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Religious Freedom and Self-Induced Abortion

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RELIGIOUS FREEDOM AND SELF-INDUCED ABORTION

I. INTRODUCTION

Although abortion is legal, seven states currently criminalize self-induced abortion,[1] and many other states criminalize activities associated with it.[2] Self-induced abortion is "[t]he practice of self-administering pharmaceutical pills, traditional herbs, or other means" to undergo abortion outside of a clinical setting.[3] However, the term self-induced abortion is somewhat of a misnomer because an individual who self-induces may receive assistance from a caregiver such as a friend or family member. While courts recognize the constitutional right to pregnancy termination, abortion's unique legal history has relegated the lawful practice of abortion solely to the medical industry.[4] As a result, those who assist with self-induced abortion as caregivers have limited legal recourse when they are confronted with criminal charges. But what is the outcome when one's religion and faith motivates caregiving for self-induced abortion? This law review comment examines religious exercise in the context of self-induced abortion, ultimately demonstrating that caregivers who act from a religious or spiritual perspective can likely assert state Religious Freedom Restoration Acts (RFRAs) as a defense if they are charged with a crime such as the unauthorized practice of medicine.

Religious freedom laws are often associated with socially conservative political agendas.[5] Yet, they also expand religious exercise protections for those whose beliefs are not necessarily "acceptable, logical, consistent, or comprehensible to others."[6] Indeed, asserting that religious or spiritual beliefs can motivate caregiving in the case of self-

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1. ARIZ. REV. STAT. ANN. § 13-3604; DEL. CODE ANN. tit. 11 § 652; IDAHO CODE § 18-606(2); NEV. REV. STAT. § 200.220; N.Y. PENAL LAW § 125.05; N.Y. PENAL LAW § 125.; OKLA. STAT. tit. 63 § 1-733; OKLA. STAT. tit. 21 § 862; S.C. CODE ANN. § 44-41-80(b); *see also* Letter from Farah Diaz-Tello, Senior Counsel, Self-Induced Abortion Legal Team, & Cynthia Soohoo, Director, Human Rights and Gender Justice Clinic, City University of New York School of Law to U.N. Working Group on Discrimination Against Women in Law and Practice (June, 2017) [hereinafter "Letter to U.N. Working Group"] (on file with author).

2. *See infra* Part IV.A.2; *see also* Letter to U.N. Working Group, *supra* note 1, at 8.

3. Jill E. Adams & Melissa Mikesell, *Primer on Self-Induced Abortion*, THE SIA LEGAL TEAM, https://docs.wixstatic.com/ugd/aa251a_8ff3236264b54fed955aa99c0ea7ca59.pdf (last visited Sept. 7, 2017).

4. *See* Roe v. Wade, 410 U.S. 113, 165–66 (1973) (holding "[t]he decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to points where important state interests provide compelling justifications for intervention"); *id.* at 113, 116–17, 120–21, 162, 163; *see also* discussion *infra* Part IV.A and notes 165–70.

5. S. POVERTY L. CTR., 'RELIGIOUS LIBERTY' AND THE ANTI-LGBT RIGHT 3–4 (2016); *see* Tom Gjelten, *Conservatives Call for 'Religious Freedom,' But for Whom?*, NPR: RELIGION (Dec. 11, 2015) (stating that several of the 2015 conservative political candidates used religious freedom as a platform), https://www.npr.org/2015/12/11/458969192/conservatives-call-for-religious-freedom-but-for-whom.

6. *Cf.* Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981) (directly referencing the *Thomas* decision in its most recent federal RFRA analysis, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014), the Supreme Court affirmed that under RFRA courts cannot determine the reasonableness of an individual's religious beliefs).

induced abortion may seem incomprehensible. Nevertheless, the issue is worth exploring because caregiving is a centuries-old practice that still occurs today.[7] In addition, evidence that religion and abortion are not inherently at odds is widely available. Some congregational and spiritual leaders are trained in pastoral care for abortion and offer support to laypeople who are seeking abortion.[8] In addition, a majority of in-clinic abortion patients identify with a religious practice.[9] Further, some doctors have stated that they will perform abortions because of their religion.[10] Thus, the assertion that self-induced abortion may occur within a religious or spiritual context has substantial support: research indicates that individuals still choose to self-induce and that religious individuals and spiritual leaders take part in abortion practices.[11]

While there are empirical data cataloguing dominant faith groups' views on abortion, there is little research regarding the intersection of religious practice and abortion outside of clinical settings.[12] Moreover, there is no legal scholarship identifying how self-induced abortion may relate to religious practice and how it may be protected by state RFRAs. This comment examines how religion may motivate caregiving for self-induced abortion and considers whether a state RFRA can provide an adequate defense for a caregiver facing criminal charges.

State RFRAs provide a potential defense for caregivers because they typically offer greater protections for religious exercise than the First Amendment.[13] Many RFRAs require courts to apply strict scrutiny—if a state substantially burdens religiously-motivated criminal activity, a state must prove that it has a compelling interest in doing so, even if a state's action results from a law that is neutral toward religion and generally applicable to everyone.[14] Further, a state must demonstrate that imposing the substantial burden is the least restrictive means of advancing its compelling interest.

To explain the differences between religious exercise protections under the Free

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7. *See* KATI SCHINDLER ET AL., NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS 2 (2002); Molly Dutton-Kenny, *Part II: The Historical Legacy of Midwives as Abortion Providers in the United States*, SQUAT BIRTH J. 21 (Winter 2013-2014); LESLIE REAGAN, WHEN ABORTION WAS A CRIME 6, 9–10 (1997).

8. *Pastoral Care Training*, RELIGIOUS COALITION FOR REPROD. CHOICE, http://rcrc.org/pastoral-care/ (last visited Sept. 7, 2017).

9. Jenna Jerman & Rachel K. Jones et al., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 1, 7 (May 2016), https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.

10. DR. WILLIE PARKER, LIFE'S WORK: A MORAL ARGUMENT FOR CHOICE 2 (2017). *See* Rebecca Luckett, *I'm a Catholic obstetrician who had an abortion. This is not politics or religion. It's life.*, USA TODAY (Mar. 19, 2018), https://www.usatoday.com/story/opinion/2018/03/19/catholic-obstetrician-who-had-abortion-not-politics-religion-its-life-rebecca-luckett-column/416614002/ (stating that because her Catholic education centered empathy, it also prepared her for her "first encounter with a patient who needed an abortion").

11. D. GROSSMAN & K. WHITE ET AL., TEX. POL'Y EVALUATION PROJECT, KNOWLEDGE, OPINION, AND EXPERIENCE RELATED TO ABORTION SELF-INDUCTION IN TEXAS 1, 2 (Nov. 17, 2015), https://liberalarts.utexas.edu/txpep/_files/pdf/TxPEP-Research-Brief-KnowledgeOpinionExperience.pdf.

12. *Very Few Americans See Contraception as Morally Wrong,* PEW RES. CTR. (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/4-very-few-americans-see-contraception-as-morally-wrong.

13. *Compare* 16A AM. JUR. 2D *Constitutional Law* § 447 (2018), *with* 42 U.S.C. § 2000bb-1, IND. CODE § 34-13-9-9, *and* Tyms-Bey v. State, 69 N.E.3d 488 (Ind. Ct. App. 2017).

14. ARIZ. REV. STAT. ANN. § 41-1493.01; CONN. GEN. STAT. § 52-571b; 775 ILL. COMP. STAT. 35/15; IDAHO CODE § 73-402; IND. CODE § 34-13-9-8.

Exercise Clause and state RFRAs, Part II of this comment briefly examines twentieth-century applications of free exercise jurisprudence and describes the environment in which state RFRAs emerged. When Congress enacted the federal RFRA, it intended to codify the application of strict scrutiny to laws of general applicability if those laws imposed substantial burdens on religious exercise. Although the federal RFRA was invalidated as applied to the states, legislatures enacted state RFRAs and kept in mind Congress's intent. Thus, Part II introduces why state RFRAs might provide better protections for caregivers as opposed to a traditional First Amendment claim.

Part III builds on the discussion of state RFRAs' expansive protections for religious exercise. Specifically, Part III acknowledges the complicated nature of applying state RFRAs, particularly in the context of criminal justice. Generally, state RFRA claims are infrequent and, in most states, local RFRA case law related to criminal charges is lacking. In addition, each state's RFRA is uniquely drafted. Thus, state courts have little guidance for interpreting and applying RFRA statutes and often look for guidance from federal sources of authority.[15] Acknowledging these difficulties, Part III posits that when a caregiver is charged with a crime because she assists others with self-induced abortion, state courts could likely adopt the federal RFRA application outlined in the Supreme Court's *Burwell v. Hobby Lobby Stores, Inc.* decision. Part III also describes why the federal RFRA analysis in *Hobby Lobby* is likely the most advantageous interpretation for caregivers asserting a RFRA defense.

Part IV addresses whether a state RFRA is ultimately a viable defense for a caregiver. Although most states do not explicitly criminalize self-induced abortion, law enforcement and prosecutors sometimes charge caregivers with criminal statutes associated with protecting public health and safety, such as the unauthorized practice of medicine.[16] In the wake of criminal prosecutions for self-induced abortion and caregiving, Part IV applies the RFRA analysis of *Hobby Lobby* to instances when a caregiver assists with self-induced abortion in her capacity as a religious or spiritual leader. By applying the *Hobby Lobby* analysis, a caregiver is able to successfully assert a state RFRA as a defense to criminal charges because the Court's interpretation of religious exercise and substantial burden in *Hobby Lobby* are quite broad. Moreover, the *Hobby Lobby* ruling requires states to provide conclusive evidence that the substantial burdens they impose on religious exercise are the least restrictive means of doing so. Accordingly, Part IV concludes that the prosecution of caregivers is not narrowly tailored enough to pass strict scrutiny.[17]

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15. *See Tyms-Bey*, 69 N.E.3d at 490; State v. Cordingley, 302 P.3d 730, 733 (Idaho Ct. App. 2013).

16. *See infra* Part IV.A.2.

17. Brian L. Porto, Background, Summary, and Comment, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 A.L.R. 5th 233 § 2 (2004).

II. STATE RFRAS EMERGE FROM TRADITIONAL FREE EXERCISE JURISPRUDENCE

A. Twentieth-Century Applications of the First Amendment's Free Exercise Clause

1. The Supreme Court Adopts Strict Scrutiny

In the late nineteenth century, the Supreme Court provided that the Free Exercise Clause only protected religious belief and not religiously-motivated actions.[18] For instance, during the late 1800's, the Supreme Court heard a series of cases regarding polygamy and held that some religious actions were not protected under the Free Exercise Clause.[19] However, the Court's stance on free exercise began to shift near the mid-twentieth century. In 1940, the Court decided *Cantwell v. Connecticut*, where it clarified its stance on religious exercise by incorporating the Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment.[20] As a result, religious exercise was officially recognized as a fundamental right and its protection was applicable to both the states and the federal government.[21]

Once the Court ruled the Free Exercise Clause applied to the states, protections for religiously-motivated behavior began to emerge in a piecemeal fashion. Slowly, the Court introduced strict scrutiny and applied it to neutral laws of general applicability in religious exercise cases. In 1944, just four years after the *Cantwell* decision, the Court held that states had the authority to question the sincerity of an individual's religious beliefs, but that states did not have the power to scrutinize the truth or the validity of such beliefs.[22] Going further, in 1961, the Court began to apply the "least restrictive means" test of strict scrutiny to religious exercise violations. Justice Warren held that a state could impose burdens on religious exercise if it was attempting to advance the state's secular goals and did not have another, less restrictive statutory scheme to do so.[23]

Although the decisions following *Cantwell* forged a path for subjecting free exercise claims to strict scrutiny, the Court did not apply strict scrutiny to neutral laws of general applicability until it heard *Sherbert v. Verner* in 1963.[24] In *Sherbert*, an individual challenged a South Carolina law after she was denied unemployment benefits. Under the law, the state denied her unemployment benefits because she refused to work on Saturday—a work requirement that conflicted with her religious beliefs.[25] On review, the Court refused to give deference to the state's reasoning for violating the claimant's free exercise.[26] Instead, Justice Brennan's majority opinion articulated the necessity of

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18. PEW RES. CTR., A DELICATE BALANCE: THE FREE EXERCISE CLAUSE AND THE SUPREME COURT 2–3 (Oct. 24, 2007), http://www.pewforum.org/2007/10/24/a-delicate-balance-the-free-exercise-clause-and-the-supreme-court [hereinafter DELICATE BALANCE].

19. *Id*.

20. *See* 310 U.S. 296, 302 (1940).

21. DELICATE BALANCE, *supra* note 18, at 4.

22. *Id*. at 5–6.

23. Braunfeld v. Brown, 366 U.S. 599, 606–07 (1961).

24. *See* 374 U.S. 398, 404 (1963); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1248 (3d ed. 2006).

25. 374 U.S. at 401.

26. *Id*. at 403–04.

applying strict scrutiny to neutral laws of general applicability when a restriction on religious exercise was in question.[27] Most notably, the majority held that the directness of the burden on one's religion was irrelevant when determining whether the application of the law was unconstitutional.[28] Thus, even laws that only indirectly or incidentally burdened free exercise were subject to strict scrutiny.[29] The *Sherbert* ruling was a watershed moment in the protection of religious exercise for two reasons. First, prior to *Sherbert*, strict scrutiny had only been fully applied to laws challenged under free speech or racial discrimination claims.[30] Second, the *Sherbert* ruling directly informed the intent and drafting process of the federal and state RFRAs.

2. The Supreme Court Rejects Strict Scrutiny

Despite the initial application of strict scrutiny to religious exercise cases, the Court regularly refused to apply it to First Amendment claims, or when the Court did, it only infrequently sided with claimants.[31] For instance, in *Bob Jones University v. United States*, the university challenged an IRS restriction that denied tax-exempt status to educational entities with racially discriminatory policies.[32] Under the challenge, the Court "rejected the university's claim, dispensing with the detailed balancing test used in *Sherbert* . . . ."[33] The *Bob Jones University* decision echoed previous Court opinions regarding the application of strict scrutiny to religious exercise claims. Thus, deference to states continued throughout the latter half of the twentieth century, as the Court typically only protected religiously-motivated conduct in a limited number of circumstances.[34]

In hindsight, the Court's eventual rejection of the *Sherbert* ruling comes as no surprise because many of the Court's leading decisions indicated an apprehension to apply strict scrutiny to laws challenged under the Free Exercise Clause. The 1990 decision in *Employment Division v. Smith* marked the official declaration of *Sherbert's* end as applied to First Amendment claims. In *Smith*, claimants were terminated from employment for their ceremonial use of peyote in a Native American Church ceremony.[35] When the claimants filed for unemployment benefits they were denied because the sacramental use of peyote violated Oregon's criminal code, which constituted work misconduct.[36] The claimants argued that the state's failure to exempt the religious use of peyote from

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27. *Id*. at 406–07.

28. *Id*. at 403–04.

29. *Sherbert*, 374 U.S. at 404 (quoting Braunfeld v. Brown, 366 U.S. 516, 607 (1961)).

30. DELICATE BALANCE, *supra* note 18, at 7.

31. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that "review of military regulations challenged on First Amendment grounds" does not receive strict scrutiny); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–05 (1985). *See also* CHEMERINSKY, *supra* note 24, at 1248.

32. *See* 461 U.S. 574, 574 (1983).

33. DELICATE BALANCE, *supra* note 18, at 9.

34. CHEMERINSKY, *supra* note 24, at 1248. Chemerinsky states that the Court only "upheld free exercise clause challenges" in two areas. *Id*. First, the Court upheld challenges to statutes requiring school attendance. *Id*. Second, the Court struck down statutes that denied benefits to individuals who "quit their jobs for religious reasons." *Id*.

35. Emp't Div. v. Smith, 494 U.S. 872, 872 (1990).

36. *Id*.

Oregon's laws was unconstitutional. However, the Court held that *Sherbert* was inapplicable.[37] Writing for the majority, Justice Scalia articulated that neutral laws of general applicability could not be subject to strict scrutiny when the prohibition of the exercise of religion was only an indirect or incidental result of the laws.[38] The Court's decision shocked lower courts and legal scholars, and it provoked significant protest from religious rights groups and civil liberties organizations.[39]

B. The Smith and Flores Rulings Catalyzed Congress and State Legislatures to Pass Religious Freedom Restoration Acts

Displeased with the Court's ruling in *Smith*, Congress intentionally diverged from the *Smith* decision when it enacted the federal RFRA and codified strict scrutiny for religious exercise claims.[40] In referencing *Smith*, Congress stated the ruling "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[41] In comparison, Congress found that because religious exercise is an "unalienable right . . . laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with [it]."[42] Congress also advocated for a broad application of RFRA when it stated that RFRA should apply to "all cases" where an individual alleges a substantial burden on the free exercise of religion.[43] As a result, the federal RFRA effectively guaranteed the application of strict scrutiny to religious exercise claims that challenged laws traditionally considered generally applicable and neutral toward religion.[44]

Despite the enactment of the federal RFRA, its application to local state actions was relatively short-lived. In 1997, the Supreme Court heard *City of Boerne v. Flores*.[45] In *Boerne*, an archbishop challenged a zoning ordinance under RFRA after municipal authorities denied him a permit to expand a church building.[46] On review, the Supreme Court ruled the federal RFRA unconstitutional as applied to state laws and local governments.[47] The Court described Congress's act as a "sweeping . . . intrusion at every level of government."[48] When it enacted the federal RFRA, Congress exceeded its scope of authority because it altered the meaning of the First Amendment's free exercise clause.[49]

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37. *Id*. at 882–84.

38. *Id*. at 872, 878.

39. PEW RES. CTR., *The Smith Decision* (Oct. 24, 2007), http://www.pewforum.org/2007/10/24/a-delicate-balance6.

40. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html?mcubz=0&mcubz=0.

41. 42 U.S.C. § 2000bb(a)(4).

42. *Id*. at § 2000bb(a)(1)–(2).

43. *Id*.

44. Mary L. Topliff, Summary and Comment – Generally, *Validity, Construction, and Application of Religious Freedom Restoration Act* (*42 U.S.C. §§ 2000bb et seq.)*, 135 A.L.R. FED. 121 (1996).

45. 521 U.S. 507 (1997).

46. *Id*. at 507.

47. *Id*. at 508, 536.

48. *Id*. at 532.

49. *Id*. at 508.

In contrast, the Court held that Congress may only enforce a pre-existing constitutional right as permitted by Section 5 of the Fourteenth Amendment.[50] Thus, although the federal RFRA remains applicable to claims and defenses against federal statutes, it is no longer applied to religious freedom claims or challenges to state laws.

Although the *Boerne* ruling invalidated the federal RFRA, many state legislatures and courts have enacted legislation or decided cases in favor of religious exercise.[51] Between 1993 and 1997, only two states emulated the federal RFRA: Connecticut and Rhode Island.[52] But since the *Boerne* decision, nearly half of the states have enacted RFRAs or similar religious freedom laws that expand religious exercise protections.[53] Of those states, five have statutes or state constitutional amendments that afford incredibly broad protections because they "do not require the burden or restriction on religious exercise to be substantial."[54] Further, some courts in states without RFRAs sometimes broadly construe the religious freedom provisions of state constitutions to increase the protection of free exercise.[55]

III. STATE INTERPRETATIONS AND APPLICATIONS OF RFRAS

A. Applying State RFRAs in a Criminal Defense Context Presents Complex Issues of Statutory Interpretation

1. Many Factors Problematize Asserting a State RFRA as a Defense to Criminal Charges

Due to the discriminatory nature of recent RFRA claims,[56] much of the discussion

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50. *City of Boerne*, 521 U.S. at 508.

51. *See 2016 State Religious Freedom Restoration Act Legislation*, NAT'L CONF. OF ST. LEGS. (Dec. 31, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx.

52. *Religious Freedom Restoration Acts Legisbrief*, NAT'L CONF. OF ST. LEGISLATURES, Vol. 23, No. (May 2015) [hereinafter "*RFRA Legisbrief*"].

53. *E.g.,* ARIZ. REV. STAT. ANN. § 41-1493.01; ARK. CODE ANN. § 16-123-401; FLA. STAT. ANN. § 761.01; IDAHO CODE ANN. § 73-402; KAN. STAT. ANN. § 60-5301; *Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGS. (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx.

54. *See, e.g.*, ALA. CONST. art. I, § 3.01, § III; N.M. STAT. ANN. §§ 28-22-3, 28-22-5; MO. REV. STAT. § 1.302(1)(2); *RFRA Legisbrief*, *supra* note 52.

55. Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164 (2016) [hereinafter *RFRA, State RFRAs, and Religious Minorities*]; Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 466–67 (2010) [hereinafter *A Look at State RFRAs*]. *See generally* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POLIC'Y 103, 103, 186–87 (2013) (concluding that some state courts interpret state constitutions according to pre-*Smith* rulings, thereby providing greater protection for free exercise claims than current First Amendment federal case law).

56. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683–84 (2014) (holding that for-profit corporations were included under the definition of person for the purposes of RFRA). Further, although no state RFRA claims were involved in *Craig v. Masterpiece Cakeshop, Inc.*, a cake shop asserted that the Colorado Civil Rights Commission violated his free exercise rights under the First Amendment after it penalized him for refusing to provide services to a same-sex couple that requested a wedding cake. *Craig*, 370 P.3d 272 (Colo. App. 2015). *See also* Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013) (where plaintiff-photographers asserted a violation of free exercise after they refused to provide a same-sex couple with wedding photography

regarding the federal Act and state RFRAs understandably centers on how religious pretext is used to harm the LGBTQ community and women.[57] Yet, state RFRA jurisprudence is relatively scant.[58] A more in-depth look at the use of state RFRAs reveals that there is not an abundance of state RFRA cases.[59] For instance, three states—Oklahoma, Idaho, and New Mexico—enacted state religious freedom laws mirroring the federal RFRA in 2000.[60] But in the last seventeen years, Oklahoma courts have adjudicated only three RFRA cases.[61] Likewise, Idaho and New Mexico courts have each only reviewed five RFRA claims.[62] Additional research also indicates that states with considerable RFRA case law are the exception to the general rule that state RFRAs are not often litigated.[63]

Of the existing RFRA case law available, there is a particularly limited number of decisions in which a defendant asserted a state RFRA as a criminal defense. Of the thirteen cases referenced above, only three involved RFRA as a criminal defense.[64] Two of the three RFRA criminal defense cases were reviewed in Idaho,[65] while the other was heard in New Mexico.[66] However, Indiana's position among RFRA states is notable. Although an explanation is absent, the Indiana RFRA statute is used frequently as a criminal defense.[67] Yet, records indicate that the Indiana Court of Appeals has heard only one RFRA criminal defense case since the Indiana legislature enacted the law in 2015.[68]

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services and the New Mexico Human Rights Commission held the plaintiffs had violated New Mexico's discrimination laws).

57. *See, e.g.*, Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.9af163a505e0; Katy Steinmetz, *The Debate Over What Indiana's Religious Freedom Act is Really About*, TIME (Mar. 30, 2015), http://time.com/3764347/indiana-religious-freedom-discrimination-act; Emma Green, *Gay Rights May Come at the Cost of Religious Freedom*, ATLANTIC (Jul. 27, 2015), https://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278.

58. *RFRA, State RFRAs, and Religious Minorities*, *supra* note 55, at 164; *A Look at State RFRAs*, *supra* note 55, at 480 (acknowledging that "[s]tate court cases, particularly at the trial level, are hard to find" and that state RFRAs likely increase favorable settlements for religious claimants).

59. *A Look at State RFRAs*, *supra* note 55, at 480.

60. OKLA. STAT. tit. 51, § 251; N.M. STAT. ANN. § 28-22-1; IDAHO CODE § 73-402.

61. *See* Shrum v. City of Coweta, 558 F. Supp. 2d 1212, 1213 (E.D. Okla. 2008); Steele v. Guilfoyle, 76 P.3d 99, 100 (Okla. Civ. App. 2003); Beach v. Okla. Dep't of Pub. Safety, 398 P.3d 1, 2 (Okla. 2017).

62. *See* Olsen v. Idaho St. Bd. of Med., 363 F.3d 916, 919 (9th Cir. 2004); Roles v. Townsend, 64 P.3d 338, 338 (Idaho 2003); Lewis v. St. Dep't of Transp., 146 P.3d 684, 686 (Idaho 2006); State v. Cordingley, 302 P.3d 730, 732 (Idaho Ct. App. 2013); State v. White, 271 P.3d 1217, 1219 (Idaho Ct. App. 2011). *See, e.g.*, Ross v. Bd. of Regents of the U. of N.M., 599 F.3d 1114, 1116 (10th Cir. 2010); Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013); St. *ex rel*. Peterson v. Aramark Corr. Servs., 321 P.3d 128, 131, 137–38 (N.M. Ct. App. 2014); State v. Bent, 328 P.3d 677, 678 (N.M. Ct. App. 2013).

63. *A Look at State RFRAs*, *supra* note 55, at 479–80.

64. *See Cordingley*, 302 P.3d at 731; *White*, 271 P.3d at 1219; *Bent*, 328 P.3d at 678.

65. *See Cordingley*, 302 P.3d at 730–31; *White*, 271 P.3d 1217.

66. *See Bent*, 328 P.3d 677.

67. Josh Sanburn, *How Indiana's Religious Freedom Law is Being Used to Defend Child Abuse and Other Crimes*, TIME (Sept. 8, 2016), http://time.com/4481073/indiana-rfra-law-child-abuse. *See generally* Maya Rhodan, *Indiana Religious Freedom Law Breeds 'First Church of Cannabis,'* TIME (Mar. 31, 2015), http://time.com/3764983/indiana-religious-freedom-law-breeds-first-church-of-cannabis/?iid=sr-link8 (discussing the creation of the First Church of Cannabis, which uses the illegal substance cannabis as a sacrament, after Indiana's RFRA was enacted).

68. Tyms-Bey v. State, 69 N.E.3d 488, 489 (Ind. Ct. App. 2017).

Even among the anomalous states with frequent local RFRA litigation, the number of instances where RFRAs are used as a criminal defense is incredibly low. In 1998, Illinois enacted its particularly broad RFRA,[69] which allows a claimant to challenge any state law or regulation and provides that RFRA may be used as a criminal defense.[70] Since the Illinois RFRA's enactment, Illinois courts have seen at least thirteen RFRA cases.[71] However, none of those cases involved the Illinois RFRA's use as a criminal defense. Similarly, Texas enacted its RFRA in 1999,[72] but none of Texas's RFRA cases have involved the state's RFRA as a criminal defense.[73] Not surprisingly, there are no available opinions discussing whether a state RFRA is a viable defense for a caregiver who assists others with self-induced abortion.

The lack of state RFRA criminal defense cases does not have a simple explanation. For instance, on the rare occasions when defendants do assert a RFRA as a defense, the plea-bargaining process may influence its use in further prosecution.[74] In addition, some states limit the use of their RFRAs under certain circumstances.[75] Although some states provide that their RFRAs may be used to challenge "all state laws and local ordinances,"[76] other states expressly exempt the application of RFRA to certain laws that might otherwise be violated due to a bona fide religious practice.[77] In Florida, a claimant cannot assert the state's RFRA as a defense to drug-related charges.[78] In addition, Pennsylvania's RFRA is not available to defendants whose religion may motivate or require them to violate existing provisions regarding health, safety, or licenses to practice medicine.[79]

The lack of uniformity in applying strict scrutiny to RFRA claims and defenses also exacerbates the uncertainty of using a RFRA as a criminal defense. Although a significant

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69. 775 ILL. COMP. STAT. ANN. 35/15.

70. *Id*. at 35/25.

71. *See, e.g.*, World Outreach Conf. Ctr. v. City of Chi., 591 F.3d 531, 533 (7th Cir. 2009); Nelson v. Miller, 570 F.3d 868, 871 (7th Cir. 2009); Fam. Life Church v. City of Elgin, 561 F. Supp. 2d 978, 991–92 (N.D. Ill. 2008); Marcavage v. City of Chi., 467 F. Supp.2d 823, 833 (N.D. Ill. 2006). *See generally* Irshad Learning Ctr. v. Cty. of Dupage, 937 F. Supp. 2d 910 (N.D. Ill. 2013) (holding that Irshad's free exercise was substantially burdened under the Illinois RFRA); Our Savior Evangelical Lutheran Church v. Saville, 922 N.E.2d 1143 (Ill. App. 2009) (holding that the city's zoning ordinance did not violate the Illinois RFRA even though it prevented the Church from building a new addition to its facilities).

72. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 110.001.

73. *See, e.g.*, Barr v. City of Sinton, 295 S.W.3d 287, 289 (Tex. 2009); Christian Acad. of Abilene v. City of Abilene, 62 S.W.3d 217, 218 (Tex. App. 2001); Balawajder v. Tex. Dep't of Crim. Just. Institutional Div., 217 S.W.3d 20, 23 (Tex. App. 2006); Walters v. Livingston, 519 S.W.3d 658, 661 (Tex. App. 2017); Scott v. State, 80 S.W.3d 184, 187–88 (Tex. App. 2002); Lilly v. Tex. Dep't of Crim. Just., 472 S.W.3d 411, 414 (Tex. App. 2015); Emack v. State, 354 S.W.3d 828, 839 (Tex. App. 2011).

74. *See generally* Vic Ryckaert, *Mom who cited religious freedom pleads guilty*, INDIANAPOLIS STAR (Oct. 28, 2016), https://www.indystar.com/story/news/crime/2016/10/28/mom-who-cited-religious-freedom-plead-guilty-abuse/92876808 (stating that a mother who initially cited religious freedom as a defense in a child abuse prosecution pled guilty to battery, reducing her felony charge to a misdemeanor).

75. For instance, Texas's RFRA imposes strict scrutiny on a free individual challenging a state's action, law, or regulation. However, the Texas RFRA operates differently for incarcerated people. In Texas, penological interests are automatically presumed to be compelling, thus the evidentiary burden of rebutting the compelling state interest shifts to the claimant. *A Look at State RFRAs*, *supra* note 55, at 491.

76. IDAHO CODE § 73-403*; see also* 775 ILL. COMP. STAT. 35/25; IND. CODE § 34-13-9-1.

77. *A Look at State RFRAs*, *supra* note 55, at 492.

78. *Id*.

79. 71 PA. CONS. STAT.§ 2406(b)(3), (6).

number of states have codified the use of strict scrutiny for religious exercise claims, each state's RFRA is uniquely drafted and applied.[80] For instance, some states only require a plaintiff to demonstrate a burden on the exercise of religion, while others require a plaintiff to demonstrate a "substantial burden."[81] Further, when analyzing whether a burden is substantial, some courts still look to First Amendment jurisprudence.[82] Applying a First Amendment analysis to RFRA claims or defenses is inherently problematic because, since the *Smith* ruling, First Amendment challenges cannot withstand laws that do not directly target religious conduct.[83] In contrast, state RFRAs were introduced and enacted to impose strict scrutiny on government actions alleged to violate free exercise.[84]

In addition to differing applications of RFRAs across state courts, state courts even disagree on the threshold requirements for showing a substantial burden. How courts analyze substantial burdens is particularly important when determining RFRA violations because a such determination controls whether the burden of proof shifts to the government.[85] For example, in a criminal case where a self-induced abortion caregiver is charged with the unauthorized practice of medicine, the state is not required to demonstrate that the law satisfies a compelling state interest and is the least restrictive means of achieving that interest until the caregiver first meets her evidentiary burden— that the application (*i.e.,* charge) of the unauthorized practice of medicine imposes a substantial burden on the exercise of her religion.[86]

2. Applying State RFRAs in Criminal Defense Cases Requires Courts to Rely on Federal Sources of Authority

When an individual asserts a state RFRA as a criminal defense, some state courts apply civil and criminal interpretations of the federal RFRA. While the limited availability of state RFRA case law certainly allows for the application of the federal RFRA in state RFRA cases, many local RFRA claims and defenses are brought in federal court alongside other claims that implicate the Religious Land Use and Institutionalized Persons Act (RLUIPA) and issues involving constitutional violations.[87] As a result, when individuals bring a state RFRA claim or defense alongside other federal or constitutional issues, federal courts are able to wield considerable influence over a state RFRA's interpretation. In addition, even when state RFRA claims are adjudicated in state court, judges sometimes

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80. *A Look at State RFRAs*, *supra* note 55, at 492.

81. *Id.* at 477.

82. Our Savior Evangelical Lutheran Church v. Saville, 922 N.E.2d 1143, 1155–56 (Ill. App. 2009) (deciding that a special use permit code did not violate the Illinois RFRA statute based on the rational basis review-style reasoning under the appellant's First Amendment claim).

83. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990); City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

84. *A Look at State RFRAs*, *supra* note 55, at 475–76.

85. *Id.* at 478.

86. *Id.* at 488–89.

87. *See, e.g.*, Ross v. Bd. of Regents of the U. of N.M., 599 F.3d 1114, 1116 (10th Cir. 2010); World Outreach Conf. Ctr. v. City of Chi., 591 F.3d 531, 533 (7th Cir. 2009); Nelson v. Miller, 570 F.3d 868, 871 (7th Cir. 2009); Olsen v. Idaho St. Bd. of Med., 363 F.3d 916, 919 (9th Cir. 2004); Shrum v. City of Coweta, 558 F. Supp. 2d 1212, 1213 (E.D. Okla. 2008).

rely on statutory interpretations of the federal RFRA by federal courts.[88] Illinois, Idaho, and Indiana each provide good examples of how federal and state courts have applied federal RFRA case law to state RFRA defenses and claims.

Federal courts in Illinois have determined how Illinois state courts ought to interpret the state's RFRA in a civil claim because RFRA claims in Illinois have historically been brought in conjunction with federal RLUIPA claims or constitutional claims.[89] The local Illinois RFRA or RLUIPA claims typically center on disputes regarding special land use permits.[90] In one case, a Muslim religious and educational institute, Irshad Learning Center, sued multiple DuPage County boards after they refused to issue the center a conditional land use permit.[91] In another Illinois RFRA action, a Lutheran church filed a claim against numerous defendants, including the City of Aurora's Mayor, when the city denied the church a permit to build an addition to its sanctuary.[92]

Federal court decisions involving special land use permits and the Illinois RFRA turned on whether the claimant demonstrated that the government imposed a substantial burden on its free exercise of religion. In reviewing these cases, the Seventh Circuit pointed out that the Illinois RFRA does not contain any definition or guidance for interpreting what constitutes a substantial burden.[93] As a result, the circuit court held that state courts should interpret the state's RFRA according to federal RLUIPA law.[94] Although Illinois appellate courts have not ruled on how the state's RFRA ought to be interpreted when used as a criminal defense,[95] it follows that if a criminal defendant were to assert the Illinois RFRA, Illinois state courts would likely look to interpretations of the federal RFRA statute.[96]

In areas where criminal defendants have used state RFRAs as a defense, state courts have relied on federal interpretations of RFRA in both the civil and criminal contexts. The Court of Appeals of Idaho has heard two cases in which individuals asserted the Idaho Free Exercise of Religion Protection Act (FERPA) as a criminal defense.[97] The first

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88. *See* State v. Cordingley, 302 P.3d 730, 733 (Idaho Ct. App. 2013); State v. White, 271 P.3d 1217, 1219 (Idaho Ct. App. 2011); Diggs v. Snyder, 775 N.E.2d 40, 44 (Ill. 2002).

89. *See, e.g.*, Irshad Learning Ctr. v. Cty. of Dupage, 937 F. Supp. 2d 910, 914 (N.D. Ill. 2013); Oak Grove Jubilee Ctr., Inc. v. City of Genoa, 808 N.E.2d 576, 579 (Ill. 2004).

90. *See, e.g.*, *Irshad Learning Ctr.*, 937 F. Supp. 2d 910, 914; Our Savior Evangelical Lutheran Church v. Saville, 922 N.E.2d 1143, 1143 (Ill. App. 2009); *Oak Grove Jubilee Ctr., Inc.*, 823 N.E.2d 968, 1020–21.

91. *Irshad Learning Ctr.*, 937 F. Supp. 2d at 914.

92. *Our Savior Evangelical Lutheran Church*, 922 N.E.2d at 1145.

93. World Outreach Conf. Ctr. v. City of Chi., 591 F.3d 531, 533 (7th Cir. 2009); *see also* Nelson v. Miller, 570 F.3d 868, 877 (7th Cir. 2009); Maum Meditation House of Truth v. Lake Cty. Ill., 55 F. Supp. 3d 1081, 1088 (N.D. Ill. 2014).

94. *Maum Meditation House of Truth*, 55 F. Supp. 3d at 1088. *See, e.g.*, *World Outreach Conference Ctr.*, 591 F.3d at 539; *Miller*, 570 F.3d at 880.

95. *See World Outreach Conference Ctr.*, 591 F.3d at 533; *Miller*, 570 F.3d at 880 (7th Cir. 2009); Fam. Life Church v. City of Elgin, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008); Baer-Stefanov v. White, 773 F. Supp. 2d 755, 756 (N.D. Ill. 2011).

96. In some instances, federal courts have analyzed RFRA in the criminal context. *See* Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 833 (9th Cir. 2012); U.S. v. Quaintance, 608 F.3d 717, 718 (10th Cir. 2010); U.S. v. Oliver, 255 F.3d 588, 589 (8th Cir. 2001).

97. State v. Cordingley, 302 P.3d 730, 732 (Idaho Ct. App. 2013); State v. White, 271 P.3d 1217, 1219 (Idaho Ct. App. 2011).

instance, *Idaho v. White*, occurred in 2012. In *White*, the state charged a man with possession of marijuana and paraphernalia.[98] White moved to dismiss the charge, asserting that the criminal drug possession and penalty laws substantially burdened his free exercise under FERPA.[99] On appeal, the state appellate court acknowledged that case law interpreting Idaho's FERPA was wanting, but that when Idaho's legislature drafted the state RFRA, it clearly intended to codify strict scrutiny as found in the federal RFRA.[100] As a result, Idaho state courts may rely on federal interpretations of RFRA civil claims and apply those interpretations to RFRA criminal defense issues.[101]

The only other published opinion involving Idaho's FERPA as a criminal defense bears a striking resemblance to *White*. In 2013, the Court of Appeals of Idaho heard *Idaho v. Cordingley*.[102] Similar to White, Cordingley was arrested for possession of marijuana and paraphernalia; he asserted the Idaho FERPA as a defense.[103] The court followed *White's* reasoning—relying, in part, on civil federal RFRA cases to interpret and apply the Idaho FERPA.[104] In addressing the source of authority Idaho courts should use when interpreting and applying FERPA, the court stated FERPA's legislative history demonstrated that the "Idaho legislature intended to adopt the 'compelling state interest test' contained in its federal counterpart."[105]

B. When a Caregiver Asserts a State RFRA as a Defense, She Can Rely on the Supreme Court's Hobby Lobby Ruling

1. Some State Courts and Judges Look to the Supreme Court's Recent Federal RFRA Civil Ruling—*Burwell v. Hobby Lobby Stores, Inc*.

In 2017, the Indiana Court of Appeals reviewed a man's Indiana RFRA defense to a criminal charge for tax evasion in *Tyms-Bey v. State*.[106] The court confirmed that the Indiana RFRA applied to criminal proceedings and could be used as a criminal defense.[107] In its analysis, the court adopted the approach of three pre-*Smith* federal cases to determine whether Indiana had a compelling interest in uniform and mandatory tax collection.[108] The court also rejected Tyms-Bey's contention that the state's mechanism for enforcement—

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98. *White*, 271 P.3d at 1219.

99. *Id*.

100. *Id*. at 1220.

101. *Id.* at 1220–21. Specifically, the *White* court relied on the Ninth Circuit's articulation of the compelling state interest test in the civil case *Navajo Nation v. U.S. Forest Service*. In *Navajo Nation*, the Ninth Circuit held that when Congress enacted RFRA, it "created a cause of action for persons whose exercise of religion is substantially burdened by [state] action, regardless of whether the burden results from a neutral law of general applicability."535 F.3d 1058, 1068 (9th Cir. 2008).

102. *See Cordingley*, 302 P.3d 730.

103. *Id*. at 732.

104. *Id*. at 735–36 (relying on Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979)).

105. *Id.* at 733.

106. *Tyms-Bey,* 69 N.E.3d at 489.

107. *Id.* at 489–90.

108. *Id.* at 490–91 (citing U.S. v. Lee, 455 U.S. 252, 258–61 (1982); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 700 (1989); Adams v. Commissioner of Internal Revenue, 170 F.3d 173 (3d Cir. 1999)).

criminal charges for unpaid taxes—should be considered when analyzing the least restrictive means of pursuing the state's interest.[109] Instead, the court relied on federal RFRA criminal decisions from the Ninth and Tenth Circuits and held that the mandatory payment of taxes ought to be considered as part of the least restrictive means analysis, as opposed to the criminal enforcement of the tax system.[110] However, the dissenting judge pointed to the majority's "selective use of federal authority" and its resulting erroneous application of the Indiana RFRA.[111]

In contrast to the majority opinion, the *Tyms-Bey* dissent referenced the Indiana RFRA statute, the Indiana Constitution, the history of First Amendment free-exercise jurisprudence, and strict scrutiny's least restrictive means test.[112] The dissenting judge characterized the majority's reliance on pre-*Smith* Supreme Court rulings as problematic because, prior to *Smith*, the courts did not require states to demonstrate that their means of substantially burdening a defendant's free exercise was the least restrictive means of doing so.[113] In addition, prior to *Smith*, neutral laws of general applicability did not constitute a substantial burden on a person's free exercise.[114] In contrast, the majority should have applied the controlling analysis presented in *Burwell v. Hobby Lobby Stores, Inc.*— one of the Supreme Court's most recent and infamous federal RFRA decisions.

The dissent's logic behind applying the *Hobby Lobby* ruling was two-fold. First, the language in the Indiana RFRA mirrored the language of the federal RFRA statute, which the Supreme Court held in *Hobby Lobby* as providing "broader protection to the exercise of religion" than pre-*Smith* free exercise jurisprudence.[115] Second, the *Hobby Lobby* ruling "reflect[ed] the intent" of the Indiana legislature and required a fact-based approach to free exercise defenses, as opposed to pre-*Smith* rulings.[116] Moreover, the *Hobby Lobby* Court's decision stipulated that the pre-*Smith* free-exercise cases were "inconsistent with the plain meaning of RFRA" because equivalency between First Amendment free exercise violations and RFRA defenses is nonexistent.[117] The dissenting judge concluded that because the *Tyms-Bey* majority "erroneously premised" its decision on pre-*Smith* free exercise rulings, it "undermine[d] the broad and particularized protection [the] legislature intended RFRA to have."[118]

In addition to the dissent in *Tyms-Bey*, other state courts have also incorporated the *Hobby Lobby* ruling into state RFRA interpretations in civil cases.[119] For example, in *Merrick v. Penzone*, the Court of Appeals of Arizona reviewed an incarcerated man's

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109. *Tyms-Bey*, 69 N.E.3d. at 491–92.

110. *Id.* at 491 (citing U.S. v. Christie, 825 F.3d 1048 (9th Cir. 2016); U.S. v. Wilgus, 638 F.3d 1274, 1288–95 (10th Cir. 2011)).

111. *Tyms-Bey*, 69 N.E.3d at 492 (Najam, J. dissenting).

112. *Id*. at 492–93.

113. *Id*. at 493–94.

114. *Id*. at 492–93.

115. *Id.* 493–94.

116. *Tyms-Bey*, 69 N.E.3d at 493 (Najam, J. dissenting).

117. *Id*.

118. *Id*. at 499.

119. *See* Merrick v. Penzone, No. 1 CA-CV 16-0505, 2017 WL 2242841, at *3 (Ariz. Ct. App. May 23, 2017); Lebaron v. O'Brien, No. 15-00275, 2016 WL 5415484, at *5 (Mass. Super. Ct. June 15, 2016).

Arizona Free Exercise of Religion Act (FERA) claim against the Maricopa County sheriff and others.[120] The incarcerated man claimed a FERA violation after personnel at the jail denied his request for unmonitored, unrecorded confessional telephone calls with his sibling, alleged to be a church elder.[121] The Arizona appellate court held that the trial court improperly granted summary judgment in favor of the Maricopa County Sheriff's Office because nothing in the record indicated that the Sheriff's Office employed the least restrictive means when it denied the claimant's request for an unmonitored confession.[122] When deciding whether the Sheriff's Office met the least restrictive means standard, the Arizona appellate court referenced the federal RFRA and quoted the *Hobby Lobby* ruling's point that "'[t]he least-restrictive-means standard is exceptionally demanding.'"[123]

2. The Federal RFRA Analysis in *Hobby Lobby Stores, Inc.* is Advantageous to Caregivers

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc*.[124] The case involved three closely-held, for-profit corporations that asserted a federal RFRA claim against the federal government for requiring the coverage of certain contraceptive methods under the Affordable Care Act's contraceptive mandate.[125] Specifically, the owners of Hobby Lobby Stores, Inc., Mardel Corporation, and Conestoga Wood Specialties Corporation alleged that the contraceptive mandate violated their free exercise rights under the First Amendment and the federal RFRA because the mandate forced them to provide health insurance coverage for contraceptive methods they believed to be abortifacients. The owners of the corporations asserted that providing access to certain contraceptive methods violated their "sincere Christian beliefs that life begins at conception," and thus they could not facilitate access to the contested contraceptive methods without spiritual impairment.[126]

Justice Alito wrote the opinion of the Court, ruling that RFRA's definition of "exercise of religion" effectuated a "complete separation from First Amendment case law."[127] In addition, the Court held that the contraceptive mandate constituted a substantial burden on the corporate persons' free exercise of religion[128] and that the government failed to meet its burden in showing that the mandate was the least restrictive means of furthering its compelling interest to provide female workers with cost-free contraception.[129]

In addressing whether Congress intended RFRA's "exercise of religion" clause to merely echo First Amendment jurisprudence, Justice Alito contrasted First Amendment

120. *Merrick*, 2017 WL 2242841, at *1.
121. *Id*.
122. *Id*. at *2.
123. *Id*. at *3. Similarly, in *Lebaron v. O'Brien*, the Superior Court of Massachusetts also quoted *Hobby Lobby*'s reference to the least restrictive means standard, noting that the standard is "'exceptionally demanding.'" 2016 WL 541544, at *5.
124. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)
125. *Id*. at 682.
126. *Id*.
127. *Id*. at 696.
128. *Id*. at 718–27.
129. *Hobby Lobby*, 573 U.S. at 272–34.

free exercise case law with the modern provisions of the federal RFRA.[130] He quoted *Smith* and stated that under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[131] Justice Alito then held that although RFRA's definition of "exercise of religion" previously directed courts to reference First Amendment case law,[132] Congress amended the definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[133] Thus, the Court affirmed that the federal RFRA "provide[s] very broad protection[s] for religious liberty."[134]

In addition, the Court concluded that the contraceptive mandate constituted a substantial burden on the claimant's free exercise because it required the claimants to "engage in conduct that seriously violates their religious beliefs."[135] In its reasoning, the Court described how economic penalties on RFRA claimants may constitute a substantial burden.[136] If the three claimants refused to provide the mandated contraceptive coverage, each faced additional taxes resulting between $15 million and $475 million per year. The Court also carefully noted the role of courts in deciding what comprises a substantial burden. For instance, Courts may not determine whether a substantial burden exists on the basis of the reasonability of the claimant's belief.[137]

Although the *Hobby Lobby* Court assumed the government had a compelling interest, it also held that the government did not meet the least restrictive means of furthering that interest. In its decision, the Court noted that RFRA requires a narrow focus when determining whether the state has demonstrated a compelling government interest—the state cannot assert "broadly formulated interests"[138] such as the promotion of "public health" or "gender equality."[139] Yet, the Court declined to adjudicate the compelling interest issue, assuming "that the interest in guaranteeing cost-free access to the . . . challenged contraceptive methods is compelling within the meaning of RFRA . . . ."[140] Instead, the Court reasoned that the government did not sufficiently demonstrate that its contraceptive mandate was the least restrictive means of advancing the compelling interest because the government failed to show that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion."[141] Specifically, the Court suggested that the government must demonstrate that "assum[ing] the cost of providing the four contraceptives at issue" was not a viable alternative.[142]

Hobby Lobby is advantageous to self-induced abortion caregivers asserting a state

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130. *Id*. at 693–94.
131. *Id*. at 694.
132. *Id*.
133. *Id*. at 696; *see also* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).
134. *Hobby Lobby*, 573 U.S. at 693.
135. *Id*. at 720.
136. *Id*. at 720–21.
137. *Id*. at 724.
138. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).
139. *Hobby Lobby*, 573 U.S. at 726.
140. *Id*. at 728.
141. *Id*.
142. *Id.*

RFRA as a defense because Alito's opinion is perhaps the most thoroughly detailed RFRA ruling. The majority opinion addresses several areas that previously generated differing RFRA analyses in the courts.[143] For example, Alito's opinion targets distinctions between First Amendment free exercise jurisprudence and RFRA,[144] the place of the Court in assessing the sincerity of a claimant's or defendant's religious beliefs,[145] the definition of exercise of religion,[146] what comprises a substantial burden,[147] and what constitutes a least restrictive means for the purposes of defeating a RFRA claim or defense.[148]

Further, *Hobby Lobby's* assumption that the state possesses a compelling interest is particularly relevant. In a case where a caregiver is charged with the unauthorized practice of medicine for assisting with self-induced abortion, the state is likely to assert a compelling interest in public health, the life and health of the pregnant person, the preservation of potential life, or the maintenance of professionalism and ethics within the medical field. A cursory review of abortion cases bolsters this conclusion,[149] and supports the view that courts would likely find a compelling state interest based on the state's assertions. Such an assumption forces a judicial inquiry to focus on whether charging caregivers is the least restrictive means of furthering the state's interest. *Hobby Lobby's* narrow focus benefits caregivers because the Court's analysis puzzles out previous ambiguities regarding what constitutes a least restrictive means and clearly states that the government must show that other avenues of advancing its interest are not viable.

IV. RFRAS ARE VIABLE DEFENSES FOR CAREGIVERS

A. Caregivers for Self-Induced Abortion May be Arrested and Prosecuted

1. Abortion's Medical and Legal History Places Abortion Within the Realm of Medical Practice

Although abortion is legal and women have the constitutional right to choose an abortion, case law and statutes indicate that abortion is typically considered a medical procedure left to licensed physicians working in abortion clinics. Nevertheless, history shows that abortions have not been exclusively performed by physicians.[150] Therefore, it is important to briefly address how abortion is unique in its medical history and in judicial review because these two factors have contributed to an environment in which law enforcement and prosecutors are able to utilize unauthorized medical practice laws to arrest and charge caregivers.

Self-induced abortion and caregiving for self-induced abortion are not new phenomena. In the U.S., self-induced abortion and caregiving existed prior to colonization,

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143. *See A Look at State RFRAs, supra* note 55, at 492.
144. *Hobby Lobby*, 573 U.S. at 682, 692–94.
145. *Id*. at 717–22.
146. *Id*. at 694–97.
147. *Id*. at 688–92.
148. *Id*. at 728–30.
149. *See* discussion *infra* Part IV.B.3 and notes 283, 295–98.
150. LESLIE REAGAN, WHEN ABORTION WAS A CRIME 71 (1997).

where pregnancy termination was "practice[d] in response" to the realities Indigenous women faced.[151] There is also evidence of self-induced abortion within colonial communities when "home medical guides gave recipes for 'bringing on the menses' with herbs that could be grown in one's garden or easily found in the woods."[152] In addition, prior to the criminalization of abortion, drugs to self-induce abortion were easily attainable, and pregnancy termination was not associated with religious or moral failings.[153] Because obstetrics had always been the "province of female midwives,"[154] and midwives evinced an "intimate knowledge of women's bodies and reproduction," they typically performed abortions before obstetrics and gynecology became a western medical practice.[155] Even after its criminalization in the late-nineteenth century, midwives continued to perform abortions in relatively equal numbers with doctors.[156] Taken together, all of these factors indicate that women have sought assistance with abortion outside of the formal healthcare industry for over a century.[157]

Although the American Medical Association (AMA) once led the campaign to criminalize abortion, the organization currently supports safe access to abortion.[158] During the *Whole Woman's Health v. Hellerstedt* hearings, the AMA joined the American College of Obstetricians and Gynecologists' amicus brief for Whole Woman's Health.[159] Regarding abortion, an AMA spokesperson stated that it "seeks to limit government interference in the practice of medicine and oppose government regulation of medicine that is unsupported by scientific evidence."[160]

While the medical community's support for safe abortion access legitimizes abortion as a genuine public health issue, abortion still remains segregated from most medical practices. Although almost one-third of abortions at eight weeks of gestation or less are medically induced and require no surgical procedure,[161] recent studies indicate that nearly

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151. Christina Rose, *Native History:* Roe v. Wade *Passes, But Indigenous Women Lack Access*, INDIAN COUNTRY TODAY (Jan. 22, 2014), https://newsmaven.io/indiancountrytoday/archive/native-history-roe-v-wade-passes-but-indigenous-women-lack-access-aPTclebqBkqJx-9OOHKwfQ/.

152. Katha Pollitt, *Abortion in American History*, ATLANTIC (May 1997), https://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851.

153. Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (June 27, 2016, 10:52 AM), https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html.

154. *Obstetrics and gynecology*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/obstetrics.

155. Dutton-Kenny, *supra* note 7, at 21.

156. REAGAN, *supra* note 150, at 70–71.

157. *Id*. at 74.

158. As gynecology became a professional practice, physicians from the American Medical Association (AMA) vied for the criminalization of abortion as a means to gain professional "supremacy" over "midwives and homeopaths." Katha Pollitt, *Abortion in American History*, ATLANTIC (May 1997), https://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851. *See also* Dutton-Kenny, *supra* note 7, at 22.

159. Ravitz, *supra* note 153.

160. *Id*.

161. Typically, a medication abortion is non-invasive and requires no surgical procedure. The most common type of medication abortion involves the use of two medications, mifepristone and misoprostol. According to the Henry J. Kaiser Family Foundation "[m]ifepristone blocks progesterone," which ends the development of a pregnancy. *Medication Abortion*, HENRY J. KAISER FAMILY FOUND. (Oct. 11, 2017), https://www.kff.org/womens-health-policy/fact-sheet/medication-abortion. After taking mifepristone, the patient takes misoprostol, which induces an early miscarriage and empties the uterus. In some states, the abortion

sixty percent of abortions are performed in specialized abortion clinics, as opposed to hospitals or physician's offices.[162] Further, a limited number of physicians possess experience with the practice because abortion is rarely taught in medical schools.[163] Despite abortion's isolation within the medical field, nearly one in four women will still choose to terminate a pregnancy by age forty-five.[164] Accordingly, abortion's confinement to specialized clinics only exacerbates the legal liabilities caregivers face because women will continue to need access to abortion but may not access it through a clinic.

Abortion case law also supports the assertion that abortion is squarely placed within the realm of professional medical care, leading to legal uncertainties for caregivers. For instance, abortion rights case law has emphasized physicians' roles as abortion providers.[165] In *Roe v. Wade*, arguments presented by the medical field seemed to shape the Supreme Court's reasoning when it decided that women have a constitutional right to choose abortion.[166] Despite the presence of feminist and right-to-life voices in amicus briefs filed to the *Roe* Court, the Court's decision "appeared mainly responsive to the arguments of the medical community."[167] Indeed, the reasoning in *Roe* is based on medical science and "its main holding affirmed the autonomy of doctors to act in what they believed to be the best interest of their patients."[168] Prior to the *Roe* decision, the legal community also viewed abortion as a physician's rights issue. The American Legal Institute proposed model legislation requiring "committees of doctors to evaluate a woman's reasons for seeking an abortion and to grant permission if the woman's situation met specified criteria."[169] Further, although the language of *Planned Parenthood v. Casey* does not explicitly silo the practice of abortion to the medical industry, it provided that states may regulate abortion clinics and may prohibit clinics from performing abortions at

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can be completed at home. *Id.* Later, the patient returns to the clinic or physician for a follow-up appointment to confirm termination of the pregnancy. When taken prior to eight weeks' gestation, medication abortion is safe and almost always completely effective. *Id.* In addition, the risk of major complication is less than five percent and the "associated mortality rate" is "less than one percent (0.00063%)." *Id.*

162. Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, GUTTMACHER INST. (Jan. 17, 2017), https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014.

163. *See* Carrie Feibel, *Can Doctors Learn to Perform Abortions Without Doing One?*, NPR (June 21, 2016 3:41 PM), https://www.npr.org/sections/health-shots/2016/06/21/481774579/can-doctors-learn-to-perform-abortions-without-doing-one (quoting a senior doctor and medical professor that while the procedure for an elective abortion is the same as that for a miscarriage, its performance requires "additional training" and that OB-GYNs who want to perform abortions must also "learn how to administer medical abortions . . . ."); Mara Gordon, *The Scarcity of Abortion Training in American's Medical Schools*, ATLANTIC (June 9, 2015), https://www.theatlantic.com/health/archive/2015/06/learning-abortion-in-medical-school/395075.

164. *Abortion Is a Common Experience for U.S. Women Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates.

165. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 874 (1992); Roe v. Wade, 410 U.S. 113, 165–66 (1973).

166. LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING, at vii (2012), http://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf.

167. *Id.* at viii.

168. *Id.* at viii, ix.

169. *Id.* at 4.

viability.[170] Thus, the *Casey* decision indicates the Court's assumption that abortion would remain within the realm of medical practice.

Abortion's history in the medical community and case law confining abortion to the medical industry combine with "abortion exceptionalism" to create an environment in which caregivers may be charged with crimes such as the unauthorized practice of medicine. Among legal scholars,[171] the term "abortion exceptionalism" refers to "the tendency of legislatures and courts to subject abortion to unique, and uniquely burdensome rules."[172] Such exceptionalism also recognizes that abortion is singled out "for more restrictive government regulation as compared to other, similar procedures."[173]

Abortion laws in the U.S. demonstrate that most legislatures limit lawful abortion practice to the medical field. Currently, nineteen states forbid the practice of abortion outside of hospital setting after specified points in the pregnancy.[174] For instance, forty-two states require an abortion to be performed by a licensed physician.[175] Specifically, the Idaho Code makes it a felony to "provide[], suppl[y] or administer[]" medication, drugs, or any substance to a person with the intent of terminating her pregnancy, unless that individual is "licensed or certified to provide health care in Idaho."[176] The Idaho Code also states that "[i]t is unlawful for any person other than a physician to cause or perform an abortion."[177] The Indiana Code expressly states that "[a]bortion in all instances shall be a criminal act" except when a physician performs the abortion under a narrow set of circumstances.[178] The Illinois abortion statute also forbids non-physicians from performing abortions.[179] Further, nineteen states require that clinicians providing medication abortions be physically present during the administration of abortion medication, thereby prohibiting the use of telemedicine and limiting access to abortion in rural areas.[180] As a result, law enforcement and prosecutors are easily able to use medical care laws to incriminate caregivers.

2. Law Enforcement and Prosecutors May Arrest and Charge Caregivers by Using Laws Intended to Protect the Public Health

How unauthorized practice of medicine laws define medical practice and pregnancy provides law enforcement and prosecutors with opportunities to arrest and charge

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170. *Planned Parenthood*, 505 U.S. at 874.

171. *See* Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1048 (2014), https://scholarlycommons.law.wlu.edu/wlulr/vol71/iss2/13 (citing Ian Vandewalker, *Abortion and Informed Consent*, 19 MICH. J. GENDER & L. 1, 3 (2012); Caroline Mala Corbin, *Abortion Distortion*, 71 WASH. & LEE L. REV. 1175, 1177 (2014)).

172. *Id*. at 1048.

173. *Id*. (quoting Ian Vandewalker, *Abortion and Informed Consent* 19 MICH. J. GENDER & L. 1, 3 (2012)).

174. *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 1, 2017), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

175. *Id*.

176. IDAHO CODE § 18-605(1).

177. *Id*. at § 18-608(A).

178. IND. CODE § 16-34-2-1; *accord* KY. REV. STAT. ANN. § 311.750; TENN. CODE ANN. § 39-15-201(b)(1).

179. 720 ILL. COMP. STAT. 510/3.1.

180. *Medication Abortion*, GUTTMACHER INST. (Oct. 1, 2017), https://www.guttmacher.org/state-policy/explore/medication-abortion.

caregivers. Indiana law broadly defines the practice of medicine to include holding oneself out to the public to either suggest or administer "any form of treatment."[181] Further, Indiana's law provides that: "it is unlawful for any person to practice medicine . . . without holding a license or permit to do so."[182] Going further than the statute provides, Indiana courts have declared that midwifery— "care for childbearing women . . . throughout pre-pregnancy, pregnancy, birth, postpartum and the early weeks of life"—[183] is not a medical practice and that pregnancy should be treated by physicians.[184] Similarly, Illinois courts have held that pregnancy is considered a condition under the state's Medical Practice Act of 1987,[185] which requires any individual who "treats any ailment or condition . . . of another" to possess a valid medical license.[186] Any person found to violate Illinois's Medical Practice Act is guilty of a felony, which is punishable by a fine of up to $10,000 or imprisonment from one to three years.[187]

Currently, the number of caregivers arrested and charged with the unauthorized practice of medicine is unknown. However, prosecutors have brought a variety of charges against women who choose to self-induce abortion.[188] Women who have self-induced have faced charges including the unlawful practice of medicine,[189] solicitation of murder,[190] feticide,[191] attempted homicide,[192] and abuse of a corpse and concealing a birth.[193] These prosecutions often occur in the absence of any statute that expressly prohibits self-induced abortion,[194] and thus, indicate a state's willingness to penalize women for overseeing or administering their own reproductive healthcare.

Considering that women who self-induce abortion are prosecuted under medical practice laws and abortion statutes, it is not wholly inconceivable that law enforcement

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181. IND. CODE § 25-22.5-8-1.

182. *Id*.

183. Mary J. Renfrew et al., *Midwifery: An Executive Summary for The Lancet's Series* 3, LANCET (June 2014), http://www.thelancet.com/pb/assets/raw/Lancet/stories/series/midwifery/midwifery_exec_summ.pdf.

184. *See* Smith v. State ex rel. Med. Licensing Bd. of Ind., 459 N.E.2d 401 (Ind. Ct. App. 1984).

185. Illinois v. Bickham, 621 N.E.2d 86, 89 (Ill. App. Ct. 1993).

186. 225 ILL. COMP. STAT. 60/49.

187. *Id*. at 60/59.

188. McCormack v. Hiedeman, 694 F.3d 1004, 1015 (9th Cir. 2012); Letter to U.N. Working Group, *supra* note 1, at 10, 13–14, 16–18.

189. Letter to U.N. Working Group, *supra* note 1, at 17.

190. *In re* J.M.S., 280 P.3d 410, 411 (Utah 2011); *see also* Letter to U.N. Working Group, *supra* note 1, at 14.

191. Patel v. Indiana, 60 N.E.3d 1041, 1044 (Ind. Ct. App. 2016).

192. Christine Hauser, *Tennessee Woman Accused of Coat-Hanger Abortion Attempt Faces New Charges*, N.Y. TIMES (Nov. 29, 2016), https://www.nytimes.com/2016/11/29/us/tennessee-woman-accused-of-coat-hanger-abortion-faces-new-charges.html; *see also* Letter to U.N. Working Group, *supra* note 1, at 16.

193. Anne Bynum, who was charged with abuse of a corpse and sentenced for concealing a birth, did not intend to terminate her own pregnancy. Patty Wooten, *Judge acquits woman of abuse of a corpse, jury convicts her of concealing birth*, SEAARK TODAY (Mar. 6, 2016), http://searktoday.com/judge-acquits-woman-of-abuse-of-corpse-jury-convicts-her-of-concealing-birth. Instead, she took abortion medication to induce early labor in an effort to give birth without the knowledge of her family and place the baby for adoption. *Id*. However, Bynum's story supports the concept that some prosecutors are willing to charge women who self-induce regardless of whether they intend to terminate a pregnancy or give birth. *See also* Letter to U.N. Working Group, *supra* note 1, at 18.

194. Only a limited number of states expressly outlaw self-induced abortion. *See* Letter to U.N. Working Group, *supra* note 1 and accompanying text.

and prosecutors would pursue charges against a caregiver. Indeed, attorneys are currently assessing the legal risks to caregivers and mapping out criminal charges that caregivers may confront.[195] For instance, full-spectrum doulas—"trained professional[s] who provide . . . physical, emotional, and informational support" to a pregnant person—[196]and abortion hotline workers risk being charged with the unauthorized practice of medicine because they often operate outside of the formal healthcare system.[197] In states without midwifery licensing laws, "midwives may be arrested and prosecuted on charges of practicing medicine . . . without a license."[198] However, caregivers are not necessarily limited to those with an interest or vocation in abortion practice. For the purposes of the present issue, caregivers are more broadly defined to include friends, family, or religious and spiritual leaders who may assist a pregnant person in self-induced abortion.

Jennifer Whalen's story provides evidence that prosecutors are charging caregivers. In 2014, Whalen, a mother of three living in Pennsylvania, was convicted of a felony after providing her teenage daughter with abortion medication in 2012.[199] Whalen's daughter, a sixteen-year-old with an unplanned pregnancy, intended to undergo an abortion at a traditional clinic. However, access to the nearest clinic required her to wait twenty-four hours after her initial counseling session and would have resulted in a 300-mile trip within a two-day period.[200] In addition, the clinic's procedure required an out-of-pocket cost of at least $300. Facing geographic and monetary limitations, Whalen agreed to purchase abortion pills for her daughter.[201] Shortly after taking the pills, Whalen's daughter experienced stomach pains. Although this is a common side effect of abortion medication and typically indicates that the miscarriage is complete,[202] Whalen's daughter asked to go to the hospital.[203] The hospital sent Whalen and her daughter home without any intervention or complications. Although the hospital did not mention any legal risks to Whalen, it reported her to state child-protective services. Later, police searched Whalen's house and identified the box that contained the abortion pills.[204] Two years after her daughter's abortion, the District Attorney charged Whalen with a felony for offering

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195. SIA LEGAL TEAM, *Making Abortion a Crime (Again): How Extreme Prosecutors Attempt to Punish People for Abortions in the U.S.*, https://docs.wixstatic.com/ugd/aa251a_09c00144ac5b4bb997637bc3ac2c7259.pdf (last visited Jan. 28, 2018).

196. DONA INT'L, *What is a doula?*, https://www.dona.org/what-is-a-doula/ (last visited Mar. 14, 2018).

197. SIA LEGAL TEAM, *supra* note 195.

198. Catherine Elton, *American Women: Birthing Babies at Home*, TIME (Sept. 4, 2010), http://content.time.com/time/magazine/article/0,9171,2011940,00.html. *See also* Smith v. State ex rel. Med. Licensing Bd. of Ind., 459 N.E.2d 401, 403 (Ind. Ct. App. 1984).

199. Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html; Quinn Cummings, *Making Abortions Illegal Doesn't Make Them Go Away*, TIME (Sept. 24, 2014), http://time.com/3423785/illegal-abortions/; David DeKok, *Pennsylvania mother who gave daughter abortion pill gets prison*, REUTERS (Sept. 6, 2014, 11:25 AM), https://www.reuters.com/article/us-usa-crime-pennsylvania-abortion/pennsylvania-mother-who-gave-daughter-abortion-pill-gets-prison-idUSKBN0H10IR20140906.

200. *See* Bazelon, *supra* note 199.

201. *Id*.

202. FDA, *Mifeprex (mifepristone) tablets label 7*, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (last visited Feb. 3, 2018).

203. *See* Bazelon, *supra* note 199.

204. *Id*.

medical consultation without a medical license. The District Attorney also charged Whalen with other crimes including dispensing drugs without a pharmacy license. In a statement, the District Attorney claimed, "this case is about endangering the welfare of a child through the unauthorized practice of medicine and pharmacy."[205] Although the judge could have given Whalen probation, he sentenced her to up to eighteen months in jail.[206]

One year after Whalen's conviction, prosecutors dropped murder charges against a Georgia woman who was arrested and jailed for taking abortion pills without a prescription or administration from a physician.[207] After attempting to self-induce abortion with medication, Kenlissia Jones prematurely gave birth on her way to the hospital. Shortly thereafter, she was "jailed and charged with murder" for the death of the fetus.[208] Although the District Attorney dropped the charges after more "thorough legal research" revealed that the state did not "presently . . . permit prosecution of Ms. Jones," he also stated that "third parties could be criminally prosecuted for their actions relating to an illegal abortion."[209] Both Whalen's incarceration and Jones's arrest and prosecution indicate that prosecutors will charge caregivers and may use unauthorized practice of medicine laws to do so.

B. Applying Hobby Lobby Allows a Caregiver to Successfully Assert a State RFRA as a Defense to Criminal Charges

1. Under *Hobby Lobby*, Caregiving Meets the Definition of a Sincerely Held Religious Belief.

Although statutes that expressly criminalize self-induced abortion are unconstitutional and prosecutions against women who self-induce are tenuous,[210] caregivers may not have similar constitutional protections because they are not unduly burdened in accessing abortion for themselves.[211] Accordingly, caregivers who assist women in self-inducing abortion require adequate legal safeguards. While there are likely a number of litigation strategies that could assist caregivers in their criminal defense, state RFRAs may be the most beneficial to caregivers who assist with self-induced abortion from a religious or spiritual perspective.

To successfully assert a state RFRA as a defense, the caregiver must first show that she assisted in the provision of a self-induced abortion because of a sincerely held religious

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205. *Id*.

206. *Id*.

207. Abby Phillip, *Murder charges dropped against a Georgia woman jailed for taking abortion pills*, WASH. POST (June 10, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/10/woman-charged-with-murder-didnt-have-any-money-to-get-an-abortion-the-legal-way-brother-says/?utm_term=.370af9acba75.

208. *Id*.

209. *Id*.

210. Letter to U.N. Working Group, *supra* note 1, at 9.

211. In *Planned Parenthood*, the Court held that "[o]nly where state regulation imposes an undue burden on a person's ability to make [the abortion] decision" is the state's action unconstitutional. 505 U.S. at 874. In its ruling, the Court did not discuss the possibility of an undue burden for a third party, or even for a physician, to perform or assist with an abortion. As a result, this paper does not assume that the undue burden standard applies to caregivers who assist a person with self-induced abortion.

belief. The caregiver can satisfy the first element of RFRA for three reasons. First, under *Hobby Lobby*, the caregiver's actions do not have to be mandated by or fundamental to her religious beliefs.[212] In addition, the caregiver's religious beliefs do not have to meet a reasonableness standard.[213] Finally, courts have experience ascertaining whether a person's religious beliefs are insincere,[214] and therefore could easily determine whether a caregiver was asserting RFRA as a means to simply shirk responsibility from criminal or civil penalties.

The idea that a caregiver may assist in self-induced abortion because of her religious beliefs may seem novel, but the *Hobby Lobby* Court's interpretation of religious exercise under RFRA allows for this possibility. In *Hobby Lobby*, the Court noted that, prior to the passage of the RLUIPA, RFRA's definition of religious exercise was limited to that under First Amendment case law.[215] However, since RLUIPA's passage, the federal RFRA's definition of exercise of religion expanded because Congress incorporated RLUIPA's definition of the phrase into the RFRA statute.[216] Today, religious exercise under RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." [217] The *Hobby Lobby* Court also held that the exercise of religion is not limited to an individual's belief. [218] Instead, exercise of religion also includes one's profession as well one's performance of or abstention from physical acts.[219] Thus, the caregiver's assistance does not have to be mandated by any religious dogma or text. So long as a religious or spiritual belief motivates her actions or she is assisting with self-induced abortion as a religious or spiritual leader, her assistance constitutes an exercise of religion.

In addition, courts' reluctance to apply a reasonableness standard to a person's sincerity of religious belief supports RFRA protections for caregivers. In *Hobby Lobby*, the United States government did not openly dispute the sincerity of any individuals' religious beliefs.[220] However, the government did imply that the reasonableness of the corporations' religious beliefs was questionable when it asserted that the link between providing contraception and the "destruction of an embryo" was too weak for the government's actions to be a substantial burden. In response, the Court explicitly discussed how determining the sincerity of an individual's religious beliefs differs from subjecting a person's religious beliefs to a reasonableness standard.[221]

In contrast to determining whether a claimant's or defendant's religious belief is sincere, the *Hobby Lobby* Court reaffirmed the general rule that courts have "no business

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212. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682 (2014)
213. *Id*. at 724–25.
214. *Id*. at 717–18.
215. *Id*. at 713–15.
216. 42 U.S.C. §§ 2000bb(4), 2000cc-5(7)(A).
217. 42 U.S.C. § 2000cc-5(7)(A).
218. *Hobby Lobby*, 573 U.S. at 713–15.
219. *Id*.
220. *Id*. at 717–18.
221. *Id*. at 724–25 (citing Thomas v. Rev. Bd. of Ind. Emp't. Sec. Div., 450 U.S. 707 (1981)).

addressing" the rationality of a person's religious belief.[222] Indeed, this is a sentiment expressed in Supreme Court rulings prior to the federal RFRA's enactment.[223] For instance, although the Court in *Smith* did not side with participants of the Native American Church, Justice Scalia's opinion also held that courts should not determine the plausibility of a religious claim.[224] *Hobby Lobby*'s affirmation discouraging courts from assessing the reasonableness of a person's religious beliefs is significant for a caregiver. For instance, placing abortion in a religious context may seem unreasonable to those whose religious beliefs warn against access to non-therapeutic abortion. Even among pro-choice supporters, a caregivers' assertion of religious free exercise may not be well-understood. Thus, a court's refrain from assessing the reasonableness of the caregiver's religious beliefs on abortion helps limit the influence of bias when deciding whether the caregiver's beliefs are sincere.

In a case where a caregiver is charged with a crime, it is her burden to establish that her religious or spiritual belief to assist with self-induced abortion is sincere. Regarding the determination of whether the caregiver's beliefs are sincere, the Court in *Hobby Lobby* held that prior case law substantially catalogs the ability of courts to determine when a person's or corporation's asserted religious beliefs act as a façade for simply choosing not to conform to civil or criminal law. For example, a pretextual assertion of religious freedom may include an exemption that provides the claimant with significant financial benefits.[225] Feigning religious belief may also include an individual's request for racial segregation during his incarceration.[226] However, the caregiver should not rely on assumptions that the court will not question her sincerity. Instead, she can assert that her religious belief is sincere, and she can support her assertion with an explanation of abortion's place in religious and spiritual practice throughout U.S. history and analogize her position to others who are similarly situated.

Evidence that religious beliefs may motivate a caregiver to assist with self-induced abortion is not wanting. Prior to the legalization of abortion under *Roe v. Wade*, religious and spiritual leaders helped women access safe, anonymous abortions.[227] Many religious leaders formed a network known as the Clergy Consultation Service and operated across the U.S. to ensure that women were able to safely access the procedure.[228] In New York, the Clergy Consultation Service on Abortion consisted of "more than 1,000 mostly

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222. *Id*.

223. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); Thomas, 450 U.S. at 715.

224. *Smith*, 494 U.S. at 887.

225. U.S. v. Quaintance, 608 F.3d 717, 718–19 (10th Cir. 2010).

226. Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996).

227. Sarah McCammon, *50 Years Ago, A Network of Clergy Helped Women Seeking Abortion*, NPR: ALL THINGS CONSIDERED (May 19, 2017, 4:36 PM), https://www.npr.org/2017/05/19/529175737/50-years-ago-a-network-of-clergy-helped-women-seeking-abortion.

228. *Id*; *see also* Grace Wong, *Before* Roe v. Wade*, Chicago Clergy Helped Women end Unwanted Pregnancies*, CHI. TRIB. (May 19, 2017), http://www.chicagotribune.com/news/ct-abortion-clergy-group-met-20170519-story.html.

Protestant pastors as well as some priests and rabbis."[229] The Clergy Consultation Service formed in 1967 and, in addition to ensuring safe access to abortion, members counseled women in their decisions to terminate their pregnancies.[230]

Even after its legalization, clergy and other religious leaders continued to actively support access to abortion through organizations like the national Religious Coalition for Reproductive Choice (RCRC), which formed out of the Clergy Consultation Service.[231] Today, RCRC provides educational and pastoral training in an effort to "unite pastors and theologians to break the stigma of abortion . . . in religious communities."[232] Specifically, RCRC offers pastoral care training so that clergy and other religious leaders may "compassionately listen to and support women and girls" because "[p]rotecting women's reproductive choices requires not just vibrant secular movements."[233] In the training, RCRC calls upon religious and spiritual leaders to bring "moral conviction and theology" to issues regarding women's access to abortion. The training provides "spiritual and moral perspectives on reproductive decision-making" because such decisions are often only discussed from "medical, scientific[,] and political viewpoints."[234] Other religious groups and congregations supporting access to abortion include Catholics for Choice,[235] Judson Memorial Church,[236] National Council of Jewish Women,[237] Methodist Federation for Social Action,[238] Presbyterian Feminist Agenda Network,[239] United Church of Christ,[240] and Unitarian Universalist Association of Congregations.[241]

Filings for some of the Supreme Court's most important abortion cases reveal that religious leaders, congregations, and faith-based organizations have expressed that access to abortion is a religious and moral imperative. In 1971, a number of ethical and religious organizations joined together in a motion to file an amici curiae brief to oppose the laws in Texas and Georgia that "interfere[d] with the liberty of the individual to exercise . . . her own conscience in the conduct of . . . her personal life." Although the brief focused on the "right of an individual to be free from State interference in the conduct of his or her private life," briefs from religious organizations in later abortion cases more directly

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229. McCammon, *supra* note 227.

230. *Id*.

231. *History*, RELIGIOUS COAL. FOR REPROD. CHOICE, http://rcrc.org/history (last visited Jan. 30, 2018).

232. *Id*.

233. *Pastoral Care Training*, RELIGIOUS COAL. FOR REPROD. CHOICE, http://rcrc.org/pastoral-care, (last visited Jan. 30, 2017).

234. *Id*.

235. *See* Brief for Judson Mem'l Church et al. as Amici Curiae Supporting Petitioners, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (No. 15-274), 2016 WL 155634 [hereinafter Religious Organizations' Amici Curiae Brief for Whole Woman's Health].

236. *Id*.

237. *Id*.

238. *Id*.

239. *Id*.

240. UNITED CHURCH OF CHRIST, GENERAL SYNOD STATEMENTS AND RESOLUTIONS REGARDING FREEDOM OF CHOICE 1 (1971), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 (last visited Jan. 30, 2018).

241. *Right to Choose: 1987 General Resolution*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/action/statements/right-choose (last visited Jan. 30, 2018).

address the role of religion in abortion access and decision-making. In *Webster v. Reproductive Health Services*, Catholics for a Free Choice, Chicago Catholic Women, the National Coalition of American Nuns, and the Women of Spirit in Colorado Task Force filed a brief in support of Reproductive Health Services.[242] In the brief, the organizations asserted that there is not a "constant teaching in Catholic theology" regarding the "commencement of personhood."[243] The organizations argued that the Catholic Church's theory of probabilism provides that "if there exists a really probabl[e] opinion in favor of liberty . . . although the opinion in favor of the law is more probable I may use the former opinion and disregard the latter."[244] Thus, the writers asserted that issues regarding moral decision-making lies within the conscience of each individual, and that individual's conscious choice is supreme. Based on the amici's argument, a caregiver's moral choice or imperative to assist with self-induced abortion resides within herself and she must follow that decision.

Most recently, theologians and a number of religious organizations and congregations discussed religious support for access to abortion. In *Whole Woman's Health v. Hellerstedt*, more than fifteen religious organizations submitted a brief in support of Whole Woman's Health.[245] In the brief, the religious organizations and congregations state that there is not a unified religious or moral position on abortion, even among major religions.[246] Therefore, a state's attempt to restrict the accessibility of abortion necessarily impinges on the religious and moral decisions of some individuals. Theologians, ethicists, and those who teach theology across a wide spectrum of religions also submitted a brief in support of Whole Woman's Health.[247] In the brief, the theologians asserted that Texas's restrictions on abortion access were "manifestly unjust and immoral under theological tenets" because the restrictions unduly burdened women in poverty and put them at risk for unsafe abortion procedures.[248]

On its face, religious support for a person's ability to choose an abortion does not demonstrate a religious imperative to assist with abortion. However, a number of religious followers and leaders have expressed that they support access to abortion because of their religion. Often, there is an assumption that people of faith who support access to abortion do so with "moral reckoning."[249] In addition, there is typically an assumption that there

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242. *See* Brief for Catholics for a Free Choice et al. as Amici Curiae Supporting Appellees, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127718.

243. *Id*. at 5.

244. *Id*. at 20.

245. *See* Religious Organizations' Amici Curiae Brief for Whole Woman's Health, *supra* note 235.

246. *Id.* at 3.

247. Brief for Theologians and Ethicists Supporting Petitioners at 1, Whole Woman's Health v. Cole, 790 F.3d 563 (2015) (No. 15-272), 2015 WL 9610345.

248. *Id*. at 1, 3. Ultimately, the amici curiae brief on behalf of the theologians and ethicists was filed in support of Whole Woman's Health in *Whole Woman's Health v. Hellerstedt*. However, at the time of the initial filings in 2015, Kirk Cole served as the Commissioner of the Texas Department of State Health Services. SCOTUSBLOG, *Whole Woman's Health v. Hellerstedt*, http://www.scotusblog.com/case-files/cases/whole-womans-health-v-cole (last visited Mar. 15, 2018). By the time the case reached the Supreme Court in 2016, John Hellerstedt served as the Commissioner of the Texas Department of State Health Services. *Id*.

249. Katey Zeh, *The Intersections of Faith and Reproductive Justice*, FEMINISM AND RELIGION (July 18, 2017), https://feminismandreligion.com/2017/07/18/the-intersections-of-faith-and-reproductive-justice-by-kate

are "scriptural and ethical conflicts" in existence that must be overcome by people of faith.[250] However, religious leaders and groups have argued that their support for abortion access is not "in spite of . . . religious beliefs" but is due to their religious beliefs as well as the belief that reproductive rights are an important element of religious leadership.[251] Without "full and robust access to . . . abortion," those religious beliefs are compromised.[252] Specifically, some rabbis state that the Jewish community has a "[r]esponsibility to ensure that all people can access comprehensive reproductive health services."[253] These rabbis tell that, "Jewish tradition commands [people] to respect [their] bodies and to strive for health as a means of honoring [one's] relationship to God."[254] Further, they assert that "Jewish law teach[es] that abortion is both moral and correct when a woman's mental or physical health is threatened."[255]

But the story of Dr. Willie Parker provides the most compelling evidence that individuals may assist with abortion due to religious or spiritual imperative. Dr. Parker holds a degree from the University of Iowa College of Medicine as well as degrees from the Harvard School of Public Health, the University of Cincinnati, and the University of Michigan.[256] Recently, the United Nations Office of Human Rights recognized him as one of twelve Women's Human Rights Defenders.[257] But most importantly, Dr. Parker is a devout Christian who chooses to provide abortions in high-need communities because of his religious convictions.[258]

For much of his young life, Dr. Parker identified as a fundamentalist Christian and wrote about abortion as a "life-ending process".[259] Indeed, Dr. Parker refused to perform abortions for the first half of his career as an OB/GYN.[260] As part of his profession, he referred patients seeking abortion to appropriate providers, but believed that performing abortions himself was wrong. However, he describes his transition from fundamentalist abortion opponent to Christian abortion provider as a "moral understanding."[261] When a series of life events forced Dr. Parker to reflect on his stance toward abortion, he found Rev. Dr. Martin Luther King, Jr.'s sermon "I've Been to the Mountaintop" particularly moving.[262] Although Dr. Parker had heard the sermon countless times, one specific instance called him to reflect on those women who are "denied the health-care services

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y-zeh.

250. *Id*.

251. Lori Weinstein & Rabbi Michael Nammath, *Our Jewish beliefs call us to advocate for reproductive rights*, WASH. JEWISH WEEK (Jan. 25, 2017), http://washingtonjewishweek.com/36072/our-jewish-beliefs-call-us-to-advocate-for-reproductive-rights/editorial-opinion/voices.

252. *Id*.

253. *Id*.

254. *Id*.

255. *Id*.

256. *About Dr. Parker*, DR. WILLIE PARKER, https://www.drwillieparker.com/about (last visited Feb. 2, 2018).

257. *Id.*

258. *Id.* Dr. Parker provides abortions in Mississippi, Alabama, Georgia, Illinois, and Pennsylvania. Currently, Mississippi has only one abortion clinic.

259. DR. WILLIE PARKER, LIFE'S WORK: A MORAL ARGUMENT FOR CHOICE 2, 24–25 (2017).

260. *Id*. at 26.

261. *Id*. at 2.

262. *Id*. at 34.

they sought because of someone else's idea of what they should do."[263] As he reflected, Dr. Parker found the story of the Good Samaritan analogous to a calling to provide abortion services.[264] In discussing this transition, Dr. Parker writes:

> The Scripture came alive and it spoke to me. For the Samaritan, the person in need was a fallen traveler. For me, it was a pregnant woman. The earth spun, and with it, this question turned on its head. It became not: Is it right for me, as a Christian, to perform abortions? But rather: Is it right for me, as a Christian, to refuse to do them? And in that instant, I understood that I, like the Levite and the priest, had been afraid—afraid of what my Christian brothers and sisters might think of me, of what my pastors and relatives . . . might say, of what the social or political consequences of fully embracing the cause of abortion might be.[265]

Today, Dr. Parker describes his work as an abortion provider as a calling, despite the abashment of his Christian opponents.[266] In discussing his calling he states, "I am a Christian, raised in the churches right here in the South . . . I remain a follower of Jesus. And I believe that as an abortion provider I am doing God's work."[267]

Many individuals' religious practices and beliefs do not compel actions similar to the Good Samaritan. However, when considering religious groups' and leaders' historical acceptance of abortion, alongside outspoken support for making religious beliefs and practice inclusive of abortion today, there is a strong indication that a caregiver could demonstrate that her assistance with self-induced abortion is based on a sincere religious belief. Whether or not the caregiver's assistance is deemed reasonable to a prosecutor, judge, or jury is completely irrelevant, as the *Hobby Lobby* Court reaffirmed that a person's religious beliefs and practices are not required to meet a reasonableness standard.[268]

2. Criminal Charges Pose a Substantial Burden on the Caregiver's Religious Free Exercise

After the caregiver shows she acted because of her sincerely held religious beliefs, the caregiver must demonstrate that the criminal charges she faces pose a substantial burden on her religious exercise. In *Hobby Lobby*, the Court found that the claimant's religion was substantially burdened by the costs resulting from the corporations' failure to comply with the contraceptive mandate.[269] To the Court, the cumulative financial penalties constituted a substantial burden because they made the practice of the claimants' religious beliefs more expensive.[270] Hence, it is equally acceptable to find that a state imposes a substantial burden on a caregiver's religious practice when a state's actions put her liberty and economic livelihood at risk.

Recall the story of Jennifer Whalen—the mother of three who purchased abortion

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263. *Id. at* 35.
264. PARKER, *supra* note 259, at 35.
265. *Id*. at 36.
266. *Id*. at 2.
267. *Id*. at 1–2.
268. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–25 (2014).
269. *Id*. at 718–22.
270. *Id*.

pills and administered them to her teenage daughter per her daughter's request. [271] Although Whalen did not assert RFRA as a defense, her prosecution and subsequent incarceration are indicative of the burdens a caregiver would likely experience. First, Whalen's charges put her in a position of having to choose between potentially preserving her liberty with an affirmative defense or pleading guilty and losing her livelihood.[272] If Whalen pled guilty to the misdemeanors of assault and endangering the welfare of a child, she would receive less jail time. But, in addition to incarceration, she would automatically lose her position as a personal-care aide at an assisted living facility—a source of income on which her family depended.[273] Ultimately, Whalen pled guilty to the misdemeanor charges and was sentenced to jail with work-release.[274] Along with the economic costs, Whalen experienced a great deal of unwanted and unwarranted attention. After her arrest, bloggers, reporters, and pro-choice activists bombarded her with phone calls. Undoubtedly, the level of attention Whalen's case received had a negative impact on her life—her family resides in a rural, conservative area where she has lived her entire life.[275]

Similar to Whalen, a caregiver would likely face economic penalties and loss of liberty. If a caregiver is charged and sentenced to prison for the unauthorized practice of medicine, she likely encounters fines relating to the violation of the statute[276] as well as fees relating to imprisonment, court costs, community service, and bail.[277] In addition to expenses directly related to her criminal charges, a caregiver would also likely endure the collateral consequences of incarceration—job loss, civil forfeiture, and limitation of welfare benefits.[278] A caregiver's physical restraint also imposes a substantial burden on her religious exercise because it limits her ability to assist women with self-induced abortion. If a caregiver is incarcerated, she is not able to act as a Good Samaritan by ordering abortion pills or traditional herbs and by ensuring that such treatments are taken in a safe and effective manner. Thus, *Hobby Lobby's* penalty-based reasoning provides that the requirements for what constitutes a substantial burden are met simply by a caregiver's prosecution and incarceration.

3. Abortion Case Law Provides that the State has a Compelling Interest

After a caregiver demonstrates that the state imposed a substantial burden on her religious exercise, the prosecution must show that the state had a compelling interest in doing so. Although the Court in *Hobby Lobby* assumed the government had a compelling interest to ensure the provision of cost-free contraception to female workers, it remarked that broadly formulated government interests, such as public health or gender equality, are

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271. *See* Bazelon, *supra* note 199.

272. *Id.*

273. *Id.*

274. *Id.*

275. *See* Bazelon, *supra* note 199.

276. *See* 225 ILL. COMP. STAT. 60/59 (providing that any person who violates Illinois's unauthorized practice of medicine statute may face a fine of up to $10,000 for their first offense).

277. *See* Salma S. Safiedine & K. Jeannie Chung, *The Price for Justice: The Economic Barriers That Contribute to an Unfair and Unjust Criminal Justice System*, 32 CRIM. JUST. 40, 44 (2018).

278. *See* Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32 (2001).

not emblematic of a compelling state interest.[279] Instead, the compelling interest inquiry requires a more narrow examination.[280] When the government asserts a compelling interest for substantially burdening the claimant's or defendant's religious exercise, the government must show that the "test is satisfied through [the] application of the challenged law 'to the person.'"[281] As a result, courts should apply strict scrutiny to the government's assertion that harm will result from granting the claimant or defendant a religious exemption from the law.[282]

When a caregiver is prosecuted, the government could assert that the harm resulting from her religious exemption is the risk of medical complications or death to the person who chooses to self-induce. Indeed, abortion was legalized in part because of the high mortality rates associated with illegal abortions that were unsanitary and not properly performed by physicians.[283] However, the advent and increased usage of medication abortion allows for caregivers to safely assist people with abortion outside of a clinical setting.[284]

In a study on self-induced abortion, the use of abortion medication was the "most commonly reported method among women who reported knowing someone who had attempted" self-induced abortion.[285] Similar to many medications, abortion pills include a list of side effects such as nausea, vomiting, weakness, or dizziness.[286] Yet, the most recent data indicates that when abortion medication is taken properly, serious adverse reactions occur in less than one percent of individuals.[287] Further, over ninety-seven percent of pregnancies treated with abortion pills successfully terminate.[288] After taking the abortion medication, less than three percent of people are required to undergo additional abortion procedures to end the pregnancy.[289] In light of these facts, the state's compelling interest in preventing medical complications or death would be minimized if individuals could legally obtain legitimate abortion pills. But currently, access to abortion medication in the U.S. is limited to physician prescriptions.[290] Without additional information on how many people who self-induce actually receive legitimate abortion medication, it is far too

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279. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–25 (2014).

280. *Id*.

281. *Id*. (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

282. *Id*. (relying on *Gonzales*, 546 U.S. at 431).

283. Roe v. Wade, 410 U.S. 113, 162 (1973).

284. D. Grossman, K White, & L. Fuentes et al., *Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas*, TEX. POL'Y EVALUATION PROJECT RES. BRIEF 1 (Nov. 17, 2015) [hereinafter "*Knowledge, Opinion, and Experience*"]; *Medication Abortion*, GUTTMACHER INST. (Jan. 25, 2018), https://www.guttmacher.org/print/evidence-you-can-use/medication-abortion. *See also* Mifeprex Medication Guide, stating that although "[s]erious infection has resulted in death in a very small number of cases . . . There is no information that use of Mifeprex and misoprostol caused these deaths." FDA, *Mifeprex Medication Guide*, https://www.fda.gov/downloads/Drugs/DrugSafety/UCM088643.pdf (last visited Feb. 3, 2018).

285. *Knowledge, Opinion, and Experience*, *supra* note 284, at 3.

286. FDA, *Mifeprex (Mifepristone) Label* 7 (2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf (last visited Feb. 3, 2018).

287. *Id*. at 7–8.

288. *Id*. at 13 tbl.3.

289. *Id*.

290. *Mifeprex (mifepristone) Information*, FDA, https://www.fda.gov/Drugs/DrugSafety/ucm111323.htm (last updated Jan. 23, 2018); *Knowledge, Opinion, and Experience*, *supra* note 284, at 3.

ambitious to conclude that a court would not find a compelling interest in preventing medical complications or death in people who choose to self-induce with abortion pills purchased via internet or through mail-order.

Abortion exceptionalism further complicates the compelling state interest analysis because it is unclear whether a court would interpret RFRA's compelling state interest test through the lens of abortion case law.[291] In *Roe*, the Court held that during the first trimester of a pregnancy, the state has no compelling interest and the abortion decision must be left to the person and that individual's physician.[292] But, at later stages of pregnancy, the state has a compelling interest in seeing that abortion is performed under circumstances that ensure maximum safety for the patient.[293] For instance, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[294]

While *Roe* articulated the need for a state to have a compelling interest in regulating abortion beyond the first trimester, later cases depressed the *Roe* holding and eventually abandoned the practice of applying strict scrutiny to all abortion regulations. In *Webster v. Reproductive Health Services*, the Court held that the state has a compelling interest in protecting fetal life from the moment of conception.[295] Building on the *Webster* ruling, the *Casey* Court stated that the government has a "profound interest" in potential life and may regulate abortion at the earliest stages of pregnancy, so long as the regulation does not pose an undue burden on the person's right to terminate a pregnancy.[296] The state's profound interests also allow it to regulate abortion to protect the health and safety of the individual.[297] Most recently, the Court echoed previous cases when it held that states are not required to assert a compelling interest for abortion regulations to be constitutional. In *Whole Woman's Health v. Hellerstedt*, the Court reaffirmed that states have a "legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient" so long as the state regulations do not pose a "substantial obstacle to a woman seeking an abortion."[298]

Because a caregiver's arrest and prosecution directly involves abortion and would likely violate existing abortion restrictions, it is unclear whether a court would require the

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291. *See supra* Part III.A.1 and notes 171 to 173. Abortion exceptionalism occurs when "litigants have alleged constitutional claims other than . . . undue burden violations" and, in response, courts adjust "how they normally analyze these constitutional claims or they have even completely foreclosed the application of other doctrines on the grounds that the undue burden standard subsumes or displaces these claims." Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1047 (2014). In the context of this paper, abortion exceptionalism refers to the court's course of action in determining the level of scrutiny to apply to constitutional claims brought alongside abortion rights violations. However, it is not inconceivable that a caregiver asserting a RFRA as a defense would also assert a First Amendment free exercise violation, or even a violation of abortion rights based on privacy. In such a case, the actual level of scrutiny the court may apply to the RFRA claim is very uncertain.

292. Roe v. Wade, 410 U.S. 113, 162–63 (1973).

293. *Id.* at 154, 163.

294. *Id*. at 154

295. Webster v. Reproductive Health Services, 492 U.S. 490, 494 (1989).

296. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–78 (1992).

297. *Id*.

298. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (quoting *Roe*, 410 U.S. at 150).

state to demonstrate a compelling interest or to only articulate a legitimate interest. Moreover, a court may review abortion jurisprudence and find a compelling state interest in protecting the life and health of the pregnant person or preserving potential human life. Because courts have been inconsistent in the standard of review they apply, great caution is warranted, as is a conservative approach when predicting whether the court will find a compelling state interest.

4. Arresting and Prosecuting Caregivers is Not the Least Restrictive Means

Although a court could conclude that the state has a compelling interest, the state must also show that it is furthering its interest by the least restrictive means possible. To satisfy this standard, the state must demonstrate "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion."[299] In *Hobby Lobby*, the Court assumed the government had a compelling interest in substantially burdening the claimants' religious exercise. However, the government did not satisfy the least restrictive means standard because it did not anticipate other ways of furthering its interest and did not demonstrate why those alternatives would have been unworkable.[300] To show that any substitute means of furthering its interests was unfeasible, the government could have used empirical evidence. Such evidence might include an "estimate of the average cost per employee or providing access to . . . contraceptives" or "statistics regarding the number of employees who might be affected."[301]

Absent any proposal from the government, the Court suggested two alternatives to the contraceptive mandate. First, the Court speculated that the government could fund the cost of the four contraceptive methods at issue. While the government argued that RFRA cannot be used to create new programs, the Court rejected this reasoning and held that "RFRA . . . may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."[302] Second, the Court pointed out that the government "itself has demonstrated that it has at its disposal an approach that is less restrictive . . . ."[303] The government had already provided nonprofit religious organizations with a religious exemption for contraceptive coverage.[304] The Court held that the religious exemption provided to nonprofits did not substantially burden the claimants' religious belief and also furthered the state's compelling interest in ensuring contraceptive coverage to female employees.[305]

When a state prosecutes and penalizes a caregiver who assists with self-induced abortion due to religious motivations, it is not furthering its compelling interest by the least restrictive means possible. While the state may have a compelling interest, it can simultaneously ensure that religious exercise is not burdened and that pregnant people are

299. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727–28 (2014).
300. *Id*.
301. *Id*. at 727–30
302. *Id*. at 729–30.
303. *Id*. at 730–32.
304. *Hobby Lobby*, 573 U.S. at 730–32.
305. *Id*.

protected. Although the caregiver is not obligated to demonstrate alternative means by which the state could further its compelling interest, it is worth exploring what avenues the state could take to do so.

Because access to abortion medication is highly restricted, states do not have the authority to broaden how abortion medication is prescribed and dispensed.[306] However, a state can mitigate potential harms and meet its compelling interest by creating an exemption for religiously-motivated caregiving either under existing abortion statutes or under existing medical licensure regulations. Although there are no laws granting religious exemptions specifically for self-induced abortion caregivers, many states offer religious exemptions to withhold from otherwise mandatory medical treatments. For instance, despite recent outbreaks of measles and mumps,[307] many immunization statutes allow for religious exemptions.[308] In addition, eighteen states grant philosophical exemptions for individuals who object to vaccinations due to a moral or personal belief.[309]

Some states also offer religious exemptions from medical licensure in certain situations, which indicates that prosecuting caregivers for administering traditional herbs or abortion medication is not the least restrictive means of preventing medical complications or death. In Florida, those who participate in the "domestic administration of recognized family remedies" or "[t]he practice of the religious tenets of any church in this state" are exempt from some of the provisions in Florida's Regulation of Professions and Occupations Code.[310] Georgia's Professions and Businesses laws also allow for a religious exemption to practice medicine. Under Georgia's medical practice provisions, the law provides that medical practice statutes do not prohibit "[t]he practice of the religious tenets or general beliefs of any church whatsoever."[311] However, some states that

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306. DANCO LABS., LLC, *Mifeprex Risk Evaluation and Mitigation Strategy* (Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifeprex_2016-03-29_REMS_full.pdf. Ideally, a state's least restrictive means to protecting the health of people who undergo self-induced abortion would manifest through amendments to the state's pharmacy dispensation laws. For instance, a state could amend its laws to provide that pharmacists may prescribe and dispense abortion medication to any person in need of it. A state could ostensibly couple this strategy with the *Hobby Lobby* Court's government-pays proposal. Because RFRAs allow states to "expend additional funds to accommodate citizens' religious beliefs," a state could subsidize the cost of abortion medication through its Medicaid program in order to guarantee that poverty is not a barrier to safe and effective medication. *Hobby Lobby*, 573 U.S. at 729–30. However, only a physician who is certified with the FDA's Risk Evaluation and Mitigation Strategy program can prescribe and dispense the medication. DANCO LABS., LLC, *Mifeprex Risk Evaluation and Mitigation Strategy* (Mar. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Mifeprex_2016-03-29_REMS_full.pdf. Further, in some states, a person must take the first pill of two in the physical presence of a clinician. *Medication Abortion*, GUTTMACHER INST. (Mar. 1, 2018), https://www.guttmacher.org/state-policy/explore/medication-abortion. While the ACLU is currently challenging the federal government's restrictions on abortion medication, the expectation that states can expand pharmacy dispensation laws to encompass the medication is currently unworkable. ACLU, *ACLU Challenges Federal Restrictions on Abortion Pill* (Oct. 3, 2017), https://www.aclu.org/news/aclu-challenges-federal-restrictions-abortion-pill.

307. NAT'L CONF. OF ST. LEGS., *LegisBrief: Vaccination Policies: Requirements and Exemptions for Entering School* 1 (Dec. 2017) [hereinafter *Vaccination Policies*].

308. *See, e.g.*, UTAH CODE ANN. §§ 53G-9-303(2), 304(iii)(b); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B); IDAHO CODE § 39-4802(2); 105 ILL. COMP. STAT. 5/27-8.1(8); IND. CODE § 21-40-5-6(a); *see also Vaccination Policies*, *supra* note 307, at 2.

309. *See Vaccination Policies*, *supra* note 307, at 2.

310. FLA. STAT. § 458.303(f)–(g).

311. GA. CODE. ANN. § 43-34-22(b)(2).

allow for religious exemptions to medical licensure or treatment laws qualify the exemption by prohibiting the administration of controlled or prescribed substances. Under California law, an individual may practice healing arts or alternative medicine so long as the individual satisfies certain disclosure requirements and does not perform surgery or "[p]rescribe[] or administer[] . . . controlled substances to another person."[312] Similarly, North Carolina allows for the "administration of domestic or family remedies" but does not permit treating others by "spiritual means" if drugs or other "material means" are used.[313]

Following *Hobby Lobby*'s reasoning, evidence that religious exemptions are already provided under the law in question is sufficient to show that a state has a less restrictive means of furthering its compelling interest rather than prosecuting a caregiver who assists with self-induced abortion. Similar to how *Hobby Lobby* broadened the religious exemption in the contraceptive mandate to include for-profit corporations, the existence of a religious exception under medical licensure laws shows that expanding the statutes to include additional groups is not an unworkable alternative. Further, broadening religious exemptions preserves the caregiver's religious exercise. As a result, a state has less restrictive means to protect the health and safety of pregnant people aside from prosecuting and convicting caregivers who assist with self-induced abortion due to a religious or spiritual motivation.

V. CONCLUSION

As described above, a caregiver who assists another with self-induced abortion may face criminal charges under unauthorized practice of medicine laws. However, if a caregiver assists in self-induced abortion due to a religious or spiritual motivation, she should assert as a defense a violation of her right to religious exercise under a state RFRA. A caregiver should raise her defense under a state RFRA because it affords broader protections than does the First Amendment. Unlike the First Amendment, state RFRAs protect religiously- or spiritually-motivated conduct even when the substantial burden on the caregiver's religious exercise arises from a neutral law of general applicability. In contrast, the First Amendment only protects free exercise when the government's action targets an individual's religious practice. Further, many state RFRAs provide that state actions that create an indirect burden on a caregiver's religious exercise constitute a substantial burden.

Yet, some factors complicate how a state court will interpret its state's RFRA. State RFRA cases are infrequent, particularly in the criminal defense context. In addition, each RFRA is uniquely drafted. Consequently, state courts sometimes fail to apply strict scrutiny to RFRA defenses and claims, making a successful outcome for a caregiver unpredictable. Despite uncertainties, the paucity of state RFRA case law places an emphasis on federal interpretations of RFRA. Some state courts have already begun to rely on federal sources of authority when adjudicating state RFRA defenses and claims. Further, recent decisions indicate that, when adjudicating criminal or civil RFRA issues,

312. CAL. BUS. & PROF. CODE § 2053.5.
313. N.C. GEN. STAT. § 90-18(c)(1) to (5).

some state courts are applying the RFRA analysis from the Supreme Court's *Hobby Lobby* decision. Thus, a state court could apply the Court's RFRA analysis in *Hobby Lobby* to a caregiver's RFRA defense.

The RFRA analysis in *Hobby Lobby* is advantageous to a caregiver who is charged with the unauthorized practice of medicine. First, the Court noted that federal RFRA's definition of religious exercise is far more expansive than that under the First Amendment. Under RFRA's definition, caregiving for individuals who self-induce abortion can easily be placed within the context of religion—religious and spiritual leaders have assisted women in obtaining abortions for decades. In addition, some individuals provide abortion services specifically because they have been spiritually called to do so. Accordingly, the assertion that providing abortion care may fit within the definition of free exercise is sound.

Next, *Hobby Lobby's* definition of what constitutes a substantial burden is broad; it includes indirect burdens on free exercise such as economic penalties. A state places a substantial burden on a caregiver's free exercise when it charges her with a statute such as the unauthorized practice of medicine. If incarcerated, a caregiver is completely prohibited from assisting with self-induced abortion. In addition to limitations on her physical liberty, a caregiver also faces heavy fines related to the violation of the statute.

Finally, the *Hobby Lobby* decision details what is required of a state to demonstrate that its actions are the least restrictive means of furthering its compelling interest. Similar to the Court's holding in *Hobby Lobby*, a state court would likely determine that a state had a compelling interest in substantially burdening a caregiver's ability to assist with self-induced abortion. However, a state would likely fail to satisfy a court that prosecuting and convicting a caregiver was the least restrictive means of furthering its interest. Under *Hobby Lobby*, a state is required to prove that it lacked an alternative means to further its interest. Part of a state's burden includes listing what other avenues a state might take and describing why those alternatives are inviable. Specifically, if a state already provides a religious exemption under an unauthorized practice of medicine statute, it must show why expanding the statute to include caregivers is unworkable. Thus, when a state fails to prove that such an expansion is impracticable, a state's argument will flounder and a caregiver will have successfully asserted the RFRA as a criminal defense.

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