v. Trump (2020)	Catholic Benefits Ass'n LCA v. Burwell (2014)	Tyndale House Pblrs. Inc. v. Sebelius (2012)
10	Wheaton College v. Burwell (2014)	Deotte v. Azar (2019)	Roman Catholic Archdiocese of N.Y. v. Sebelius (2013)
11	Short v. Berger (2022)	Dierlam v. Trump (2017)	Hobby Lobby Stores, Inc. v. Sebelius (2013)
12	Ave Maria Found. v. Sebelius (2014)	Roman Catholic Archdiocese of Atlanta v. Sebelius (2014)	March for Life v. Burwell (2015)
13	United States v. Weslin (1997)	Dobson v. Azar (2019)	Grote v. Sebelius (2013)
14	Tropical Chill Corp. v. Urrutia (2022)	Franciscan All., Inc. v. Becerra (2022)	Korte v. United States HHS (2012)
15	DeOtte v. Nevada (2021)	Briscoe v. Sebelius (2013)	Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS (2013)
16	Conestoga Wood	Vita Nuova, Inc. v. Azar (2020)	Monaghan v. Sebelius (2013)

	Specialties Corp. v. Sebelius (2012)		
17		Am. Pulverizer Co. v. United States Dep't of Health & Human Res. (2012)	Korte v. Sebelius (2012)
18		Christian & Missionary Alliance Found., Inc. v. Burwell (2015)	Newland v. Sebelius (2012)
19		Annex Med., Inc. v. Burwell (2014)	Briscoe v. Sebelius (2013)
20		Catholic Diocese of Nashville v. Sebelius (2013)	Real Alternatives, Inc. v. Burwell (2015)
21		Catholic Benefits Ass'n LCA v. Hargan (2018)	Diocese of Fort Wayne-South Bend, Inc. v. Sebelius (2013)
22		W.B. v. Crossroads Academy-Central St. (2019)	Wieland v. United States HHS (2016)
23		Baker v. Crossroads Academy-Central St. (2022)	Whole Woman's Health v. Smith (2018)
24		Insight for Living Ministries v. Burwell (2014)	Annex Med., Inc. v. Burwell (2014)
25		Rodriguez-Vélez v. Pierluisi-Urrutia (2021)	Deotte v. Azar (2019)
26		Archdiocese of St. Louis v. Burwell (2014)	Hobby Lobby Stores, Inc. v. Sebelius (2012)
27		Care Net Pregnancy Ctr. v. USDA (2014)	Eden Foods, Inc. v. Sebelius (2013)
28		Catholic Charities of the Archdiocese of Phila. v. Burwell (2014)	Mo. Ins. Coalition v. Huff (2013)
29		Doe v. Parson (2019)	Air Force Officer v. Austin (2022)
30		Christian Emplrs. All. v. Azar (2019)	
31		Sch. of the Ozarks, Inc. v. United States HHS (2015)	

32		Newland v. Sebelius (2013)	
33		Ozinga v. United States HHS (2013)	
34		Braidwood Mgmt. v. Becerra (2022)	
35		Doster v. Kendall (2022)	
36		Christian Emps. All. v. United States Equal Opportunity Comm'n (2022)	
37		Ilya Feliksovich Iosilevich v. City of New York (2022)	

Code Tree:

Below is a sample of the code tree in a chart format. In Dedoose the code tree appears as a series of dropdown menus where smaller codes are indented underneath larger codes. The darker color code represents the larger code families that are associated with a specific color, and the lighter codes under that are the sub-codes belonging to the family.

Code/Sub-Code	Definition
Religion	Type of religion or spirituality of the initial plaintiff
Christianity	Of or relaing to the Christian faith
Unitarian Universalist	Of or relaing to the Unitarian faith
Judaism	Of or relaing to the Judaism or Jewish customs
Spiritualiy	Of or relaing to the spirituality or spiritual practices
Buddhism	Of or relaing to the the teachings of Buddha or practice of Buddhist customs
Paganism	Of or relaing to the pagan ideas

Other	Other faith, nondescript
Healthcare	Form of healthcare including medication, devices, surgeries, counseling, etc.
Abortion	Deliberate termination of pregnancy
Contraception	Deliberate use of artificial methods to prevent pregnany
IUD	Hormonal birth control that prevents the fertilization of an egg
Morning After Pills	Emergency contraceptive that prevents the fertilization of an egg
Sterilization	Surgery or medication that renders someone unable to reproduce
Reproductive Counseling	Counseling related to reproductive healthcare
Gender-Affirming Care	A surgical procedure altering a transgender person's physical appearance to align with their gender identity and related medication, counseling, etc.
Vaccines	A substance used to stimulate immunity from a virus
PrEP	Pre-Exposure prophylaxis preventing HIV infection
Arguments	Argumentation deciding RFRA claims
Definition of Life	Definitions or conceptions abou when life begins
Facilitation	To cause, directly or indirectly, an outcome through direct actions
Forced/Coerced Choice	A decision influenced by outside power or pressure
Religious Belief	Stated religious belief
Perception of Violation	A lititgant's alleged violation (does not have to be actual violation)
Actual violation	Actual violation derived from stated religious

	belief
Probability of Medical Outcome	Statistical ambiguity of medical outcome (e.g. uncertainty of birth control effectiveness)
Correctness	The concept that a belief must be correct
Group	Of or relating to a group's religious freedom
Individual	Of or relating to an individual's religious freedom
Case Type	Preliminary or permanent injunction status
Preliminary Injunction	Temporary legal relief that preserves the status quo
Permanent Injunction or Summary Judgement	Court order requiring a person to do or cease doing an action described in final judgement

Findings

Roadmap

This research paper sets out to explain exactly what elements of RFRA's implementation in the field of healthcare policy have led to the current outcomes in case law. I initially hypothesized that RFRA seemed to be too broad which allowed for it to contradict itself, but upon analyzing the actual argumentation, I have found that the issues with RFRA's intentional broadness is not a contradiction across different opinions of case law but in the argumentation in RFRA opinions. This means that the problem is not that different RFRA cases are contradictory in ruling but instead the internal argumentation uses an incoherent logic when evaluating claims. I will be calling this the "perception problem", a major finding that explains how the perception of a violation of free exercise, within the substantial burden prong of RFRA, is used as acceptable justification for a burden even if there is no actual violation using the standard set out in the plaintiff's own stated beliefs.

The qualitative coding was especially useful as I was able to specifically code for "religious belief", "perceived violation", and "actual violation" separately. I then compared the two to find that there is a misalignment between the actual belief and the perceived violation, leading to a mismatch of perceived violation and actual violation, making it abundantly clear that there was a contradiction. I then noticed the prevalence of this misalignment between the two codes, leading me to observe a high prevalence of this issue within the dataset. One important caveat is that most of the complaints in the dataset pertained to the Affordable Care Act's contraception mandate, so the argumentation would be along similar lines which accounts for the high prevalence of the "perception problem", which was present in every ACA contraception mandate claim, when coding. When examining other healthcare related claims such as vaccine mandates, abortion, and transgender related healthcare, the perception problem was much less prominent. This issue, however, is still fundamentally a part of RFRA in general and not just contraception mandate claims; to control for this I was able to find several instances of the "perception problem" in non-healthcare RFRA opinions and was sure to provide an example of one in the findings.

Another reason why the perception problem is less prevalent in non-contraception claims is that other claims tend to have broader, less scientifically described beliefs. What I mean by this is that the beliefs related to contraception, although fundamentally religious in their description and deemed by the courts, were described using medical terms. For example, "sanctity of life" arguments were not generalized but instead nearly always described as the religious belief that, "life begins at conception" or "the moment of embryo fertilization". These religious beliefs use medical terminology and concepts whereas other beliefs such as those relating to transgender healthcare will typically describe their beliefs without medical

terminology, therefore, making it harder to find an exact misalignment. An example is that plaintiffs argue they should not be forced to cover gender-confirmation surgery because they believe "that every man and woman is created in the image and likeness of God, and that they reflect God's image in unique—and uniquely dignified—ways"[2]. This spectrum of how much medical language is used to describe religious beliefs differs in religious cases, even in those with similar subject matter and will be discussed later.

While the "perception problem" is not present in all RFRA cases, it was in a significant portion of the dataset and captures how the substantial burden prong of the balancing test works across the board. This finding leads to two sub-findings: the distinction between "sincerity" and "correctness" and the prioritization of religious ideas over medical terminology. The former describes the issue with how the court defines "sincerity" in their examination of whether a plaintiff has a "sincerely held religious belief"[3]. The latter is the corollary to the overarching finding of the "perception problem" and how it impacts medicine specifically.

The second, and final, finding discussed is the "facilitation" issue. While the "perception problem" focuses on the ambiguity of *what* is actually being violated, "facilitation" focuses on the ambiguity on *how* something is actually being violated. "Facilitation" refers to the belief that a plaintiff's religious exercise is violated by being forced to enable a third party action that results from their primary action. A broad example relating to claims about insurance coverage exemptions is the idea that by purchasing insurance for a specific type of healthcare, such as prophylactic medication for HIV, this purchase then facilitates any possible behavior that the plaintiff believes results from or is encouraged by the use of this healthcare, such as "homosexual behavior"[4]. This finding occurs in nearly every case in the dataset. Att times

[2] Religious Sisters of Mercy v. Azar 513 F. Supp. 3d 1113
[3] The Religious Freedom Restoration Act (RFRA) 1993
[4] Braidwood Mgmt. v. Becerra 4:20-CV-00283-O

"facilitation" collapses into the "perception problem", as the issue of facilitation can sometimes be dependent on the incorrectly perceived violation, but remains sufficiently distinct as not all cases with the "facilitation" finding exhibited the perception problem.

Finding I: The Perception Problem

The first finding, and perhaps the most striking, is that even though RFRA creates a balancing test between burden on religious belief and compelling state interest, the burden on religious belief has to merely be perceived and does not have to be aligned with a proven burden on the religious belief. In abstract terms, this means that if X is a religious belief based on Y criteria, in order for there to be a substantial burden, Y does not have to be violated. Rather, the plaintiff only has to *perceive* X to be violated. This finding highlights the tension between religion and medical definitions and expertise in these cases. Particularly, even if there is an established medical consensus on a definition or explanation of the function of a medical procedure or prescription, the religious belief about said procedure or prescription will win out in the RFRA ruling.

A notable example of this comes out of the infamous *Hobby Lobby* opinion. In *Burwell v. Hobby Lobby (2014)*, it was ruled that 1) for-profit corporations are able to make RFRA claims and 2) The Affordable Care Act's contraception mandate was illegal without new rulemaking for religious exemptions. The owners of Hobby Lobby claimed that, due to their religious beliefs regarding contraception, it would substantially burden their free exercise to provide insurance to their employees that provided contraception they deemed to be abortifacients. This is based on the owner's sincerely held religious belief that "human life begins at conception" and that "[t]he fetus in its earliest stages…shares humanity with those who conceived it"[5]. By "conception", the

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

owners are referring to the point of fertilization before implantation to the uterine wall. Going back to our abstract analysis, X is the religious belief that the contraception used aborts a human life, and Y is that a human life begins at the moment of fertilization.

The contraception the owners had cited in their complaints were four specific hormonal drugs used which were either Intra-Uterine Devices (IUDs) or "morning after pills". Both of these forms of contraception work to prevent the fertilization of an egg. Although there was discussion of the possibility of IUDs and "morning after pills" preventing implantation, no evidence has been produced to support this claim. Even further, in December 2022 the FDA changed the labeling on these contraception methods to specify that these were not abortifacients. This aligned with recent studies that show that IUDs and "morning after" pills do not impact implantation, and in fact, the effectiveness of "morning after" pills to prevent fertilization is only about 15%[6]. According to this literature, there is no violation of the religious criteria Y of life beginning at conception since these contraception methods act before conception. Therefore, there is only a *perceived* violation of the religious belief X that the contraception is abortifacient.

The issue here is that the birth control methods listed by the owners of Hobby Lobby are not abortifacients by official labeling or by function. They are not classified by the FDA as such nor do they prevent implantation after fertilization (conception) has occurred. This means that the substantial burden of forcing a company to pay for abortifaceint coverage is determined by a perception of what medications are thought to beabortifacient instead of being based on the actual definition of abortifacient. In other words, even though the point of the substantial burden element of RFRA is to examine the relationship between the religious belief and the state's actions, a burden is able to be determined by the sole perception of the religious individual

[6] Linacre Q, "Does "Levonorgestrel Emergency Contraceptive Have a Post-Fertilization Effect?"

making the claim. This is not to say that those making RFRA claims can argue for burdens that do not exist, but the perception finding allows for the state's actions to be interpreted in a way in which they would not, especially for healthcare policy, where specific definitions of how medical devices and medications function, decide what those functions are.

Even acknowledging the possible uncertainty of the function of the contraception methods, the larger issue is that their function was never discussed in the evaluation of the substantial burden in the cases themselves. One thing that makes healthcare policy distinct from other RFRA case topics is the specificity of terms in the medical industry. When interpreting a statute and its implications, judges must use the specific terminology of the content of the statute. Unlike a RFRA claim related to burial rites, for example, whether or not burial flowers are considered religious is more ambiguous than whether or not an IUD is an abortifacient[7]. This finding that perception is more important than actual violation undermines the function and credibility of standardized medical terminology that is crucial to the understanding of whether or not there was a substantial burden at all. The majority opinion of *Hobby Lobby* characterizes the substantial burden leg of the balancing test as "a difficult and important question of religion and moral philosophy, namely, the circumstances under which is is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another"[8]. This would indeed be the case if the court takes the time to consider whether or not the "immoral act" functionally violates the morals and belief of the owners of Hobby Lobby which requires a discussion of what these medical devices actually do. It ignores the aspect that it is not entirely a philosophical discussion but a scientific one, too.

[7] "Burial flowers" is in reference to Winnifried Sullivan's "The Impossibility of Religious Freedom" where a RFRA claim for burial decor was denied due to the materials (e.g. flowers, cross, Stars of David, etc.) were not considered to be religious and therefore there was no substantial burden on religion.
[8] Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682 (2014)

One of the few opinions in the case law that does discuss whether these devices are abortifacients are not is in *Louisiana College v. Sibelius (2014)*. The majority opinion reads: "While most FDA-approved contraceptive methods function by preventing fertilization of an egg, four of those methods—the emergency contraceptive drugs Plan B and Ella, commonly known as the "morning after" pills, and two types of IUDs—may have the effect of preventing attachment or implantation of a fertilized egg to the uterine wall (collectively, "emergency contraceptives")"[9]. While this does discuss that there is a difference between contraception that impacts fertilization and contraception that impacts implantation, the discussion is speculative at best as the judges claim that it "may have the effect" with no definitive idea of the function. That might be exactly the point, that even a probability of impacting implantation would be enough to be considered as impacting implantation. This argument then relies on courts launching into hypotheticals about healthcare.

Still, in *L.A. College*, the wording places emphasis on the use of belief in violation rather than actual violation. The opinion reads, "Thus, L.C. objects to the use of emergency contraceptives, believing that such drugs and devices cause the death of a fertilized embryo"[10]. The wording is still that the plaintiffs believed the drugs caused the death of an embryo and not an adjudication that they have actually caused the death of an embryo. *L.A. College* then makes this even more explicit saying,

> "[T]he unsettled issue does not appear to be whether the court must accept the plaintiffs' subjective view of whether they are compelled or pressured to act in a religiously offensive way, or whether the court must examine the nature and quality of the act to gauge whether it is offensive from some kind of objective perspective. The case law provides an answer to this question: the plaintiffs' view of whether the act is religiously offensive controls."[11].

[9] Louisiana College v. Sibelius 38 F. Supp. 3d 766
[10] Louisiana College v. Sibelius 38 F. Supp. 3d 766
[11] Louisiana College v. Sibelius 38 F. Supp. 3d 766

This solidifies the finding that there is not an objective standard for determining violation of religious belief. This means that, virtually, the function of the medical device does not matter, at least to an extent that can decide whether or not there is a substantial burden.

To support this perception argument, I will also be offering an example that is not related to healthcare to further illustrate my point. *EEOC v. Kroger Ld. (2022)* grants a RFRA exemption from employee attire at a Kroger Grocery Store. Kroger had fired an employee for not wearing workplace attire that included a multicolored heart associated with the company's "Our Promise" campaign. The teal, red, orange, and blue heart represented the company's customer service philosophy and was decorated in the company's colors[12]. The employee won their RFRA suit under the claim of their sincerely-held religious belief that this heart forced them to support the LGBTQ+ community[13]. Again, here a claim was won not because it actually violated a religious belief, but because there was a perceived violation.This claim was settled on the perception of the heart's coloring and meaning instead of its actual image or reprsentaton making it a claim of perception rather than actual violation.

A. Medical Terminology

The direct corollary to this argument is this: if the perception of violation is preferred to any argumentation of whether there was an actual violation, and that determination of whether there is an actual violation is rooted in the definitions of medical terminology, devices, and other healthcare, then it must be that religious perception is preferred to medical definitions. This is a stunning observation not only because it shows that there is an actual lean from the courts toward religion when examining religion's function in healthcare regulation, but also because the field of healthcare is so dependent on the specificity of these definitions. This corollary further

[12] See Appendix B for an image of the heart
[13] E.D. Ark. Oct. 26, 2022 4:20-CV-01099 LPR

exemplifies how even if there is uncertainty about the function of certain forms of healthcare, there is an absence of discussion of function in the opinions in general because of the deference to a statement of belief. In short, assertions are being prioritized over medical definition without proper scrutiny.

This sub-finding becomes clear when examining RFRA complaints where multiple forms of healthcare under the same coverage plan are claimed to be in violation of free exercise. One example is *Legatus v. Sibelius (2013),* a preliminary injunction granted on the merits of RFRA when plaintiffs argued against purchasing insurance covering contraception, sterilization, and related counseling. *Legatus* reads, "Catholicism teaches that "life begins at conception and that abortion, sterilization, and contraception are contrary to divine law"[14]. Legatus argues that the HRSA Mandate imposes a substantial burden on its religious exercise "by forcing Legatus to do precisely what [its] religion forbids: impermissibly facilitate access to abortion-inducing products, contraception, sterilization, and related counseling"[15]. The substantial burden is on the beleif that "life begins a conception", but then clumps three distinct forms of healthcare and counseling under this one belief without distinguishing that not all of these forms of healthcare relate to the destruction of life after conception. It could be read that Catholicism believes in life at conception *and in addition* that the three listed forms of healthcare are prohibited by Catholic law; however, when stated together it reads that the three procedures are violations because they terminate life after conception, and this is how the opinion is generally read afterwards, which is not true of contraception or sterilization which both alter the body to prevent conception.

This particular wording can be ambiguous, but the way this is phrased in *Religious Sisters of Mercy v. Azar (2021)*. Plaintiffs claim that, "They also believe that performing

[14] Legatus v. Sebelius, 988 F. Supp. 2d 794
[15] Legatus v. Sebelius, 988 F. Supp. 2d 794

gender-transition, abortion, and sterilization services would violate their religious beliefs regarding human sexuality and procreation"[16]. Here different forms of healthcare are clumped under the broad umbrella about asserted beliefs regarding sexuality and procreation. While these beliefs may have been stated in more detail during oral argumentation and briefs, the decision itself does not outline specifically any consideration for how these are different. Plaintiffs are not required to explain every mechanism of their beliefs, but in order to actually evaluate whether or not a belief is burdened, courts must be able to track how the belief is impacted through the way it manifests. In this particular example, why is there a connection between gender transition and "sexuality and procreation" when gender is treated as distinct from sex in both the legal terminology of the Affordable Care Act as well as in the medical field at large?

The medical terminology corollary gets tricky because not all beliefs are defined or linked directly to a specific medical phrase or definition even if the religious beleif is related to healthcare. These types of cases are more recent and not related to contraception but other forms of healthcare. A recent example of this comes from the granted preliminary injunction for *Air Force Officer v. Austin (2022),* in which the Plaintiff was granted injunction from the Air Force's vaccin mandate because it violated his religious objections to the COVID-19 vaccine. The Air Forc Officer states her belief that her "body is a temple of the Holy Spirit", and that to inject it with a "novel substance of unknown long-term effects" would be a violation of that religious belief[17]. The perception problem is less clear here because there is no medical bounds to determine whether the vaccine violates the body's function as "a temple of the Holy Spirit". There is no requirement for RFRA plaintiffs to use medical terminology to dscribe their religious

[16] Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113
[17] Air Force Officer v. Austin, 588 F. Supp. 3d 1338

beleifs, but this ambiguity highlights the tension of regulating the intersection of religion and healthcare.

B. Sincerity and Correctness

The second and final aspect of the "perception problem" is the concern about determining sincerity. This is the crux of RFRA, because its purpose is to protect the sincere religious beliefs of individuals and corporations. RFRA already has at least three standards for evaluating a belief: religious rather than philosophical, sincerely held, and a non-centrality requirement. "There is no dispute that Meyers' beliefs are sincerely held and that they are substantially burdened by 21 U.S.C. §§ 841 and 846 and 18 U.S.C. § 2. The issue is whether his sincerely held beliefs are "religious beliefs," rather than a philosophy or way of life"[18]. This statement does two things: 1) it claims that religion can be defined by the court, and 2) it claims that sincerity is something the court has discretion on and not solely up to the plaintiff to declare. The first means that what is considered religion is being regulated under RFRA. This leads to the idea that there has to be a definition of religion if the court is to decide if that religion is being burdened. The second standard, the non-centrality requirement, is a simple non-restrictive one and claims that a belief does not have to be a central tenet or belief of the religion to be sincere [19].

Several of the cases in the dataset address the notion of sincerity when analyzing the substantial burden. *Diocese of Cheyenne v. Sebelius (2014)* directly quotes *Meyers* to establish an idea of sincerity, but the interpretation that comes out is circular at best. The opinion states, "The Government has not disputed that Plaintiffs' asserted beliefs are sincere and religious in nature. *See United States v. Meyers,* 95 F.3d 1475, 1482 (10th Cir. 1996) (stating a claimant must establish his or her beliefs to be both religious, rather than philosophical and held sincerely)".

[18] United States v. Meyers, 95 F.3d 1475

[19] Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113

Diocese of Cheyenne calls back to the stated standards for evaluating a belief, but when justifying the reason for sincerity, the cited case law asserts sincernss instead of describing it. The opinion goes back to the statute: “Broken down, the RFRA analysis involves two steps, and each step has two requirements. In the first step, the plaintiff has the burden of showing: 1) their asserted religious beliefs are sincere, and 2) the law in question substantially burdens the exercise of those sincere religious beliefs”, and the courts role in RFRA: “In considering substantial pressure, the Court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby,* 723 F.3d at 1137”[20]. But in venturing to answer this question of sincereity the court merely asserts that the beliefs are sincere without describing why.

Sincerity is only described, when evaluating whether there is a substantial burden, the use as a means to argue against the government and allow the substantiality to be accepted without scrutiny. This argumentation about correctness versus sincerity is used to waive aside the “perception problem”. The summary judgement of *Braidwood Mgmt. v. Becerra (2022)* relies on a misrepresented and vague idea of sincerity. The claim made by Plaintiffs is that the PrEP insurance coverage mandate under the Affordable Care Act substantially burdens their Christian beliefs because it the coverage would promote homosexual behavior. The opinion argues:

> “But Defendants inappropriately contest the *correctness* of Hotze's beliefs, when courts may test only the *sincerity* of those beliefs. The Supreme Court has "made it abundantly clear that, under RFRA, [HHS] must accept the sincerely held complicity-based objections **[*55]** of religious entities." *Little Sisters of the Poor*, 140 S. Ct. at 2383. Defendants may not "tell the plaintiffs that their beliefs are flawed" because the connection between the morally objectionable conduct and complicity in the conduct "is simply too attenuated." *Hobby Lobby Stores*, 573 U.S. at 723-24”[21].

[20] Diocese of Cheyenne v. Sebelius, 21 F. Supp. 3d 1215

[21] Braidwood Mgmt. v. Becerra, 2022 U.S. Dist. LEXIS 161052

Here, the court ignores the issue the "perception problem" and claims that Defendents are attacking whether or not the beliefs are correct in some objective sense rather than correct according to the criteria Plaintiffs originally stated as their religious beleifs in their original complaint..

The belief that the "perception problem" exploits, however, is not one of some objective, outside idea of correctness respective of the religion, but a standard that respects the religion by using its own logic. This is implicit in the language of RFRA itself and the description substantial burden prong in *Cheyenne* and *Hobby Lobby*. The wording is conditional, as the question of whether or not there was a substantial burden is dependent first on whether or not there was a sincere belief. This means that the "perception problem" identified is dependent on the existence of a real sincere belief. Sincerity implies there is a version of the belief that the plaintiff is serious about no matter how unrealistic it might seem to a bystander. Still, there is a reality to the belief and logical consequences that come from it to the believer. Therefore, there must be some degree of correctness when discussing sincerity. In order to judge whether or not a burden has been placed on his belief, the belief must stand on its own to be examined by a court, operating by its own consistent definitions. This means that a degree of internal correctness is needed.

Finding II: Facilitation

The second and final finding is the paradox of facilitation. There is no stated definition under RFRA as to what it means for a party to facilitate the behavior of another. As explained in the introduction, the third party aspect of *Hobby Lobby* was especially controversial, for how could someone claim to have their personal free exercise burdened when the behavior that

violated their beliefs was not certain to happen? This is not to say that conscientious objection claims cannot be made, and in fact courts have upheld them with no issue. The primary example s *Gilette v. United States (1971)* where a man was able to succeed on a free exercise claim that he was unable to serve in the Vietnam War because of humanist religious principles, primarily because it was not a war of self-defense[22]. Here, however, there is a direct link between an objection to war and fighting in a war. There is no definition as to what facilitate means or how many steps between the plaintiff and the action there must be for something to be facilitated, it is unclear how opinions made claims that individuals were facilitating actions that were ultimately decided by third parties. To derive a meaning I coded for "facilitation" to determine the instances for which this argumentation was used. This was particularly easy since this is the language the court itself uses.

The most common use of the facilitation argument occurs in insurance coverage claims where plaintiffs argue that the mandate to cover a specific form of healthcare would be the facilitation of a certain behavior exhibited by the recipient of that healthcare. Most famously written in *Hobby Lobby* where the Hahn family argues, "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs"[23]. Here the religious belief is stated as a matter of "support", but this ultimately links back to the prime belief in the complaint, the beginning of human life at the moment of conception. Here, the facilitation is not directly ending the life of a fertilized embryo, but providing the probability that a fertilized embryo would be terminated under the support of the Hahns; it is a probability and not a certainty, meaning facilitation does not need to have a secured chance of actually occurring. Moreover, if you believe the "perception problem" this probability of facilitation actually

[22] Gillette v. United States, 401 U.S. 437
[23] Burwell v. Hobby Lobby Stores, Inc. 573 U.S.

becomes zero, completely improbable. That is, if it is true that the contraception methods under fire in *Hobby Lobby*—IUDs and morning after pills—do not actually cause the death of a fertilized embryo, then the idea of facilitation does not exist in any practical sense in this case.

This observation about facilitation is especially strong where the probabilities can be more clearly calculated due to clear medical terms in both the stated belief and outcome, but things become murkier when the stated belief and stated outcome are broader. This is the case with *Braidwood Mgmt. v. Becerra*. The facilitation argument here reads, "They say neither they nor their families require such preventive care. They also claim that compulsory coverage for those services violates their religious beliefs by making them complicit in facilitating "homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman"[24]. Here there is no direct path between contraception and reproductive organs, two medical concepts, but rather the medication and several behavioral outcomes. Facilitation here does not mean direct cause, but instead expands on the idea of probabilities by acting in a role more similar to "support" or perhaps "incentivize". The drug itself cannot cause drug use in the same way contraception can impact uterine conditions, so the *Braidwood* ruling expands the idea of facilitation into a convoluted chain reaction of possibilities.

Once again, the "perception problem" pervades because there is no discussion as to whether it is even possible for a PrEP user to have a higher rate of drug use or sexual activity in any causative way, but the facilitation argument still stands unique from this stating that even if it could, the probability is so low it is unclear what the standard or definition of facilitation is. In *Braidwood*, the phrases "complicit in a scheme" and "complicit in those behaviors" are used specifically, implying that complicity in the system at large is also a form of facilitation. Here there is a misalignment as "complicit" infers a passive role whereas "facilitation" usually implies

[24] Braidwood Mgmt. v. Becerra, 2022 U.S. Dist. LEXIS 161052

an active role. This becomes abundantly clear in *Louisiana College v. Sibelius (2014)* where the self-certification form to apply for exemption was itself also ruled to be a form of facilitation. A rule was created to amend the ACA to have an option for employers to self-certify that they are opting out of insurance coverage for objections to the contraception mandate, and here Louisiana College wins on the claim that even the act of signing this form is a substantial burden on their religion because it still facilitates the insuring of contraception. What matters here, Plaintiff argues, is not "whether the government believes the accommodation is adequate to dispel Plaintiff's religious objections," but whether Plaintiff has an "honest conviction" that self-certification conflicts with its religion"[25]. The opinion of the court stresses that any form of pressure to change behavior is a form of substantial burden, but the linkage between the act of self-certifyng and the undesired outcomes that conflict with a religious beleif is unclear.

A final element that relates to facilitation is the possible misalignment between the individual nature or RFRA and its post-*Hobby Lobby* feature of being able to influence third party groups of people. For this, the codes "individual" and "group" were compared. It is implicit in the statute itself, given that RFRA examines individual belief and exercise rather than the belief or exercise of a religion or religious group as a whole, but *Doster v. Kendall (2022)* explicitly states the individual approach of RFRA.

> "[T]he Air Force (correctly) states that RFRA adopts an individual-by-individual approach: the Air Force must show that it has a compelling interest in requiring a "specific" service member to get vaccinated based on that person's specific duties and working conditions. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)[26].

Here the emphasis is on the nature of RFRA being tailored to the individual. This is evident in the fact that burdens on religion are viewed individually—as there is heterogeneity across the same religious groups in the dataset—as well as the compelling interest where the state cannot

[25] Louisiana College v. Sibelius 38 F. Supp. 3d 766
[26] Doster v. Kendall, 54 F.4th 398

use generalizations to explain why they have a compelling interest to burden this particular individual's religion. The latter is explicit in the form of the "least restrictive means" prong of RFRA. *Doster* makes this explicit as well, "the Air Force fails to identify the specific duties or working conditions of a single Plaintiff. It instead seeks to satisfy RFRA with the "general interests" underlying its vaccine mandate"[27].

This creates a troubling question when examining how facilitation functions in RFRA: how can a statute whose burdens lie in individual experience claim to be individualized when the perceived violation is occurring through the actions of a group of people? What do we consider faclitations when that group is not acting under the control or guidance of that individual? I think, to be charitable, that there is a degree that compliance with a concept that a religious individual objects to is a sincere remark (hence conscientious objection claims), but because there is no guidance what exactly facilitation means coupled with RFRA's highly individualized nature, it is confusing why the third parties involved are only considered as a part of the plaintiff's individual behavior. This individual and group issue particularly tends to favor the religious individual making a claim as Defendants are often asked to denote the wider scope of their actions where religious individuals are not. For example, in *Braidwood*, plaintiffs win their RFRA complaint on a facilitation argument without considering the third party harms, but Defendants are asked to consider third parties when providing compelling interest.

> "More importantly, Defendants do not show a compelling interest in forcing private, religious corporations to cover PrEP drugs with no cost-sharing and no religious exemptions. Defendants provide no evidence of the scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant **[*58]** "to the marginal interest" in enforcing the PrEP mandate in these cases"[28].

[27] Doster v. Kendall, 54 F.4th 398
[28] Braidwood Mgmt. v. Becerra, 2022 U.S. Dist. LEXIS 161052

This could cerrtanly be an issue with representation, but this double standard for the consideration of parties is consistently shown across complaints in the dataset.

Overall, the "facilitation" issue is a finding that is more of an observation of ambiguity than an internal contradiction as is the "perception problem". This is mainloy due to the function of judges as discretionary actors whose job is to determine questions of "to what extent?". Still, there are multiple aspects of facilitation that lend to RFRA being an even more broad statute than what could be intended, specifically with its impact on third parties who rely on their employers' insurance.

Policy Implications

Overview: Amending RFRA

The qualitative analysis leads to multiple findings that there are several incoherencies and ambiguities within the argumentation and internal logic of RFRA itself as implemented in these lawsuits and then compounded together as case-law. While the literature discussed primarily focused on the win-loss rate of certain claims and cases, these findings pinpoint how the success of a RFRA claim is mechanized; it is the gears of what makes RFRA tick. Because of this, the simplest solution that attempts to fix these contradictions is to amend the text of RFRA directly. I will propose two possibilities for this: a broad amendment that focuses on tightening definitions of RFRA and a narrow amendment that focuses on healthcare specifically. The former is heavily rooted in my own research above, and the latter is a discussion of the Do No Harm Act that has been proposed in the House of Representatives to the 116th Congress[29].

Implication I: Definitions

The two broad findings from this research—the "perception problem" and "facilitation"—are show incoherence in what constitutes a substantial burden, so the first fix

[29] Congress.gov, "H.R. 1450-Do No Harm Act"

could be to amend the substantial buden element of RFRA with definitions outlinng what a violaton entails and to what degree. This can be split into roughly two mechanisms, one for each of the two findings: the "declaration of belief" and the "definition of facilitation". The former focuses on the link between actual violation and perception of violation whereas the latter tries to narrow who exercise can apply to.

To begin with the "declaration of belief", plaintiffs must state specifically what their religious belief is irrespective of the circumstances of the case. The stated belief cannot restate the law at issue itself, but must come from a sincere belief that exists without the language of that law being present. An example of this is that an individual's religious belief cannot be "insurance coverage of contraception is immoral" but instead must be a statement of the "why" behind that belief which could be what is typically stated in contraception mandate claims, "human life begins at conception". These stated beliefs need not include medical terminology or even specific warranting; they should just be clear and removed from the language of the statute.

The second and more important aspect of the declaration is once the declaration has been made, that will be the standard to which the substantial burden claim is analyzed upon. This invites courts to remove the belief from the individual and analyze it against the circumstances of the situation. To do this, courts will have to consider elements outside of the testimony of that individual's belief. Once an individual has declared the belief that "life begins at conception" they cannot be the determinants of when a life, using their own belief, at conception is or is not terminated. This standalone feature is fundamental to solving the "perception problem". Courts use this type of standalone standard for evaluating a situation all the time. For example, in criminal law, a conviction is not based on whether or not the alleged victim believed to be assaulted but whether or not the alleged victim was actually assaulted. Because the standards for

evaluating civil suits under RFRA are different, this would of course not be held to the same level of evidence and scrutiny as a criminal case, but the purpose of the declaration is to have a standard which to apply the circumstances of the complaint to.

Because the belief is not acting as the "evidence" but the standard of evaluation (in the balancing test sense and not the legal understanding of "standard"), this avoids the issue of Judges deciding what is and what is not religion or religious. This harkens back to the issue of "correctness" over sincerity. The correctness as applied in the "declaration of belief" fix is not an external correctness but an internal correctness of the logic of the plaintiff's state belief. The belief will then be sincere if the actions discussed within the complaint correctly relate back to the "declaration of belief".

The facilitation issue is trickier because it does more or less ask the question of what qualifies as religion more than the "perception problem" does. My gut reaction of wanting a definition of "facilitate" runs into the problem that this will also create definitions for what counts as exercise and therefore religion, so to solve this, there needs to be a focus on the internal logic of the stated belief similar to "declaration of belief". I think about the "definition of facilitation" where the question is not how closely related is the violation to the individual but to the belief itself. How many steps away from the actual belief and its possible outcomes. Possibility is also a secondary issue with this aspect since the research pointed out this idea of uncertainty, but it is unclear how to measure probabilities of outcomes as a usable standard for whether something is facilitated by engaging in the action and thus violating the religious belief.

It might be helpful to use the *Gillette* case as an example again. Fighting in war has a 100% certainty of violating a religious beleif that is against the participation of war. In contrast to this, there is greater uncertainty as to whether or not providing contraception coverage will

mean the usage of contraception. This uncertainty expands with the self-certification form, too. It is unfair to ask judicial officers to start doing mathematical calculations to what the probability of an event occurring is based on the action of another, but this idea of uncertainty should be narrowed as courts attempt to more clearly define facilitation.

Implication II: Do No Harm Act and Healthcare

A more comprehensive amendment to RFRA that targets healthcare and other policy specific issues takes shape in the Do No Harm Act, first introduced by then-Representative Joseph Kennedy III in 2019 and then reintroduiced by Senator Cory Booker in 2021[30]. The bill provides the general senses of Congress that argue RFRA should not be interpreted to impose religious views on others, harm others, or permit discrimination of others. The bill sets out to accomplish these goals by arguing fo 3 exceptions of the application of RFRA:

1. To any law that provides for or requires
    a. Protection from discrimination
    b. Wage provisions in the workplace
    c. Protections against child labor
    d. Access to or information about healthcare
2. Government sponosored goods and services
3. Government accomdations.

The amendment under the Do No Harm Act changes the content of a RFRA claim instead of how RFRA fundamentally operates. The question then must be whether there are substantial reasons for why RFRA should or should not operate under certain policy topics. Why are government accommodations and healthcare different than other policy topics covered by RFRA? One simple explanation is that the Do No Harm Act is reacting directly to different

[30] Congress.gov, "H.R. 1450-Do No Harm Act"

controversial RFRA cases such as *Hobby Lobby* and *Religious Sisters of Mercy.* Legislation, even about bills that originally garnered unanimous bipartisan support, are political, and this amendment is a political response to grievances about RFRA's application about very specific complaints.

A secondary reasoning for this, and one that also supports the general political claim, is that the topic areas prohibited by the exemption are viewed as unique from other policy fields such as immigration or prisons because they are seen as more fundamental rights. It would be difficult to analyze the similarities between the covered topics outside of a commonality that they fall under what many on the political left view as fundamental protections that are not yet protected by the Constitution: healthcare, living wages, abuse, and varying forms of discrimination. This identification with a side of the political spectrum is not a flaw of the amendment, but instead an observation that this approach to RFRA is a political one instead of a legal one. My proposed definitonal amendments are legal in nature, but can be implemented either as guidelines for legal interpretation or legislatively. Regardless, they are apolitical in nature and nonspecific to complaint content.

When analyzing the Do No Harm Act, I find it difficult to see how these limitations will better RFRA as a whole since they do not target the contradictions at large but instead focus on top areas. To be charitable, in order to determine the merits of these top areas, I would want to do a larger analysis of RFRA cases of these topic areas to compare if there is some discriminatory factor versus in other topic areas. Because this paper focused specifically on healthcare and the argumentation, I can't make this critique. Nonetheless, the act is limited in scope. While not every bill must address the full scope of a piece of legislation, the Do No Harm Act feels

half-hearted yet well intentioned, attempting to preserve a substantial piece of free exercise legislation in a post-*Smith* Supreme Court era.

On top of this limitation, Do No Harm does not solve for the ambiguity of interpreting RFRA. Specifically Section 3.3 of the Do No Harm Act is broad reading, "to the extent that application would result in denying a person the full and equal enjoyment of a good, service, benefit, facility, privilege, advantage, or accommodation, provided by the government"[31]. The phrase "full and equal enjoyment" poses similar issues to the "facilitation" issue where there is ambiguity relating to the degree something is "full".

What seems more important, and more relevant to the research, is to think about specifically what the research highlights about healthcare's specific use of definitions. This circles back, once again, to the issue of tension between religious and medical definitions. Healthcare is incredibly definitionally heavy, and religious exercise is not, or at least more ambiguous in the implications of its definitions. Definitions in healthcare have actually shown to be reactive to case law like that established after Hobby Lobby as the FDA relabled morning after pills to not be abortifacients[32]. This responsiveness to the interpretation of RFRA is incredibly telling, but because this research implies that RFRA operates on the perception of a violation without needing an actual violation, this relabeling of contraception would not change anything under how RFRA is currently interpreted. This leads to reaffirming the view that RFRA must fundamentally change the way it operates and is interpreted in order to respect the authority of those medical labels.

This in turn does make a more compelling case for the Do No Harm Act because in a world where medical fact is outweighed by facts created by religious belief, medical fact

[31] Congress.gov, "H.R. 1450-Do No Harm Act"
[32]

typically is at a loss. The idea of calling something a belief but then imbuing it with a certain quality of fact and reality undermines medical institutions and the fact finding done by experts and professionals. It might be tempting to place the burden upon the FDA and other institutions with labelling power, but this does not resolve the perception problem side-sweeping the evaluation of definitions in general. Even with the definitional changes, there still might be minimal discussion about the perception of those definitions in the case law unless an amendment of some form is made.

Conclusion

For 30 years now, the Religious Freedom Restoration Act has been discussed as both the return of religious freedom and the rise of a religious theocracy in the United States. Much of the existing literature has made astute observations about the way RFRA tends to slip through the fingers of healthcare institutions while also possibly being a tool to expand access. The only thing scholars tend to agree on is that statute's breadth and uncertainty. While this paper is only a drop in the bucket, it identified two major reasons for this issue. Both the "perception problem" and the issue of "facilitation" have explanatory power for how RFRA operates, and point toward a structural amendment to the statute itself that lawmakers might consider for resolving this debate. Whether they take upon the challenge of defining boundaries within the state itself or limiting its range with new legislation such as the Do No Harm Act, the solution is bound to still produce legal debate surrounding what is and isn't religious exercise. I highly encourage legal scholars and policymakers to do so, but in the process give careful consideration to what protecting a belief looks like, especially if we truly want to acknowledge the sincere beliefs themselves and not just a vague idea of religion. Religious mandates and healthcare

mandates can coexist, but both ends need to find the proper bounds of one another to full respect the other.

Appendix A: Shepard's Signal Indicators

Listed below are *Shepard's* Signal indicators along with the most common analysis phrases tied to them.

SHEPARD'S SIGNAL INDICATORS	COMMON ANALYSIS PHRASES
Positive treatment indicated The green signal indicates that citing references in the *Shepard's* Citations Service contain history or treatment that has a positive impact on your case (for example, affirmed or followed by).	**Followed by**—The citing opinion relies on the case you are *Shepardizing*™ as controlling or persuasive authority.
Warning: Negative treatment is indicated for statute The red exclamation point signal indicates that citing references in the *Shepard's* Citations Service contain strong negative treatment of the *Shepardized*™ section (for example, the section may have been found to be unconstitutional or void).	**Unconstitutional by**—The citing case declares unconstitutional the statute, rule or regulation you are *Shepardizing*. **Void or invalid by**—The citing case declares void or invalid the statute, rule, regulation or order you are *Shepardizing* because it conflicts with an authority that takes priority.
Warning: Negative treatment is indicated The red signal indicates that citing references in the *Shepard's* Citations Service contain strong negative history or treatment of your case (for example, overruled by or reversed).	**Overruled by**—The citing case expressly overrules or disapproves all or part of the case you are *Shepardizing*. **Abrogated by**—The citing case effectively, but not explicitly, overrules or departs from the case you are *Shepardizing*. **Superseded by**—The citing reference—typically a session law, other record of legislative action or a record of administrative action—supersedes the statute, regulation or order you are *Shepardizing*.
Questioned: Validity questioned by citing references The orange signal indicates that the citing references in the *Shepard's* Citations Service contain treatment that questions the continuing validity or precedential value of your case.	**Questioned by**—The citing opinion questions the continuing validity or precedential value of the case you are *Shepardizing* because of intervening circumstances, including judicial or legislative overruling.
Caution: Possible negative treatment indicated The yellow signal indicates that citing references in the *Shepard's* Citations Service contain history or treatment that may have a significant negative impact on your case (for example, limited or criticized by).	**Criticized by**—The citing opinion disagrees with the reasoning/result of the case you are *Shepardizing*, although the citing court may not have the authority to materially affect its precedential value. **Distinguished by**—The citing case differs from the case you are *Shepardizing*, either involving dissimilar facts or requiring a different application of the law.
Neutral: Citing references with analysis available The blue "A" signal indicates that citing references in the *Shepard's* Citations Service contain treatment of your case that is neither positive nor negative (for example, explained by).	**Explained by**—The citing opinion interprets or clarifies the case you are *Shepardizing* in a significant way. **Cited in Dissenting Opinion at**—A dissenting opinion cites the case you are *Shepardizing*. **Interpreted or construed by**—The citing opinion interprets the statute, rule or regulation you are *Shepardizing* in some significant way, often including a discussion of the statute's legislative history.
Cited by: Citation information available The blue "I" signal indicates that citing references are available in the *Shepard's* Citations Service for your case, but the references do not have history or treatment analysis (for example, the references are law review citations).	**Cited by**—The citing document references the *Shepardized* cite.

Appendix B: Kroger "Our Promise" Heart

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