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Not by Any Means: Defining RFRA's Application to Title VII

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Introduction

After a lifetime of struggling with her gender identity, feeling she had nowhere to turn, Aimee Stephens walked into her backyard on a November day in 2012 with a loaded gun.[1] Fortunately, she decided not to give up that day, but it would only be the beginning of her struggle to find herself and be accepted for her decisions.[2] Soon after, Aimee would lose her job as a Funeral Director because her employer stated that her decision to transition from a male to a female offended his religious beliefs.[3] The legal fight that would ensue drew a line in the sand between Title VII of the Civil Rights Act of 1964 and the Religious Freedom and Restoration Act (RFRA).[4] The growing debate in the correct application of nondiscrimination laws to gender identity has forced courts to grapple with the relationship between religion and third-party harm, specifically to the LGBT community.

As the first case to address whether an employer may claim protection from a discrimination claim under RFRA in this setting, Aimee's story signaled the first time the court placed a limit on the use of religion to avoid Title VII application. In *EEOC v. R.G. and G.R. Funeral Homes*, the Sixth Circuit held that Title VII extends protection to transgender workers like Aimee, and that RFRA does not shield employers from Title VII anti-discrimination regulations. Part I will analyze the overall climate of Title VII and its applicability to discrimination based on sexual orientation and gender biases in the wake of the Sixth Circuit

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[1] Emanuella Grinberg, *She Came Out and Got Fired. Now Her Case Might Become a Test for LGBTQ Rights Before the Supreme Court*, CNN (Sep. 3, 2018, 6:26 PM), https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html.
[2] *Id*.
[3] EEOC v. R.G., 884 F.3d 560, 569 (6th Cir. 2018).
[4] *Id*. at 583.

decision in *EEOC v. R.G.* In parts II and III, through the development of the current state of Title VII, this Comment will examine the effects of the Sixth Circuit ruling on the intersection of RFRA and Title VII. Part IV will explore the current tension between the RFRA and Title VII protection of gender identity, and the need to place limits on the RFRA's application. Parts V and VI will argue that the structure of the RFRA itself prohibits its application to Title VII claims on the basis of sex discrimination.

I. Brief Overview of the Evolution of Title VII and its Applicability to Sexual Orientation and Gender Identity

Title VII states that it is "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[5] Title VII was enacted in 1964 to protect employees from discrimination based on those characteristics.[6] In the years since its inception, however, "because of sex" has generally been interpreted narrowly in accordance with a mix of congressional intent, the accepted public interpretation of sex, and a plain meaning statutory understanding.[7] With minimal legislative history or guidance, courts knew that the statute was designed to primarily protect women.[8] In the fifty years since Congress enacted Title VII of the Civil Rights Act of 1964, the public perception and acceptance of sexual orientation and gender identity has changed drastically.[9] Issues that were not salient in the years immediately after the passage of Title VII are now in the forefront of case law.

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[5] 42 U.S.C. 2000e-2(a)(1).
[6] *Id*.
[7] Lisa J. Banks & Hannah Alejandro, *Changing Definitions of Sex under Title VII*, AMERICAN BAR ASSOCIATION, LABOR AND EMPLOYMENT LAW SECTION: NATIONAL CONFERENCE ON EQUAL EMPLOYMENT OPPORTUNITY LAW, 2016 at 2.
[8] *Id*.
[9] *Id*.

Supporters of adherence to the plain meaning interpretation of Title VII argue that allowing a broader and more modern interpretation of "sex" violates the separation of powers.[10] In 2017, former Attorney General Jeff Sessions issued a two-page memo stating that transgender people are not protected by Title VII.[11] In his memo, he stated that as a matter of law, Title VII does not prohibit discrimination based on gender identity.[12] Sessions inferred that congressional intent was to apply the statute only to the traditional definition of sex as biologically male or female.[13] In the past thirty years, however, multiple courts have held discrimination on the basis of sexual orientation or gender identity falls within the definition of "sex" in the statute, and is actionable as a Title VII discrimination claim.[14] These courts have determined that both sexual orientation and gender identity cannot be separated from the understanding of 'sex' as written in Title VII.[15]

Although the Supreme Court has not ruled on the issue of Title VII application to gender identity, this Comment assumes, for the purposes of its argument, that like recent courts have found, Title VII protects discrimination on the basis of gender identity. The focus will be on the intersection between the RFRA and Title VII in cases involving such discrimination. This Comment will argue that the Congressional intent and structural language of the RFRA bars its

[10] Brooke Sopelsa, *16 States Urge High Court to Reject Federal Protections for Transgender Workers*, NBC NEWS, (August 29, 2018, 11:58 AM) https://www.nbcnews.com/feature/nbc-out/16-states-urge-high-court-reject-federal-protections-transgender-workers-n904741.

[11] Memorandum from the Attorney General on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civils Rights Act of 1964, October 4, 2017. https://www.documentcloud.org/documents/4067401-DOJ-memo.html#document/p1.

[12] *Id*.

[13] *Id*.

[14] *See, e.g.,* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that a transgender firefighter had stated a legitimate adverse employment action under Title VII for his employer's discrimination on the basis of his transgender status); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (holding that an employee fired due to her transgender status was protected by Title VII); Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 699 (7th Cir. 2016) (holding that discrimination against a college professor due to her sexual orientation was an actionable claim under Title VII); Zarda v. Altitude Express, 855 F.3d 76, 81 (2d Cir. 2017) (holding that an employee discriminated against for his sexual orientation had stated an actionable claim under Title VII).

[15] *See* cases cited *supra* note 14.

application to discrimination claims on the basis of sex under Title VII, specifically in the wake of the *EEOC v. Harris* decision.

II. Intersection of the Religious Freedom and Restoration Act and Title VII

The Religious Freedom and Restoration Act provides that the Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).[16] Section (b) states the exception, which provides that Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.[17] The RFRA thus utilizes a two-step burden shifting analysis.[18] "First, the claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest."[19] A response to the *Employment Division v. Smith* decision, discussed below, the RFRA intended to create a statutory right to free exercise exemptions and create broader protection for the free exercise of religion.

A. Brief History of the RFRA

In 1989, two Native Americans who worked as counselors for a private drug rehabilitation organization ingested peyote—a powerful hallucinogen—as part of their religious ceremonies as members of the Native American Church.[20] After becoming aware of the unlawful conduct, their

[16] 42 U.S.C. § 2000bb-1(b) (2018).
[17] *Id*.
[18] *Id*.
[19] EEOC v. R.G., 884 F.3d 560, 583 (6th Cir. 2018).
[20] Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

rehabilitation organization fired the counselors.[21] They then filed a claim for unemployment compensation, which was denied because the reason for their dismissal was considered work-related "misconduct."[22] The Supreme Court ultimately held that the Free Exercise Clause does not protect an individual whose religious beliefs conflict with an otherwise valid law prohibiting conduct that the government is free to regulate.[23] Even if the statute infringed on a religious practice, the Court stated, it would be upheld as long as it was generally applicable and did not target religion.[24]

The *Employment Division* case sparked outrage in the religious community.[25] Prior to the decision, courts employed the *Sherbert* test, established in *Sherbert v. Verner*, which required the court to first determine whether the person had a claim involving a sincere religious belief and, second, if so, whether the government action was a substantial burden on the person's ability to act on that belief.[26] The Court in *Employment Division* determined that the *Sherbert* test did not require exemptions from generally applicable criminal laws.[27] Following the decision, at the insistence of religious groups, Congress overturned the decision by passing the RFRA. Hoping to reinstate the protections afforded religious groups by the *Sherbert* test prior to *Employment Division*, the legislation was worded almost identically to the language of the Sherbert test. Thus, the RFRA reinstated the strict scrutiny compelling interest test, requiring the government to show

[21] *Id*.
[22] *Id*.
[23] *Id*. at 885.
[24] *Id*.
[25] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).
[26] Sherbert v. Verner, 374 U.S. 398 (U.S. 1963) (holding that Sherbert's ability to freely exercise her religion was significantly burdened by the state's restrictions on unemployment compensation, and that no compelling reason existed to justify this substantial burden).
[27] *Id*. at 884.

a compelling interest as well as a narrowly tailored statute in the face of substantial burdens on religious liberties.[28]

B. RFRA and the Clash Between Employer and Employee Rights

New demands for 'free exercise' have recently brought to the forefront the struggle between the rights of employers and those of employees. In *Burwell v. Hobby Lobby Stores*, the Court ruled in favor of allowing a corporation to claim protection under the RFRA and refuse to implement the statutory insurance coverage that included certain types of contraception under the Affordable Care Act.[29] The Hobby Lobby owners had strong religious objections to the use of certain methods of birth control, and alleged that requiring them to provide health insurance coverage to their employees for those types was contrary to these sincerely held religious beliefs.[30] The Supreme Court held that requiring the corporation to provide contraception that was contrary to the owners' religious beliefs imposed a burden within the meaning of RFRA and that there were less restrictive means of furthering the assumed compelling government interest in providing insurance coverage that included contraception to employees.[31]

The *Hobby Lobby* ruling was important in allowing "closely held" corporations, not just people or religious institutions, to claim protection from the law for religious reasons.[32] In effect, it also privileged the potential religious burden on the employer over the resulting burden on the employee. In finding that the corporation was considered a person under the RFRA, the court concluded that requiring a closely-held corporation with religious ideals to provide contraception that was contrary to their owners' religious beliefs was a substantial burden.[33] The Court

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[28] Garret Epps, *The Strange Career of Free Exercise*, ATLANTIC, (Apr. 4th 2016).
[29] 134 S. Ct. 2751, 2759 (2014).
[30] *Id*.
[31] *Id*. at 2759–60; s*ee infra* Part V.E.
[32] *Id*. at 2768.
[33] *Id*.

additionally found that the defendant failed to show that requiring the corporation to provide contraception was the least restrictive means of furthering the compelling government interest of providing contraceptives to employees at no cost, including deductibles or copayments.[34] The Hobby Lobby holding was a success for religious freedom in its promotion of employer's religious rights over the right of employees. Regardless of whether the government interest in providing contraception to employees was compelling, the religious burden this threatened to impose outweighed any burden that might be placed on the employee. As stated by Hobby Lobby's counsel, Paul Clement, "not all burdens are created equal."[35]

IV. Tension Between the Religious Freedom and Restoration Act and Title VII Protection of Gender Identity

Many state officials were concerned by the recent court decisions upholding Title VII protection in gender identity and transgender discrimination.[36] The shift sparked backlash and a wave of support for state and federal loopholes to enforcement of anti-discrimination laws, specifically through use of the RFRA. Partly in response to recent developments for the LGBT community, U.S. Attorney General Jeff Sessions recently named two top department officials to lead a new team to ramp up enforcement of religious liberty protections in federal laws.[37] He claimed the "dangerous movement" eroding religious freedom has "gotten to the point where courts have held that morality cannot be a basis for law . . . and where one group can actively target religious groups by labeling them a 'hate group' on the basis of their sincerely held religious beliefs."[38] Sessions went on to say, "Under this administration, the federal government is not just reacting—we are actively seeking, carefully, thoughtfully and lawfully, to accommodate people

[34] *Id*. at 2780.
[35] Epps, *supra* note 28 (quoting Paul Clement).
[36] Braden Campbell, *States, Faith Groups Tell Justices to Hear Trans Bias Case*, LAW 360, August 24th, 2018.
[37] Marcia Coyle, *Who's Leading AG Jeff Sessions' New 'Religious Liberty Task Force'?* N.Y. L.J., August 1, 2018.
[38] *Id*.

of faith. Religious Americans are no longer an afterthought."[39] This new 'religious liberty task force' was created to police the implementation and enforcement of the religious liberty guidance Sessions published in October of 2017.[40] The memorandum, issued at the executive order of President Trump, sought to reassert the importance of religious freedom in the U.S., implementing a broader interpretation of religious liberty in its enforcement of federal laws.[41]

With newfound momentum garnered by the government's recent heightened support for religious freedom, the Alliance Defending Freedom, a conservative Christian non-profit organization with whom the Department of Justice has sided in recent Supreme Court cases, filed the petition for Writ of Certiorari pending in the Supreme Court challenging the Sixth Circuit decision in the *Harris* case.[42] It alleged that transgender status is not protected under Title VII, and that the Religious Freedom and Restoration Act should provide a defense to discrimination claims when an employer's sincerely held religious beliefs are involved.[43]

In 2018, the Sixth Circuit became the first federal Court of Appeals to address the extent to which the RFRA may limit the EEOC's power to enforce Title VII in cases of transgender discrimination. *Harris* held that transgender people were protected under Title VII because discriminating on the basis of gender identity was equivalent to discriminating due to a failure to conform to gender stereotypes, as the Supreme Court held in *Price Waterhouse* and as many circuit courts had held in subsequent cases.[44] The case further determined that the Funeral Home could not be afforded an accommodation through the Religious Freedom and Restoration Act

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[39] *Id*.
[40] Memorandum for All Executive Departments and Agencies, Federal Law Protections for Religious Liberty, Exec. Order No. 13798, 82 FR 21675, 2017 WL 1832983(Pres.)
[41] *Id*. at 7.
[42] Petition for Writ of Certiorari, R.G. & G.R. Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018).
[43] *Id*.
[44] EEOC v. R.G., 884 F.3d 560, 567 (6th Cir. 2018). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

because preventing discrimination is a compelling government interest, and enforcing that goal through Title VII is the least restrictive means of advancing that compelling interest.[45]

A. *Harris* and Its Implications on the Religious Freedom and Restoration Act

Aimee Stephens began working as a funeral director at Harris Homes, a closely held for-profit funeral home, in 2007.[46] Thomas Rost, the president and owner of Harris Homes, is a devout Christian who believes that "his purpose in life is to minister to the grieving, and his religious faith compels him to do that important work."[47] When Ms. Stephens began working at Harris Homes, she presented as a man.[48] In July of 2013, Ms. Stephens wrote a letter to her employer informing him that she now identified as a female and planned to present as a woman and wear female attire at work.[49] A few weeks later, Rost informed Stephens that the situation was "not going to work out."[50] Rost then offered Stephens a severance agreement if she "agreed not to say anything or do anything," which Stephens refused.[51]

Following her termination, Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination.[52] The EEOC then brought suit alleging that Harris Homes was in violation of Title VII of the Civil Rights Act of 1964 by (1) terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory clothing allowance

[45] *R.G.*, 884 F.3d at 593, 597 (6th Cir. 2018).
[46] *Id*. at 567.
[47] Petition for Writ of Certiorari at 3, EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d at 593, 597 (6th Cir. 2018).
[48] *Id*. at 4.
[49] *Id*.
[50] *Id*. at 5.
[51] *R.G.*, 884 F.3d at 569.
[52] *Id*.

policy that provided clothing to male employees who conformed with the company's dress code but did not do the same for females.[53]

Harris Homes argued that it did not violate Title VII in its implementation of a sex-specific dress code, which Rost claimed placed an equal burden on male and female employees, or by firing her.[54] Alternatively, Rost argued that Title VII should not be enforced against the Funeral Home because the RFRA forbids the government from placing an unjustified and substantial burden on his (and by extension the Funeral Home's) religious beliefs.[55] He argued that requiring the Funeral Home to continue employing Stephens as she transitioned from male to female would constitute this illegal burden on his sincerely held religious beliefs.[56]

The District Court granted summary judgment in favor of the Funeral Home on both claims, finding that, although there was "direct evidence to support a claim of employment discrimination," the RFRA barred enforcement of Title VII against the Funeral Home because "doing so would substantially burden Rost'[s] religious exercise. . . ."[57] On appeal, the Sixth Circuit reversed the District Court's grant of summary judgment finding that (1) the Funeral Home engaged in illegal sex stereotyping and (2) the Funeral Home's discrimination on the basis of transgender or transitioning status was in violation of Title VII.[58]

V. Analyzing the RFRA's Application to Title VII in *Harris*

The Sixth Circuit held that there is no difference between discriminating on the basis of sex and discriminating due to the sex a person chooses to be, and a prohibition of discrimination due to a failure to conform with gender stereotypes is necessarily a prohibition against

[53] *Id*. at 566–67.
[54] *Id*. at 567.
[55] *Id*.
[56] *Id*.
[57] *R.G.*, 884 F.3d at 570.
[58] *Id*. at 574, 580.

discrimination on the basis of gender identity.[59] The court articulated that "it is analytically impossible to fire an employee based on that employee's status as a transgender without being motivated, at least in part, by the employee's sex."[60]

In regard to the RFRA defense, the Court found that the Funeral Home had not established that applying Title VII's proscriptions against sex discrimination to it would substantially burden Rost's religious exercise, and alternatively, even if Rost's religious exercise were substantially burdened, the EEOC had established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination.[61]

A. Burden Analysis

RFRA can be triggered only by a substantial burden on a person's exercise of religion.[62] Analyzing the relationship between the RFRA and claims of transgender discrimination requires the court to address whether the employer faced an actual burden to his or her religious freedom as required by the statute. In *Harris*, the Funeral Home alleged two burdens: "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people."[63] The court articulated several reasons for rejecting these supposed burdens.

The court viewed the first alleged burden as resting on presumed biases.[64] The Funeral Home assumed that its clients would be disturbed by a transgender funeral home director although

[59] *Id*. at 575.
[60] *Id*.
[61] *Id*. at 588, 595.
[62] 42 U.S.C. § 2000bb-1(a) (2018).
[63] *R.G.*, 884 F.3d at 586.
[64] *Id*.

this was not supported by any evidence in the record.[65] As the court articulated, "Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered at the very least raises a material question of fact as to whether his clients would actually be distracted . . . ."[66] A religious claimant relying on customers' presumed biases to establish a substantial burden under the RFRA has not been directly addressed by the court before.[67] However, the general consensus in courts dealing with Title VII sex discrimination claims have forbid the use of customers' "preferences and prejudices" as a justification for sex discrimination.[68] Therefore, even if the record did support Rost's claim that his clients may be disturbed by Stephens's appearance, this would not be a valid basis for establishing a substantial burden under the RFRA.

The Funeral Home asked the court to find that requiring it to employ a transgender individual interfered with Rost's "religious exercise of caring for the grieving."[69] Accepting this view, however, requires courts to consider the presumed biases and opinions of customers as a factor in the weighing of a religious burden. Section 703(e) of Title VII does allow an employer to discriminate on account of religion, sex, or national original in the rare circumstances where religion, sex, or national origin is a bona fide occupational qualification "reasonably necessary to the normal operation of that particular business or enterprise."[70] This is an extremely narrow exception, however, that only involves qualifications that are essential to performing core elements of the job.[71] Rost did not assert the bona fide occupational qualification exception, and his lofty

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[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *See e.g*., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) (holding that presumed biases cannot justify discrimination).
[69] *R.G.*, 884 F.3d at 585.
[70] 42 U.S.C. § 2000e-2e(1).
[71] *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

and vague accusation that employing a transgender individual would interfere with his ability to care for the grieving rests on presumed customer biases that could not form the basis of a bona fide occupational qualification exception.[72] This reasoning would also further encourage employers to rely on the opinions and prejudices of their clients as a basis for their religious beliefs.

The second alleged burden, that employing a transgender woman violated Rost's beliefs to the point that he must leave his profession, was also not a substantial burden because no action was required of Rost that directly related to the practice at odds with his religious beliefs.[73] This issue presents one of the important divergences between *Harris* and prior cases. Rost chose to require a dress code he monetarily supported.[74] Therefore, he was not being forced to choose between literally supporting a practice which violated his religion and leaving the profession.[75] As stated in the Sixth Circuit's decision, "This is a predicament of Rost's own making."[76] He could have made the choice not to supply clothing to either gender, and would then have not been actively supporting the choices of his employees.[77] An employee cannot claim a religious exemption from a discrimination complaint due to a practice that he is choosing to support himself, as this essentially nullifies any argument that his religious practice is being burdened by the law. The RFRA is designed to protect the expression of religion, not to be a veil over personal prejudice. Understanding the essential line between real burdens on a person's ability to exercise their sincere religious beliefs and a protection from the supposed effect of artificial biases held by an employer or the general public is crucial to understanding the need to question RFRA use against Title VII enforcement.

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[72] *R.G.*, 884 F.3d at 585.
[73] *Id*. at 587.
[74] *Id*. at 588
[75] *Id*.
[76] *Id*.
[77] *Id*. at 587.

B. Belief v. Coercion

Second, and of equal importance, the Court shed light on the distinction between supporting and tolerating a practice that is not congruent with ones religious beliefs. Rost cited the *Hobby Lobby* case in arguing that "'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious' consequences constitutes a substantial burden for the purposes of the RFRA.'"[78] In this case, Rost was not asked to support or condone the practice with which his religion is at odds. There is an important distinction that can be drawn between forcing an employer to use his money or resources to directly pay for, support, or condone the practices of an employee that are contrary to the employer's religion, and simply employing that individual. Employing someone is rarely viewed as an endorsement of the choices of that employee in his or her personal life, and for that reason a requirement of nondiscrimination in employment cannot be the basis for an alleged burden on one's religious practice. The court held that, as a matter of law, tolerating Stephens's understanding and presentation of her sex and gender identity is not tantamount to supporting it.[79]

The *Harris* court used the example of military recruiters at a law school campus as an analogy to the practice of employing someone with beliefs in opposition of your own.[80] The Supreme Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus did not improperly compel schools to endorse the military's policies discriminating against gays because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally

[78] *R.G.*, 884 F.3d at 587 (quoting Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2775 (2014)).
[79] *Id*. at 588.
[80] *Id*. at 589 (first citing Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006); and then citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841–42 (1995)).

required to do so, pursuant to an equal access policy."[81] As a matter of law, the *Harris* court found a distinction between complying with Title VII and, for instance, paying for Stephens's transition efforts.[82]

The *Harris* court also cited *Rosenberger v. Rector & Visitors of the Univ. of Va.*, where the Supreme Court held that being required to provide funds on an equal basis to religious as well as secular student publications did not constitute state university's support for students' religious messages.[83] Following Rost's own assertions, it is clear that he was aware of the line between tolerance and enforcement given his articulation that he employed people of all faith or no faith, and allowed employees to wear Jewish head coverings although he is not of the Jewish faith.[84] Here, requiring the Funeral Home to refrain from terminating an employee whose decisions relating to her gender identity were contrary to Rost's religious beliefs does not, as a matter of law, mean that Rost is endorsing or supporting those views.

Rost's assertions called into question the existence of any real burden on his ability to express his religion if it was not something he required any other employee to similarly support. If it is assumed that the existence of other employees displaying badges of faith not congruent to Rost's did not impose a burden on his religious practice, it is difficult to see how employing someone who was similarly in opposition to his faith placed any burden. The court was then left only with the biases that were addressed in the prior section, which could not form the basis for a valid claim of religious burden.

C. Compelling Government Interest

[81] *Rumsfeld*, 547 U.S. at 65.
[82] *R.G.*, 884 F.3d at 589.
[83] 515 U.S. 819, 841–42 (1995).
[84] *R.G.*, 884 F.3d at 589.

The compelling interest test of the RFRA seeks to strike a balance between religious liberty and competing governmental interest.[85] This is a difficult line to walk, as the government must be careful to protect religious freedom without actively endorsing or supporting any particular religion. It also requires the courts to balance the competing interests of different parties. The compelling interest test requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants."[86]

The compelling interest requirement was guided by the pre-RFRA decisions and reasoning of both *Wisconsin v. Yoder* and *Holt v. Hobbs*.[87] In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group, particularly where that exemption did not cause any identifiable harm to a third party.[88] In *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen were not harmed by allowing the Amish to keep their children home from high school.[89] Amish children do not need to be prepared "for life in modern society" and their own traditions equip them for a life of self-sufficiency in their community.[90] The court stated that mandated school "attendance interferes with the practice of a legitimate religious belief" and that there must exist a "state interest of sufficient magnitude to override the interest claiming protection."[91]

[85] 42 U.S.C. § 2000bb-1(b) (2018).
[86] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).
[87] Holt v. Hobbs, 135 S. Ct. 853, 863 (2015); Wisconsin v. Yoder, 406 U.S. 205 (1972).
[88] *Yoder*, 406 U.S. at 229.
[89] *Id*. at 234.
[90] *Id*. at 222.
[91] *Id*. at 214.

In *Holt*, a case involving the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court recognized that the Department of Corrections had a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy that the petitioner objected to on religious grounds.[92] The Court, however, failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a 1/2-inch beard."[93] The compelling interest requirement that derived from these earlier cases contemplated the struggle that would exist between weighing a compelling government interest and protecting the First Amendment religious freedom.

The Sixth Circuit used this compelling interest analysis to come to an opposing conclusion in *Harris*. Allowing the Funeral Home an exemption from Title VII enforcement meant the government would essentially be "allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce."[94] The earlier cases required exempting religious parties from areas of the law that would, in their entirety, cause no real harm to the law, the general public, or any identifiable human being. In those cases, allowing exemptions to avoid placing burdens on religious exercise fell within the statutory purpose and reach of the RFRA, allowing those with sincere religious beliefs to practice without the burdens imposed by generally applicable law, and without injuring a third party.[95]

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[92] *Holt*, 135 S. Ct. at 863 (A 'sister statute' to the RFRA, RLUIPA has a similar legislative purpose and extends protection to prisoners' ability to exercise their religion and religious institutions when faced with zoning restrictions on their properties).
[93] *Id*.
[94] EEOC v. R.G., 884 F.3d 560, 591 (6th Cir. 2018).
[95] H.R. Rep. No. 103-88 at 9 (1993).

Here, however, allowing Harris Homes the same exemption caused substantial harm to Ms. Stephens.[96] This substantial harm, workplace discrimination and termination due to her sex, is one that the government seeks to avoid for the general public. It is a substantial and compelling interest. Therefore, the question is whether the harm of granting an exemption to a particular religious employer is sufficiently great to require compliance with the law.[97] The court correctly found in the *Harris* case that the harm of granting an exemption for the Funeral Home is sufficiently great to require compliance with the law.[98]

D. Least Restrictive Means

The last question posed under the RFRA looks to whether there exist other means of achieving the government's desired goal without imposing a substantial burden on the exercise of religion by the objecting party.[99] This last requirement of the RFRA asks whether there is an alternative method the government could implement in furthering its compelling interest that would not place a burden (or would place a lesser one) on the exercise of religion.[100] In the *Harris* case, the EEOC bore the burden of showing that requiring the Funeral Home to continue to employ Ms. Stephens constituted the least restrictive means of furthering its compelling interests.[101] In contrast, the District Court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII. It determined that the discrimination against Stephens was only with respect to the clothing she would wear at work, and that therefore a "gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not

[96] *R.G.*, 884 F.3d at 592.
[97] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).
[98] *R.G.*, 884 F.3d at 592.
[99] 42 U.S.C. § 2000bb-1(a)(b) (2018).
[100] H.R. Rep. No. 103-88 at 7 (1993).
[101] *R.G.*, 884 F.3d at 593.

be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs."[102] In reaching this conclusion, the court sidestepped all other evidence of sex stereotyping present in the case beyond the attire worn by Ms. Stephens, and looked to a shallow solution that would only bandage the issue of discrimination.[103] The Funeral Home's counsel himself conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs."[104]

The Sixth Circuit held that the District Court erred in determining that a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII.[105] It determined that requiring the bare minimum from the employer, that he not terminate the employee, was the least restrictive means of furthering the government interest of eradicating discrimination on the basis of sex.[106] The heart of this last analytical aspect of the RFRA highlights the implicit clash between the language of the RFRA and the purpose of Title VII. When the employer wishes to discriminate, there can be no less restrictive alternative that satisfies Title VII's nondiscrimination command than a requirement to treat employees without regard to their protected status.

E. Contrasting Hobby Lobby and Harris

One of the deciding factors of the *Hobby Lobby* case was the Court's determination that there were less restrictive and equally functional means of supporting the government interest of providing women with contraceptives without cost-sharing.[107] An important distinction can then be drawn between the decision in *Hobby Lobby* and that of *Harris*. In the former, the Supreme

[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*. at 594.
[106] *Id*.
[107] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014).

Court determined that there were less restrictive means of providing contraception to the company's employers because such accommodations were provided for religious non-profits.[108] The Affordable Care Act included accommodations that allowed those with religious objections to avoid funding contraception for their employees.[109]

An exemption was specifically contemplated in the creation of the Affordable Care Act for those who objected to the funding and support of contraception for religious reasons.[110] No such exemption for religion was included in Title VII for discrimination on the basis of sex.[111] Unlike other circumstances where the law or program can be modified to lessen a burden on religion with minor or nonexistent harm to third parties, a call for an exemption or less stringent enforcement of Title VII will unquestionably harm the class the law was created to protect. As the court articulated in *Harris*, "Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement."[112]

VI. Weighing the Burdens of Religious Freedom and LGBT Discrimination Requires a New Analysis of the RFRA

The contentious issue in the cases involving the intersection between transgender discrimination and the RFRA is the court's apparent decision to weigh one government interest over another. In choosing to place the right to religious freedom over the right to freely express your sexuality and work without discrimination, the government is essentially choosing the rights of some over the rights of others.

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[108] *Id*.
[109] *Id*.
[110] Adam Sonfield, *The Religious Exemption to Mandated Insurance Coverage of Contraception*, 14 AMA J. ETHICS 139 (2012).
[111] 42 U.S.C. § 2000e.
[112] EEOC v. R.G., 884 F.3d 560, 596 (6th Cir. 2018).

It is accepted in case precedent and social norms that preventing discrimination due to race is a compelling government interest. In *Bob Jones University v. United States*, the IRS revoked tax-exempt status of the University because it openly prohibited interracial dating and marriage.[113] The University then claimed that the IRS had inhibited its religious liberty by revoking its tax-exempt status because it was enacting policies aligned with its sincerely held religious beliefs.[114] The Supreme Court found that the IRS was justified in its actions, and that the government may place a limitation on religious liberties by showing it is necessary to accomplish an "overriding governmental interest."[115] Because it is clear that preventing racial discrimination was such a governmental interest, the Court held that "not all burdens on religion are unconstitutional."[116]

Courts have displayed this adherence to anti-discrimination laws notwithstanding claims of free exercise defenses in other cases.[117] The courts have recognized that "the maintenance of an ordered society can and at times does conflict with the practice of certain religious beliefs."[118] The corresponding weighing of burdens that must take place calls for an objective understanding that societal rights that are crucial to the health of our country will require occasional dampening of the free reign of religious freedom.[119]

In another recent case, *Franciscan Alliance v. Burwell*, a group of five states and religiously affiliated health care organizations filed a lawsuit against the Federal Government challenging a

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[113] 461 U.S. 574, 581 (1983).
[114] *Id*. at 602.
[115] *Id*. at 603.
[116] *Id*.
[117] *See e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (denying a free exercise claim against compliance with anti-discrimination laws); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1307 (9th Cir. 1982) ("Case law has long drawn a distinction between the absolute freedom to hold religious beliefs and the freedom of conduct based on religious beliefs, which latter freedom may be curtailed in some circumstances for the protection of societal interests").
[118] *Pac. Press*, 676 F.2d at 1309.
[119] *Id*.

U.S. Department of Health and Human Services regulation.[120] The regulation at issue clarified that the Affordable Care Act prohibits health care entities receiving federal funds from discriminating against patients and employees because they are transgender or because they seek reproductive care.[121] The plaintiffs sought an injunction against the regulation on the grounds that it required them to provide services that were in violation of their religious beliefs.[122] The District Court enjoined the regulation on administrative law grounds but said in dicta that the RFRA would likely prohibit applying the regulations to the religious plaintiffs in any event.[123]

The hospital system's and medical professionals' religious exercise rights under the RFRA were substantially burdened, the court said, because a prohibition on categorical exclusions "forces [them] to make an individualized assessment of every request for performance of" procedures that violate their religious beliefs, thus "operating so as to make the practice of … religious beliefs more expensive."[124] The court held that several less restrictive means were available to the government, including identifying providers who would willingly provide the procedures and paying for coverage from those providers.[125] The court ultimately determined that allowing an exemption for Plaintiffs would not frustrate the Government's goal of expanding nondiscriminatory access to healthcare or cause harm to third parties.[126]

This distinction between cases where less restrictive means were available is equally as important in *Franciscan Alliance* as in the prior discussion of the *Hobby Lobby* case.[127] In both *Hobby Lobby* and *Franciscan Alliance*, the court determined that there were less restrictive means

[120] 227 F. Supp. 3d. 660 (N.D. Tex. 2016).
[121] *Id*. at 671.
[122] *Id*. at 671–72.
[123] *Id*. at 692.
[124] *Id*.
[125] *Id*. at 692.
[126] *Franciscan Alliance*, 227 F. Supp. 3d. at 693.
[127] See *supra* Part II.B.

of furthering the stated compelling government interest and allowing an exemption would not unquestionably lead to third party harm. Conversely, the determination that a less restrictive means was not available in the *Harris* case underscores the reasoning that the RFRA should not apply to instances of discrimination based on sex in the workplace because adhering to nondiscrimination claims is the least restrictive method available.[128]

A. Barring Application of RFRA to Title VII: Understanding the Framework

The controversy surrounding RFRA defenses to Title VII sex discrimination claims will only increase current uncertainty prior to a Supreme Court decision on the subject of transgender protection under Title VII and application of the RFRA in response to Title VII discrimination claims. The movement in courts to uphold Title VII claims on the basis of transgender discrimination has forced courts to examine the ways that expansion of the RFRA is endangering the protection of Title VII application.[129] In order to protect this compelling government interest against discrimination, the Supreme Court will need to reject the call of states across the country and hold that discrimination based on sex as a matter of law cannot be accommodated through the use of the RFRA.

In examining the substantial burden requirement of § 3 of the RFRA, the language of the RFRA arguably forecloses using it to narrow Title VII. Section 3(b)(1) and (2) of the RFRA state that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.[130] In all cases involving RFRA application to what would otherwise be Title VII's prohibition of discrimination

[128] EEOC v. R.G., 884 F.3d 560, 591 (6th Cir. 2018).
[129] Adam K. Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265, 277 (2017).
[130] 42 U.S.C. § 2000e-2(e)(1).

on the basis of sex, there has been no dispute that protecting antidiscrimination in furtherance of Title VII is a compelling government interest.[131] The complication arises from different courts' analyses of what constitutes a substantial burden, and when a less restrictive alternative is available.[132]

A substantial burden should exist when "government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs."[133] Regardless of the sincerity of a party's closely held religious belief, it is essential that a court examine the actual burden as a matter of law that is being asserted on that party's ability to exercise their religious belief.[134] In *Kaemmerling v. Lappin*, Kaemmerling, a federal inmate alleged that the DNA Analysis Backlog Elimination Act of 2000 (DNA Act)[135] violated his rights under the RFRA.[136] Kaemmerling claimed that it is his sincere religious belief that DNA is "a foundational aspect . . . of God's creative work" and that requiring him to submit his DNA went against his sincerely held religious beliefs.[137] The court held that Kaemmerling did not allege facts sufficient to support a substantial burden on his religious exercise because he was unable to identify an "exercise" that was being burdened.[138] Because he did not object to the act of his DNA being taken from his body, but to the extraction and storage of the DNA information, activities in which Kaemmerling plays no role, there was no action by him that the government would be burdening.[139] The "burden" is therefore essentially once-removed.

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[131] *See* Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2759 (2014); EEOC v. R.G., 884 F.3d 560, 567 (6th Cir. 2018).
[132] Hersh, *supra* note 129.
[133] Kaemmerling v. Lappin, 553 F.3d 669, 678 (2008) (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).
[134] *Id*.
[135] 42 U.S.C. §§ 14135-14135e.
[136] *Id*. at 674.
[137] *Id*. at 678.
[138] *Id*. at 679.
[139] *Id*.

The court stated that there should be a line between "factual allegations that Kaemmerling's beliefs are sincere and of a religious nature" and the "legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened."[140] There similarly must be a distinction between direct burdens on a person's ability to exercise her religion and attenuated connections between the religious objection and the disputed act. Similar to the facts in *Kaemmerling*, the owner of the Funeral Home in *Harris* did not identify a specific exercise of his religion that was being burdened; he simply objected to employing someone who engaged in a conduct that violated his religious beliefs.[141] This is the kind of attenuated connection that the court must avoid. The decision of an employee to present as one gender in no way affects his or her employer's beliefs or expression of those beliefs and does not burden his ability to exercise that belief. No action is forbidden or required by the government of the employer in relation to the conduct that violates his religion. It is crucial that courts recognize this distinction. In her dissent in the *Hobby Lobby* case, Justice Ginsberg quoted Senator Kennedy's remarks in the proposal of the RFRA amendment: "[The RFRA] does not require the Government to justify every action that has some effect on religious exercise."[142]

The second prong of the RFRA requires that the burden be the least restrictive means of furthering a compelling government interest.[143] In cases involving Title VII and RFRA interpretation, courts have previously found that another option is available that is a less restrictive means of furthering that interest and has therefore allowed an accommodation through the RFRA.[144] In these cases, even a hypothesized provision of services by the government was enough

[140] *Id*.
[141] EEOC v. R.G., 884 F.3d 560, 588 (6th Cir. 2018).
[142] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2798 (Ginsberg, J., dissenting).
[143] 42 U.S.C. § 2000e-2(e)(1) (2018).
[144] *See Hobby Lobby*, 134 S. Ct. 2751; *see also* Franciscan Alliance v. Burwell, 227 F.Supp.3d 660 (N.D. Tex. 2016).

to offer a less restrictive alternative means of furthering a compelling government interest for the purpose of evaluating the least restrictive means analysis.

In *Hobby Lobby*, the Court stated that the most straightforward alternative would be for the Government to assume the cost of providing contraceptives to any woman unable to obtain them through their employee health-insurance policy due to employers' religious objections. This was obviously not what the government contemplated when the ACA was created, as Congress declined to write into law the preferential treatment Hobby Lobby described as less restrictive. There were, however, possible options available that would serve a comparable purpose without causing harm to third parties.[145]

There is an important difference between these prior cases and those involving Title VII discrimination on the basis of sex. Title VII was created and has been implemented to avoid allowing exceptions to the bar on workplace discrimination unless it is an actual qualification for performing a job.[146] It was created, in essence, as the bottom line—asking employers not to discriminate. Title VII does not ask the employer to support, either monetarily or physically, the actions and beliefs of its employees. Because an affirmative action is not taking place, the court cannot ask any less from the employer. It asks only for tolerance in the employees' personal choices outside of the workplace.[147]

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[145] Adam K. Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265, 284 (2018).
[146] 42 U.S.C. 2000e (2018).
[147] Title VII does include a limited carve out that allows religious organizations to give preference to members of their own religion. The statute directs that a religious organization is one whose purpose and character is primarily religious. *See* 42 U.S.C. 2000e-2e. *See also* John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J.L. & RELIGION 280 (2018) (addressing the conflict between religious liberty and LGBT rights in regard to Title VII's exemption for religious employers and discrimination against LGBT employees).

In both *Hobby Lobby* and *Franciscan Alliance*, the objecting parties were asked to perform an affirmative act in direct conflict with their sincerely held beliefs. In *Harris*, in order to comply with the law, the Funeral Home was not asked to do anything beyond refraining from terminating Ms. Stephen's employment.[148] Requiring accommodations through the Religious Freedom and Restoration Act for passive acts, ones that do not require the objecting party to actively condone the beliefs that are contrary to their beliefs, sets a slippery-slope precedent. The language of the RFRA specifically states that the Government "shall not substantially burden a person's exercise of religion . . . ."[149] Drawing a line between protecting one's ability to exercise his religion, and allowing that employer to discriminate against an employee because he decides to make personal choices in his own life that are contrary to the employer's beliefs, is essential in the future application of RFRA to Title VII discrimination claims. The government, through its application of Title VII in the *Harris* case, did not seek to burden Rost's ability to exercise his religion. No law inhibited his ability to express his religious beliefs.[150] It is essential that the Supreme Court makes this distinction so that employers are not able to legally terminate employees who possess beliefs that are contrary to their religion.

B. Understanding the Congressional Intent of the Religious Freedom and Restoration Act Led by the Free Exercise Clause.

The RFRA was instituted only to overturn the decision in *Employment Division v. Smith*, not to create a new realm of rights for religious exercise.[151] As stated in the "Purposes" section of the Act, the purpose of the RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise

[148] *See Hobby Lobby*, 134 S. Ct. 2751; Franciscan Alliance v. Burwell, 227 F.Supp.3d 660 (N.D. Tex. 2016).
[149] § 2000e.
[150] *See* EEOC v. R.G., 884 F.3d 560 (6th Cir. 2018).
[151] 139 CONG. REC. 26,178 (1993) (statement of Sen. Kennedy).

of religion is burdened; and [] to provide a claim or defense to persons whose religious exercise is burdened by government."[152] As stated in the discussions following the RFRA statute, the cases prior to *Employment Division* recognized Free Exercise claims only where a truly substantial burden was being placed on the exercise of religion.[153] Further, only once these burdens have been displayed should the compelling interest test be applied.[154] This points to the fact that not "every government action that may have some incidental effect on religious institutions" requires justification.[155]

Consistent with this congressional intent, the RFRA was in no way created to construe the compelling interest test more stringently or more leniently than it was prior to *Smith*.[156] In keeping with this Congressional intent and the climate of cases prior to *Smith*, understanding the language of the RFRA should limit its application in instances involving sex discrimination in the workplace.[157] The substantial burden must be interpreted as a government statute or requirement that inhibits one's ability to actively exercise or express his religion, and the courts must recognize that the least restrictive means has already been established through the language of Title VII.[158] Combining an analysis of each of the factors of the compelling interest test set forth in the RFRA therefore reveals the need to identify areas of the law which cannot bend to requests for accommodation—namely, Title VII.

Conclusion

[152] 42 U.S.C. § 2000e-2(e)(1).
[153] *See, e.g.*, Thomas v. Review Board, Indiana Employment Security Commission, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).
[154] 42 U.S.C. § 2000 discussion.
[155] *Id*.
[156] H.R. Rep. No. 103-88, at 7 (1993).
[157] *See, e.g.*, *Yoder*, 406 U.S. 205; *Thomas*, 450 U.S. 707.
[158] H.R. Rep. No. 103-88, at 7.

Looking to the least restrictive means requirement and identifying that requiring an employer only to employ someone with beliefs that differ from theirs highlights the first reason in which the RFRA should not be applied to the Title VII antidiscrimination act. Looking next at the substantial burden analysis, it is evident that employing a person who holds beliefs contrary to the objecting party's is not a burden on that party's ability to exercise and express his own religious beliefs.

The holding in *Harris* asks of courts to understand that the enforcement of Title VII in the face of sex discrimination is itself the least restrictive means of furthering a compelling government interest. In the face of continuing confusion and controversy towards Title VII application and RFRA involvement, it is necessary for the Supreme Court to limit the application of the RFRA so as to protect the effectiveness and sincerity of Title VII.

Moving forward, the government must correctly weigh the importance of eradicating discrimination in the workplace against the protection of freedom of religion where no real burden exist, and risk of harm to third parties is substantial. The decision in *Harris* holding that Title VII as applied to discrimination on the basis of sex is a compelling interest and the least restrictive means of furthering that interest should be expanded to all sex discrimination cases moving forward and should be understood as a structural exemption from RFRA application.