

To Exempt or Not Exempt: Religion, Nonreligion, and the Contraceptive Mandate

SARAH KIM*

TABLE OF CONTENTS

I.	INTRODUCTION	780
II.	BACKGROUND AND CONTEXT	784
	A. <i>Patient Protection and Affordable Care Act</i>	785
	B. <i>IOM Recommendations</i>	786
	C. <i>The ACA’s Religious Exemptions</i>	788
	1. <i>Trump’s Executive Order and the Fourth Religious Exemption</i>	790
III.	THE MORAL PROBLEM AND THE CIRCUIT SPLIT.....	792
	A. <i>March for Life</i>	793
	B. <i>Real Alternatives</i>	797
IV.	ANALYSIS	801
	A. <i>The ACA Should Include a Moral Exemption to the Contraceptive Mandate</i>	801
	1. <i>Religion v. Nonreligion</i>	801
	a. <i>Religion Is Not Special</i>	803
	1. <i>Providing Identical Accommodations to Both Religious and Nonreligious Organizations</i>	804
	a. <i>Real Alternatives Does Not Follow Seeger and Welsh While March for Life Does</i>	808

* © 2019 Sarah Kim. J.D. Candidate 2020, University of San Diego School of Law; B.S. 2017, Cornell University. I would like to thank Professor Steven Smith for his guidance and expertise, and the members of the *San Diego Law Review* for their thorough feedback and tireless editing. Most of all, I would like to thank my family and friends for their endless support. All errors are my own.

2.	<i>The Supreme Court Has Prohibited Distinctions Between Religious and Secular Beliefs that Hold the Same Place in Individuals' Lives</i>	809
2.	<i>Religious and Nonreligious Organizations Are Similarly Situated</i>	813
a.	<i>HHS's Stated Purpose in Creating a Religious Exemption Justifies the Extension of Such an Exemption to Nonreligious Organizations</i>	814
b.	<i>The Underlying Reasons Justifying the Protection of Religious Beliefs Also Justify the Protection of Nonreligious Beliefs</i>	815
1.	<i>A Moral Exemption to the Contraceptive Mandate Should Protect Nonreligious Organizations' Sincerely Held Beliefs</i>	816
c.	<i>The Similarities Between Religious and Nonreligious Organizations Matter in Determining Whether the Organizations Are Similarly Situated</i>	817
3.	<i>The Contraceptive Mandate with Only a Religious Exemption Does Not Pass a Rational Basis Review</i>	819
V.	SOLUTION	823
A.	<i>Uniform Factor Test to Identify a Sincerely Held Belief</i>	824
VI.	CONCLUSION	827

I. INTRODUCTION

Consider two employers.

Employer A is a closely held corporation owned and run by the Doe family. The family is a member of the Mennonite Church, a Christian denomination that believes that “[t]he fetus in its earliest stages . . . shares humanity with those who conceived it.”¹ The family operates their national store chain “in accordance with their religious beliefs and moral principles.”²

1. Editorial, *Don't Abort the Truth*, Mennonite (June 2, 2009), <https://the-mennonite.org/opinion/dont-abort-truth/> [<https://perma.cc/57ZF-FYTH>].

2. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013), *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of HHS*, 724 F.3d 377 (3d Cir. 2013), *rev'd sub. nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In *Conestoga Wood Specialties Corp.*, the plaintiffs owned and operated a closely held corporation that manufactured wood products; the plaintiffs were Mennonite Christians. *Id.* at 402. As a result of their Mennonite faith, the plaintiffs did not want to contribute in any way to the use of abortifacient contraception. *Id.* at 403. The plaintiffs argued that operating their corporation in accordance with their Mennonite faith constituted the exercise of religion under the Free Exercise Clause and that being forced to give coverage for all FDA-approved contraception burdened their religious beliefs. *See id.* at 406. However, the court noted that neither the Supreme Court nor the Third Circuit has decided whether for-profit, secular corporations owned by a religious family possessed the religious rights held by individuals. *Id.*; *see also Citizens United v. FEC*, 558 U.S. 310, 333 (2010).

Accordingly, they exclude abortifacient³ contraception from the group health insurance plan they offer to their employees.⁴

Employer B is a nonprofit, nonreligious, and pro-life organization that organizes the largest pro-life event in the country each year in Washington, DC. Its mission is to “[e]nd abortion by uniting, educating, and mobilizing pro-life people in the public square.”⁵ And its moral vision is “[a] world where the beauty and dignity of every human life are valued and protected.”⁶ Correspondingly, Employer B only hires people who oppose all forms of abortion.⁷ Additionally, they too choose to exclude abortifacient contraception from the group health insurance plan they offer to their employees.

Consequently, the court ruled against the plaintiffs. *Conestoga Wood Specialties Corp.*, 917 F. Supp. 2d at 319. But the court’s ruling was reversed in *Hobby Lobby*, 134 S. Ct. 2751.

3. See Karen Swallow Prior, *The Pill: Contraceptive or Abortifacient?*, ATLANTIC (Dec. 31, 2012), <https://www.theatlantic.com/sexes/archive/2012/12/the-pill-contraceptive-or-abortifacient/266725/> [<https://perma.cc/4GD7-7L5B>].

4. *Hobby Lobby*, 134 S. Ct. at 2765. In *Hobby Lobby*, Hobby Lobby, a for-profit closely held corporation owned and operated by a religious family, refused to completely comply with the contraception regulations laid out in Obamacare. *Id.* at 2759, 2766. The plaintiffs argued that the regulations violated the Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA) because they burdened their religious beliefs. *Id.* at 2766. In contrast, the Department of Health and Human Services argued that the plaintiffs should not have the right to sue because the contraception regulations applied only to the corporation and not to the owners as individuals. *Id.* Ultimately, an en banc panel of the Tenth Circuit held that corporations were persons for the purposes of RFRA and had the same rights under the Free Exercise Clause as individuals do. See *id.* at 2751, 2766–67.

5. *About the March for Life*, MARCH FOR LIFE, <http://marchforlife.org/about-us/> [<https://perma.cc/G7GC-VZM3>].

6. *Id.* In the United States, abortion represents one of the most politically contentious issues in the public sphere. See Anna North, *How Abortion Became a Partisan Issue in America*, VOX (Apr. 10, 2019), <https://www.vox.com/2019/4/10/18295513/abortion-2020-roe-joe-biden-democrats-republicans> [<https://perma.cc/KC6S-LKXD>]. The legal and moral controversies surrounding abortion polarize the American people. See *id.* This polarization not only reflects society’s conflicting social and moral views but also reflects its conflicting views on the interpretation of law. See *id.* In *Roe v. Wade*, the Supreme Court stated that because there is no true consensus regarding when life begins, the word “person” in the Fourteenth Amendment does not include the unborn. 410 U.S. 113, 157–58 (1973). Because of this, the Court ultimately decided that fetuses do not have the right to life, liberty, and property guaranteed under the Fourteenth Amendment. *Id.* In the dissent, Justice Rehnquist stated that the majority had acted beyond its judicial powers because it had simply fashioned and announced a new constitutional right for pregnant mothers without any reason or authority. See *id.* at 177 (Rehnquist, J., dissenting).

7. See, e.g., *March for Life v. Burwell*, 128 F. Supp. 3d 116, 123 (D.D.C. 2015).

Both organizations believe that life begins at conception. Both organizations oppose coverage in their health insurances plan for abortifacient contraception. Both are either owned and operated by or made up of individuals who oppose the use of such contraceptive methods. One bases its opposition on its religious faith, the other bases its opposition on its moral beliefs.

In cases related to the Affordable Care Act's Contraceptive Mandate, a mandate that requires employers to provide contraception to employees, courts have upheld religious exemptions for religious organizations from the mandate.⁸ Courts have upheld such exemptions because the Constitution prohibits government interference with a religious organization's exercise of religion.⁹

Additionally, the Equal Protection Clause of the Fifth Amendment prohibits the government from treating entities that are similarly situated differently without a rational basis.¹⁰ In the context of conscientious war objectors, the Supreme Court has stated, "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral . . . , those beliefs . . . occupy . . . the life of that individual 'a place parallel to that filled by God' in traditionally religious persons," then the individual should be given the same accommodation as the religious individual.¹¹ It then seemingly appears that courts would afford nonreligious employers the same exemption to the Contraceptive Mandate as religious employers. But is that actually the case? Does the government give both Employer A and Employer B exemptions to the Contraceptive Mandate because they have the same views about contraception?

The answer is not so clear. Courts are split on whether they should also give a nonreligious organization like Employer B, which has the same views about contraception as a religious organization like Employer A does, an exemption to the Contraceptive Mandate.¹²

In an effort to remedy the obvious discrepancy, the Trump Administration issued a new interim final rule to the Affordable Care Act that included a

8. See *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). The Obama Administration even issued religious exemptions to the Contraceptive Mandate for certain employers to help mitigate the Contraceptive Mandate's mandatory nature from imposing on employers' religious beliefs. See Garance Franke-Ruta, *All the Ways to Get Out of Obamacare*, ATLANTIC (Sept. 27, 2013), <https://www.theatlantic.com/health/archive/2013/09/all-the-ways-to-get-out-of-obamacare/280075/> [<https://perma.cc/6WE5-NQ8Z>].

9. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012).

10. See *United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008).

11. See *Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion).

12. See, e.g., *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 343 (3d Cir. 2017); *March for Life*, 128 F. Supp. 3d at 125.

religious exemption and a moral exemption.¹³ However, two federal district courts issued preliminary injunctions that enjoined the Trump Administration from enforcing the moral exemption.¹⁴ And although the preliminary injunctions presumably resolved the concern that the moral exemption would leave women working for certain organizations without coverage for all FDA approved contraception, an equal protection violation lingers.

In an attempt to help mitigate the difficulties courts are experiencing with the Contraceptive Mandate, this Comment¹⁵ proposes a uniform factors

13. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

14. See *California v. HHS*, 281 F. Supp. 3d 806, 813–14 (N.D. Cal. 2017), *aff'd in part, vacated in part sub nom. California v. Azar*, 911 F.3d 558 (9th Cir. 2018); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017), *aff'd*, Nos. 17-3752, 18-1253, 19-1129 & 19-1189, 2019 WL 3057657 (3d Cir. July 12, 2019), *amended in part by* Nos. 17-3572, 18-1253, 19-1129 & 19-1189, 2019 WL 3228336 (3d Cir. July 18, 2019) (mem.). California and Pennsylvania sought to enjoin enforcement of the interim final rule because the Trump Administration failed to comply with the Administrative Procedure Act. *HHS*, 281 F. Supp. 3d at 821–22; *Trump*, 281 F. Supp. 3d at 563–64. In 2017, a court in California and a court in Pennsylvania issued nationwide preliminary injunctions against the Trump Administration's interim final rules. *HHS*, 281 F. Supp. 3d at 832; *Trump*, 281 F. Supp. 3d at 585. Those cases were appealed to the Ninth Circuit and Third Circuit, respectively. See *generally Pennsylvania v. President United States*, Nos. 17-3752, 18-1253, 19-1129 & 19-1189, 2019 WL 3057657 (3d Cir. July 12, 2019); *Azar*, 911 F.3d 558. The Ninth Circuit upheld the California injunction but limited the scope of the injunction to only California, Delaware, Maryland, New York, and Virginia. *Azar*, 911 F.3d at 584. The injunction filed in the Pennsylvania court was originally stayed, but then lifted, by the Third Circuit. *President United States*, 2019 WL 3057657, at *4. The Trump Administration still issued the final regulations, and they became effective on January 14, 2019. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). Shortly thereafter, a court in Pennsylvania and a court in California issued a second set of injunctions. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 798 (E.D. Pa. 2019) *aff'd*, Nos. 17-3752, 18-1253, 19-1129, 19-1189, 2019 WL 3057657 (3d Cir. July 18, 2019); *California v. HHS*, 351 F. Supp. 3d 1267, 1271 (N.D. Cal. 2019), *appeal filed*, No. 19-15150 (9th Cir. Jan. 28, 2019). The injunction issued in Pennsylvania applied nationwide, and the injunction issued by the court in California only covered thirteen states and the District of Columbia. *Trump*, 351 F. Supp. 3d at 835; *HHS*, 351 F. Supp. 3d at 1271, 1301.

15. Addressing the legality of the moral exemption for the Contraceptive Mandate involves two major questions: (1) whether the exclusion of a moral exemption for the

test that courts can use in their equal protection analysis to define a deeply and sincerely held religious belief and determine whether religious and nonreligious organizations are similarly situated. To demonstrate the necessity of a uniform factor test, this Comment starts by providing the history of the Affordable Care Act and the Contraceptive Mandate and exploring the religious exemptions created in response to the Contraceptive Mandate in Part II. Part III elaborates the current circuit split on the issue by delivering an overview of how courts have struggled to apply an equal protection analysis for nonreligious organizations in Affordable Care Act cases, specifically delving into two cases. Part IV analyzes the equal protection issue and argues that the exclusion of a moral exemption for the Contraceptive Mandate violates the equal protection provision in the Fifth Amendment in light of three questions: (1) what is the difference between religious and nonreligious organizations; (2) what does it mean to be similarly situated; and (3) does the government have a rational basis in treating religion differently than nonreligion. Finally, Part V proposes a factor test that courts can use to help them identify a deeply and sincerely held belief.

II. BACKGROUND AND CONTEXT

Before discussing the enforceability of a moral exemption to the Affordable Care Act, it is important to understand the context that gives rise to the debate in the first place. At the heart of the issue are the Contraceptive Mandate, the Institute of Medicine's Recommendations, and the various religious exemptions to the Contraceptive Mandate promulgated by the executive branch. Consequently, this Part begins by examining the history of the Affordable Care Act and the Contraceptive Mandate. It also gives a brief account of the recommendations responsible for determining what types of contraceptive methods the Mandate required employers to cover for their employees. Finally, it concludes with an overview of the several religious exemptions created by the Obama and Trump administrations to the Contraceptive Mandate.

Contraceptive Mandate violates the equal protection provision in the Fifth Amendment, and (2) whether the interim final rule issued by the Trump Administration violated the Administrative Procedure Act and is therefore unauthorized. But, even if the answer to the second question is in the affirmative, and courts invalidate the moral exemption, the first question is still left unanswered. This is a problem because an equal protection violation still remains. Thus, the scope of this Comment will only address the first question.

A. Patient Protection and Affordable Care Act

Congress signed the Patient Protection and Affordable Care Act (ACA) into law on March 23, 2010.¹⁶ After the ACA's passage and the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*,¹⁷ the ACA became legally binding. Congress intended the ACA to bring reform to health insurance by ensuring "affordable and accessible" coverage "for all Americans."¹⁸ Notably, the ACA required newly issued health insurance plans to cover preventive and wellness services, including women's preventive services.¹⁹ And as of January 1, 2013,²⁰ a majority of health plans guaranteed

16. Patient Protection and Affordable Care Act § 1101, 42 U.S.C. § 18001 (2012). In 2018, a federal judge in Texas declared the entire ACA as invalid on the basis that once Congress repealed the tax penalty, which enforced a mandate that Americans get health insurance, the whole law became invalid. *Texas v. United States*, 340 F. Supp. 3d 579, 585, 619 (N.D. Tex. 2018). In that case, the plaintiffs argued that because the passage of the Tax Cuts and Jobs Act of 2017 no longer made the individual mandate a tax, Congress no longer had the authority or power to regulate the individual mandate. *Id.* at 585, 591. The judge's ruling was in direct contrast to Congress's decision not to strike down the ACA in 2017. See Alicia Parlapiano et al., *How Each Senator Voted on Obamacare Repeal Proposals*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/interactive/2017/07/25/us/politics/senate-votes-repeal-obamacare.html> [<https://perma.cc/R6DU-3UCA>]. Nevertheless, despite the holding in *Texas v. United States*, the ACA will remain in effect as the ruling is appealed. Berkeley Lovelace Jr. & Tucker Higgins, *Yes, Obamacare Is Still the Law of the Land Despite US Court Ruling Striking It Down*, CNBC (Dec. 17, 2018, 3:45 PM), <https://www.cnn.com/2018/12/17/obamacare-still-law-of-land-despite-us-court-ruling-striking-it-down.html> [<https://perma.cc/A4YQ-YCB9>].

17. 567 U.S. 519, 587–88 (2012). In that case, the Supreme Court held that the "individual mandate" of the ACA, which required individuals to purchase and maintain health insurance and coverage, was constitutional under Congress's power vested in the Taxing Clause. *Id.* at 588. Under the Articles of Confederation, the national government had no power to tax individuals directly. See generally ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 2. Instead, it could only ask the states to contribute their share of tax revenue to the national treasury. *Id.* Learning from the mistakes of the Articles of Confederation, the Framers included the Taxing Clause in Article 1, Section 8 of the Constitution. See U.S. CONST. art. I, § 8, cl. 1. Through the Taxing Clause, Congress has the power to collect taxes without first asking for permission from the states. See *id.*

18. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERV. ADMIN. (Sept. 2018), <https://www.hrsa.gov/womens-guidelines/index.html> [<https://perma.cc/Z3LJ-M2E4>].

19. 29 C.F.R. § 2590.715-2713 (2018); *What Marketplace Health Insurance Plans Cover*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/what-marketplace-plans-cover/> [<https://perma.cc/4JFE-REFC>].

20. NAT'L WOMEN'S LAW CTR., CONTRACEPTIVE COVERAGE IN THE NEW HEALTH CARE LAW: FREQUENTLY ASKED QUESTIONS 2 (2011), http://www.nwlc.org/sites/default/files/pdfs/contraceptive_coverage_faq_11.9.11.pdf [<https://perma.cc/QL86-D6UJ>].

providers cover enrolled women for all preventative care required by the Act without additional cost sharing.²¹ However, the ACA did not specify what preventative services should have been covered.²² Instead, Congress delegated that decision to the Health Resources and Services Administration (HRSA), a subdivision of the Department of Health and Human Services (HHS).²³

B. IOM Recommendations

To complete the task, the HRSA enlisted the help of the Institute of Medicine (IOM), “an arm of the National Academy of Sciences . . . established ‘for the explicit purpose of furnishing advice to the Government.’”²⁴ The HRSA had the IOM conducted a study to review “what preventive services [were] important for women’s health and well-being” and therefore “should be considered in the development of comprehensive guidelines” for preventive services for women.²⁵ After its study, the IOM concluded that the mandate should cover services like testing for human papillomavirus and counseling and screening for human immunodeficiency virus.²⁶ However, the most contentious recommendation involved contraception: “the committee recommends for consideration as a preventive service for women: the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”²⁷ That recommendation included “abortifacient” drugs, a term coined by pro-life groups.²⁸ Such drugs may “prevent a woman

21. See 45 C.F.R. §§ 147.130, 156.130 (2017).

22. See 42 U.S.C. § 300gg-13 (2012).

23. *Id.*

24. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2788 n.3 (2014) (Ginsburg, J., dissenting) (quoting *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 460 n.11 (1989)).

25. See LINDA ROSENSTOCK ET AL., INST. OF MED. OF THE NAT’L ACADS., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 21 (2011).

26. *Id.* at 9.

27. *Id.* at 10.

28. See Prior, *supra* note 3. According to the American College of Obstetricians and Gynecologists, a group representing approximately 58,000 obstetricians and gynecologists across the United States, a pregnancy exists only after implantation is complete. *About Us*, AM. COLLEGE OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/About-ACOG/About-Us> [<https://perma.cc/V2C4-656S>]; see Rachel Benson Gold, *The Implications of Defining When a Woman is Pregnant*, in GUTTMACHER REP. ON PUB. POL’Y 7, 7 (2005), <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf> [<https://perma.cc/A4S9-X5LB>]. Thus, drugs that act to affect implantation or pre-implantation events conceivably would be considered contraceptives, and drugs that act to affect post-implantation events conceivably would be considered abortifacients. However, some argue that as technology advances, the line between abortion and contraception will become blurred because differentiating between classes of drugs can be, at times, illogical. See Renée C. Wyser-Pratte, Comment,

from releasing eggs” or “prevent sperm from reaching or fertilizing the egg.”²⁹ Or, in the view of many pro-life groups, the drugs may cause an abortion.³⁰

The IOM did not see its recommendation that the ACA cover contraception as controversial or problematic because “[c]ontraceptive coverage [had] become standard practice for most private insurance and federally funded insurance programs.”³¹ Additionally, at the time it conducted the study, “[t]wenty-eight states [had] . . . regulations requiring private insurers to cover

Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception, 79 Or. L. Rev. 1121, 1130 (2000).

29. Cathy Lynn Grossman, *What’s Abortifacient? Disputes Over Birth Control Fuel Obamacare Fight*, WASH. POST (Jan. 28, 2014), https://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacare-fight/2014/01/28/61f080be-886a-11e3-a760-a86415d0944d_story.html?noredirect=on&utm_term=.1bcb4bb9602d [<https://perma.cc/BU2H-R7AB>]. There is disagreement as to when life begins and whether the right to personhood guaranteed by the Fourteenth Amendment can be given to the unborn. See Mary Ziegler, *The Jurisprudence of Uncertainty: Knowledge, Science, and Abortion*, 2018 WIS. L. REV. 317, 324–25. Personhood can be defined and interpreted very differently, but in the context of abortion, it can be best understood as the presence of certain characteristics that grant a legal, ethical, or moral standing. See Brendan (Bo) F. Pons, Comment, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?*, 58 S.D. L. REV. 119, 138–49 (2013) (detailing different past and present philosophical approaches in defining personhood). In *Roe vs. Wade*, the Court argued that because there is no general consensus on when life begins, the right to personhood guaranteed by the Fourteenth Amendment cannot be given to the unborn. 410 U.S. 113, 159 (1973). Several pro-choice advocates argue that just because life starts at conception does not mean the fetus has a right to personhood. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 47–48 (1971). They believe that the right to life only means the right not be unjustly killed and does not guarantee a fetus personhood. *Id.* at 57. They argue that fetuses do not have the right to use another person’s body and that women have their own property rights to their bodies. *Id.* at 50–52. However, some pro-life advocates argue that a mother’s womb is a fetus’s natural home. Francis J. Beckwith, *Arguments from Bodily Rights: A Critical Analysis*, in *THE ABORTION CONTROVERSY: A READER* 155, 165 (Louis P. Pojman & Francis J. Beckwith eds., 1994). They argue that “a newborn has a natural claim on her parents to care for her, regardless of whether her parents wanted her.” *Id.*

30. Alexandra Desanctis, *Yes, Some Contraceptives Are Abortifacients*, NAT’L REV. (Nov. 4, 2016, 8:39 PM), <https://www.nationalreview.com/2016/11/contraception-birth-control-abortion-abortifacients-ella-plan-b-iud-embryo-life/> [<https://perma.cc/JG2Y-ZXPZ>]. However, it is not universally agreed upon that certain types of contraception can cause an abortion. See Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES (June 5, 2012), https://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html?pagewanted=all&_r=0 [<https://perma.cc/3XA6-E7VS>].

31. ROSENSTOCK ET AL., *supra* note 25, at 108.

contraceptives.”³² However, many state statutes exempted employers from following this particular part of the ACA for religious reasons.³³ In contrast, the IOM’s study failed to consider religion in its recommendations.³⁴

After the study was complete, the HHS adopted the IOM’s recommendations despite the controversy.³⁵ In 2011, the HHS issued guidelines explaining that the contraceptive services required by the ACA were based on IOM’s study,³⁶ and that under statute, employers needed to provide their employees with all preventative services, including contraception some considered to be abortifacients. This became popularly referred to as the Contraceptive Mandate.

C. The ACA’s Religious Exemptions

In the short time after the passage of the ACA, several organizations raised concerns that the Contraceptive Mandate forced religious employers to provide services that were in conflict with their religious beliefs.³⁷ Consequently, the HHS promulgated an interim final rule exempting certain

32. *Id.*; see also *Insurance Coverage for Contraception Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx> [https://perma.cc/XR5C-YKVA] (last updated Feb. 2012) (stating that at least twenty-six states already required the coverage for any FDA approved contraception).

33. See, e.g., CAL. HEALTH & SAFETY CODE § 1367.25(c) (West 2017) (“Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for FDA-approved contraceptive methods that are contrary to the religious employer’s religious tenets.”). Although California has given religious and personal exemptions before, it has also eliminated them. Bob Egelko, *California’s Mandatory-Vaccination Law Survives Court Test*, S.F. CHRONICLE (July 19, 2018, 9:50 AM), <https://www.sfchronicle.com/health/article/California-s-mandatory-vaccination-law-survives-13047905.php> [https://perma.cc/MHB4-XRKL]. In 2016, California’s vaccination law required children in public and private schools to be vaccinated against contagious diseases like measles and chickenpox. See *id.* The law also eliminated any exemption to the vaccination based on parents’ personal beliefs. See *id.* The law only allowed children with doctor certified medical exemptions and those who were home schooled to be exempt. *Id.* A federal court refused to issue a preliminary injunction against the law. See *id.*

34. See generally ROSENSTOCK ET AL., *supra* note 25, at 1 (failing to mention religion anywhere in its report).

35. See 45 C.F.R. § 147.130(a)(1)(iv) (2017); see also 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2018); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2018); *Women’s Preventive Services Guidelines*, *supra* note 18.

36. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,870 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; 45 C.F.R. pts. 147 & 156).

37. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,625 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

religious employers from providing contraceptive services to their employees (First Religious Exemption).³⁸

Yet, fearing that the First Religious Exemption did not fully address or solve the concern that the Contraceptive Mandate forced certain employers to provide contraceptive services that were against their religious beliefs, the HHS initiated a notice and comment rulemaking procedure.³⁹ At the conclusion of this procedure, the HHS promulgated a new final rule (Second Religious Exemption).⁴⁰ The Second Religious Exemption redefined “religious employer” to mean “churches, their integrated auxiliaries, and conventions or associations of churches.”⁴¹ Under this new definition, secular nonprofit organizations were unable to qualify for the Second Religious Exemption regardless of their beliefs toward certain contraceptives. However, like the First Religious Exemption, the Second Religious Exemption was short lived.

Following the enactment of the Second Religious Exemption, the Supreme Court ruled on two cases in which the Contraceptive Mandate was at issue.⁴² As a result of those cases, the HHS issued a third set of interim

38. *Id.* at 46,623. To qualify for the First Religious Exemption, an employer must be a religious employer that “(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code Section 6033(a)(3)(A)(i) and (iii).” *Id.*

39. See *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). The Administrative Procedure Act authorizes federal agencies to promulgate rules. See *Administrative Procedures Act: Summary*, AM. LEG. EXCHANGE COUNCIL, <https://www.alec.org/model-policy/administrative-procedures-act/> [https://perma.cc/EC8D-ZGHV]. Under Section 553 of the Administrative Procedure Act, a federal agency must provide public notice of the proposed rule and give the public an opportunity to comment on the proposed rule. 5 U.S.C. § 553 (2017).

40. See *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. at 39,873. A qualified organization under the Second Religious Exemption had to notify the health insurance issuers or third-party administrators of its health plan of its objection, which would then trigger the issuer or administrator’s duty to provide the required contraceptive services to the organization’s employees in place of the organization. *Id.* at 39,885. This procedure was referred to as the accommodation process. See *id.* at 39,870.

41. *Id.* at 39,874.

42. In the first case, the Court granted certiorari to resolve whether the Contraceptive Mandate violated the RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2751 (2014). In *Hobby Lobby*, the Court narrowly held that applying the Contraceptive Mandate to a closely held, for-profit organization that had religious objections did in fact violate RFRA. See *id.* at 2785. In the second case, the Court exempted a religious college from needing to notify the issuer or administrator of its health plan of its religious objection.

final rules (Third Religious Exemption) that complied with the cases' holdings.⁴³ The HHS finalized the Third Religious Exemption on July 14, 2015.⁴⁴ The Third Religious Exemption extended the definition of a religious employer to include closely held, for-profit organizations with religious objections to contraceptive coverage.⁴⁵

1. *Trump's Executive Order and the Fourth Religious Exemption*

But like its predecessors, the Third Religious Exemption's run was unsurprisingly short. Nonreligious organizations with moral objections to the Contraceptive Mandate began filing lawsuits to challenge the mandate because they were not exempt from contraceptive coverage, although they had the same beliefs about certain contraception as did religious organizations. In response, President Trump issued an Executive Order called "Promoting Free Speech and Religious Liberty" on May 4, 2017.⁴⁶ The President called

Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014). In *Wheaton College*, Wheaton refused to comply with the Second Religious Exemption because it viewed its sending notice of its religious objection to the issuer or third-party administrator as being complicit in the termination of human life. See Brief for Appellant Wheaton College at 15, *Wheaton Coll. v. Burwell*, 791 F.3d 792 (7th Cir. 2015) (No.14-2396), 2015 WL1517134, at *15–16. Ultimately, the Court reasoned that Wheaton did not need to send notice of its objection to its issuer or third-party administrator because it had already notified the government of its objection when it sent the Secretary of HHS a letter stating its religious objections to providing contraceptive services. See *Wheaton Coll.*, 134 S. Ct. at 2807.

43. See Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092, 51,118 (Aug. 27, 2014) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; 45 C.F.R. pt. 147).

44. See Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; 45 C.F.R. pt. 147).

45. *Id.* at 41,324. The Third Religious Exemption also changed the accommodation process so that employers with religious objections to the Contraceptive Mandate could either notify their objection to the health insurance issuers or third-party administrators of its health plan or notify the Secretary of HHS of their religious objection. See Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,096.

46. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017). According to Article II of the Constitution, the President is in control of the execution and enforcement of the laws legislated by Congress. U.S. Const. art. II, § 3. Yet, there is debate and controversy surrounding the actual nature and scope of executive authority. For example, in a Supreme Court case involving a president seizing steel plants, the justices offered multiple opinions on what constituted executive authority. See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The majority, following a formalist perspective, believed that seizing steel mills was not within the president's executive power. *Id.* at 585. In contrast, though Justice Frankfurter concurred with the majority, his opinion took more of a functionalist perspective and advocated that the court needed to look beyond the language of the Constitution and see how the president's power has been used in the past. See generally *id.* at 593–610 (Frankfurter, J., concurring). The dissent went a step further and concluded that because the president was able to seize plants before, the president

for the Secretary of Treasury, the Secretary of Labor, and the Secretary of the HHS to “consider issuing amended regulations . . . to address conscience-based objections to the preventive-care mandate under [the ACA].”⁴⁷

As a result, on October 6, 2017, the HHS issued a new interim final rule (Fourth Religious Exemption) with the purpose of carrying out President Trump’s order.⁴⁸ Unlike the prior exemptions, the Fourth Religious Exemption contains two exemptions to the Contraceptive Mandate. First, the Fourth Religious Exemption excuses any nonprofit or for-profit entity, whether closely held or publicly traded, that has sincerely held religious beliefs against providing certain contraception from fully complying with the mandate.⁴⁹ Second, the moral exemption excuses any nonprofit or for-profit organization that is closely held from fully complying with the mandate if the organization’s objection to the mandate is based on sincerely held moral convictions.⁵⁰

Unlike the previous exemptions, the Fourth Religious Exemption significantly expands the scope of who could opt out of the Contraceptive Mandate and

must have the power to do so again. *Id.* at 680, 683, 710 (Vinson, J., dissenting). Yet, the most cited opinion comes not from the majority or the dissent but from Justice Jackson. *See id.* at 634 (Jackson, J., concurring). Justice Jackson gave the framework for the president’s power by laying out three categories. *Id.* at 635–38. First, the president has powers conferred from Congress. *Id.* at 635. Second, the president has concurrent power, which is power the president does not have but is given by Congress. *Id.* at 637. And third, the president has inherent or enumerated powers from the Constitution. *Id.* at 637.

47. Exec. Order No. 13,798, 82 Fed. Reg. at 21,675, § 3.

48. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). According to the Necessary and Proper Clause, Congress has the “[p]ower . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. Const. art. I, § 8, cl. 18. Thus, one scholar has argued Congress has the constitutional authority to create executive agencies with substantial autonomy from the president. A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 789 (1987). Therefore, Congress has the power to create administrative agencies, which become part of the executive and subject to the executive power. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 44 (1994).

49. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,806.

50. *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,851 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147). Additionally, the Fourth Religious Exemption does not require an employer to notify anyone of its decision to take the exemption. *See id.* at 47,850, 47,858. In other words, the exemption makes the accommodation process completely discretionary.

eliminates the requirement that employers notify anyone of their decision to take an exemption. This perceptibly generated controversy that the other exemptions did not.⁵¹

III. THE MORAL PROBLEM AND THE CIRCUIT SPLIT

Before the Fourth Religious Exemption, nonreligious organizations with moral objections to the Contraceptive Mandate were not exempt from contraceptive coverage even though they had the same beliefs as religious organizations did on opposing certain contraception.⁵² Mindful of this discrepancy, nonreligious organizations began filing lawsuits claiming the Contraceptive Mandate violated their rights to equal protection.⁵³ Yet, the results from these lawsuits have varied.

Currently, the lower courts have been unable to agree on whether the exclusion of a moral exemption for the Contraceptive Mandate violates the equal protection provision in the Fifth Amendment. Further, the lower courts currently cannot look to the Supreme Court for an answer because it has not yet directly addressed the issue. This lack of uniformity is troubling because it appears that the protection of a nonreligious organization's right to equal protection depends on the court the nonreligious organization files suit in.

A brief framework of how courts from two different jurisdictions addressed the equal protection issue regarding nonreligious organizations will provide insight into two things: (1) the different reasonings and rationale for the holdings of each case and (2) the reason why courts have been inconsistent in their holdings. Consequently, this Part lays out the reasonings and holdings of two cases involving nonreligious organizations and their rights to equal protection under the Contraceptive Mandate. Section III.A will examine the decision of *March for Life v. Burwell* from the D.C. Circuit, which held that the Contraceptive Mandate violated the Equal Protection Clause of the Fifth Amendment, while Section III.B will examine the decision of *Real Alternatives, Inc. v. Secretary HHS* from the Third Circuit, which held the exact opposite.

51. It should be noted that there are serious legal issues regarding whether the Fourth Religious Exemption issued by the Trump Administration violated the Administrative Procedure Act and is therefore unauthorized. In January 2019, a district court in Pennsylvania held that the HHS failed to comply with notice-and-comment rulemaking procedures in promulgating the Fourth Religious Exemption, and the Third Circuit Court of Appeals affirmed this judgment. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 815–16 (E.D. Pa. 2019), *aff'd*, Nos. 17-3752, 18-1253, 19-1129, 19-1189, 2019 WL 3057657 (3d Cir. July 18, 2019).

52. See generally *March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015).

53. See, e.g., *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 345 (3d Cir. 2017).

A. March for Life

In *March for Life*, the plaintiff, the March for Life Education and Defense Fund (March for Life), was a nonprofit, nonreligious, and pro-life organization.⁵⁴ It only hired individuals who opposed all forms of abortion, including contraceptive methods that it considered abortifacients.⁵⁵ March for Life provided health insurance to its employees.⁵⁶ However, because March for Life did not support abortion, it opposed coverage in its health plan for contraception it considered abortifacients.⁵⁷ But because March for Life was a nonreligious organization, it did not qualify for the religious exemption under the Contraceptive Mandate.⁵⁸ Thus, regardless of March for Life's views on contraception, the law legally required it to provide all mandatory

54. *March for Life*, 128 F. Supp. 3d at 122.

55. *Id.* at 123. According to experts, hiring based on an organization's culture and values increases employee retention. Brent Gleeson, *The 1 Thing All Great Bosses Think About During Job Interviews*, INC. (Mar. 29, 2017), <https://www.inc.com/brent-gleeson/how-important-is-culture-fit-for-employee-retention.html> [<https://perma.cc/YUX8-L2RN>]. Experts believe that organizations tend to fail when they do not have clear and articulated values that inform employees the purpose of the organization. Scott MacFarland, *Why Should Companies and Employees Have Shared Values?*, HUFFINGTON POST (Nov. 6, 2013), https://www.huffingtonpost.com/scott-macfarland/why-should-companies-and-_b_4225199.html [<https://perma.cc/UUN6-ZH8G>]. However, under the law enforced by the U.S. Equal Employment Opportunity Commission, employers cannot discriminate against potential employees because of a person's race, color, religion, sex, national origin, age, disability, or genetic information. *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/practices/> [<https://perma.cc/G2JB-EYXB>]. This means that while organizations like March for Life can express to potential employees the organization's core values, which includes the opposition to certain contraception, it cannot discriminate against a potential employee for not believing in the organization's opposition because of his or her religious belief.

56. *March for Life*, 128 F. Supp. 3d at 123.

57. *Id.* According to the American College of Obstetricians and Gynecologists, abortifacients are agents that disturb an embryo in the uterine lining after a viable egg had fused with viable sperm. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *FACTS ARE IMPORTANT: EMERGENCY CONTRACEPTION (EC) AND INTRAUTERINE DEVICES (IUDs) ARE NOT ABORTIFACIENTS 1* (2014), <https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactsAreImportantEC.pdf> [<https://perma.cc/8Q24-KSED>]. There is disagreement about whether emergency contraception like Plan B are abortifacients. See Sonia Lopez et al., *Access to Contraception*, 18 GEO. J. GENDER & L. 439, 442–43 (2017). The American College of Obstetricians and Gynecologists defines emergency contraception like Plan B as a drug used after sexual intercourse but before a viable egg had fused with viable sperm. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra*, at 1.

58. *March for Life*, 128 F. Supp. 3d at 123.

contraceptive methods. Because providing the contraceptives violated its members' moral beliefs, March for Life brought suit against the government.

The Equal Protection Clause of the Fifth Amendment forbids legislators from treating significantly similar entities differently.⁵⁹ In other words, the government cannot treat “*similarly situated* individuals differently without a rational basis.”⁶⁰

March for Life argued that the Contraceptive Mandate violated the Fifth Amendment's guarantee of equal protection because it treated nonreligious organizations differently than similarly situated employers like religious organizations.⁶¹ The government argued that March for Life was not similarly situated to religious organizations because it was neither religious nor a church.⁶² The court reasoned, however, that the government applied the

59. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). It should be noted that while the Fourteenth Amendment clearly has an Equal Protection Clause, the Fifth Amendment does not. Compare U.S. CONST. amend. XIV, with U.S. CONST. amend. V. In *Brown v. Board of Education*, the Supreme Court invalidated state and local laws that promoted school segregation as violation of the Fourteenth Amendment's Equal Protection Clause. 347 U.S. 483, 493–95 (1954). On the same day, the Court, in *Bolling v. Sharpe*, used the Due Process Clause under the Fifth Amendment to prohibit segregated schools in the District of Columbia. 347 U.S. 497, 500 (1954). The Court went on to state that although the Fifth Amendment did not have an Equal Protection Clause, the concepts of equal protection and due process both stem from the American ideal of fairness and thus are not mutually exclusive. *Id.* at 499. Consequently, despite a clearly stated Equal Protection Clause, the Court has assumed in subsequent cases that the Due Process Clause of the Fifth Amendment contains an equal protection guarantee. David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L. J. 1253, 1255 (2005); see also *Weinberger v. Wiesenfeld*, 420

60. *Noble v. U.S. Parole Comm'n*, 194 F.3d 152, 154 (D.C. Cir. 1999) (per curiam) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). Courts do not require the government to produce any evidence or articulate any argument for a rational basis review. See *Heller v. Doe*, 509 U.S. 312, 320–21 (1993). Instead, in order to succeed in a rational basis review, the challenger of law must disprove “every conceivable basis” for the legislative classification. *Id.* (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Yet, in some cases, the Court has applied a broader application of the standard. For example, in *City of Cleburne*, the respondent purchased a building with the intention of leasing it to the Cleburne Living Center (CLC). *City of Cleburne*, 473 U.S. at 435. However, the city issued a new ordinance that required a special use permit from the CLC because the CLC planned to use the home for individuals with disabilities. *Id.* at 436–37. The city eventually denied the CLC's permit. *Id.* at 437. CLC then sued the city alleging that the ordinance was invalid because it discriminated against individuals with disabilities. *Id.* The Court ultimately overstepped the traditional rational basis test and struck down the ordinance because the city was unable to demonstrate any rational basis for the ordinance. *Id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).

61. *March for Life*, 128 F. Supp. 3d at 125.

62. *Id.* at 126.

similarly situated analysis incorrectly.⁶³ It stated that the correct question in need of answer was whether March for Life was similarly situated in terms of “the precise attribute selected for the [exemption].”⁶⁴

The court argued that the government exempted religious employers from the Contraceptive Mandate because of the “unique relationship between a house of worship and its employees.”⁶⁵ According to the court, the HHS believed the unique relationship referred to the fact that employees of religious organizations were less likely than other employees to want contraceptives covered by their employers.⁶⁶ Specifically, the HHS stated:

63. *Id.*

64. *Id.*

65. *Id.* at 121 (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54; 29 C.F.R. 2590; 45 C.F.R. pt. 147)). It has been argued that religion can promote democracy through communal events such as church going. In his article *Bowling Alone: America’s Declining Social Capital*, Robert Putnam argues that social capital—the trust and cooperation that results from the relationships formed among individuals in civic organizations and community groups—is necessary for democracy. Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65 (1995). Putnam argues that social capital, which comes from activities like church going, creates a more effective government. *Id.* at 66–67. Putnam points to the recent decline of participation in civic associations as one reason for the rise in voter apathy. *Id.* at 67–68. Putnam argues that without social capital, democracy will fail because people will not be able to build the trust and tolerance with other people required for democracy. *Id.* at 73. His argument goes: democracy needs cooperation, and without social capital that comes from activities such as church going, cooperation is not possible. *See id.* at 66–67.

66. *March for Life*, 128 F. Supp. 3d at 126–27. In the United States, religion in the public sphere represents one of the most contentious issues. *See generally* KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES (6th ed. 2011). Some argue that the acceptance of religious groups in the public sphere, especially in the political arena, threatens the stability of American democracy. *See id.* at 350. They claim that “researchers have found that hostility to blacks, Jews, homosexuals, and other minority groups has most often been expressed by adherents of theologically conservative churches.” *Id.* at 350–51. However, there are others that argue that religion in the public sphere upholds values and beliefs that are necessary to the preservation of democratic values. *Id.* at 358. They argue that human rights have been upheld in the United States because of the religious belief in the “equality of human beings before God.” *Id.* They also argue that religious values are the foundation for many democratic values: “Love for and the belief in freedom” comes from the “belief in the sacredness of the individuals as a child of God.” *Id.*

A group health plan qualifies for the exemption if the plan is established and maintained by an employer that primarily employs persons who share the religious tenets of the [employer] . . . [and] would be *less likely* to use contraceptives even if contraceptives were covered under their health plans.⁶⁷

This led the court to hold that though the HHS claimed to be protecting religious beliefs with the religious exemption to the Contraceptive Mandate, the HHS was really protecting a moral philosophy about the sanctity of human life.⁶⁸ Accordingly, the court concluded that the HHS was mistaken to believe that only religious organizations and their employees believed in the sanctity of human life.⁶⁹ In the court's view, March for Life and its employees embodied pro-life principles.⁷⁰ In fact, its employees refused to use what they believed were abortifacient contraception.⁷¹

Consequently, the court held that the Contraceptive Mandate violated the Equal Protection Clause of the Fifth Amendment because March for Life was similarly situated to religious organizations and thus the government should have afforded it an exemption also.⁷² In addition, the court concluded the government did not have a rational basis for denying March for Life an exemption to the Contraceptive Mandate and allowing religious organizations an exemption.⁷³ It did not agree with the government's argument that it had a rational basis to not exempt March for Life solely on the basis that religious organizations have historically been given advantages over their nonreligious equals.⁷⁴

67. *March for Life*, 128 F. Supp. 3d at 126 (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (codified at 26 C.F.R. pg. 54; 29 C.F.R. 2590; 45 C.F.R. 147)).

68. *Id.* at 127.

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.* at 128.

73. *See id.* In *United States v. Carolene Products Co.*, the Supreme Court rejected a due process challenge to a federal prohibition on interstate shipment of filled milk. 304 U.S. 144, 147 (1938). In upholding the federal prohibition, the Court created a rational basis standard. *Id.* at 152. The Court stated that when determining whether a federal law violated the Constitution, it would give deference to the legislature unless there was no rational basis for the law. *Id.* In footnote four, the Court infamously stated that it would only apply stricter scrutiny to laws that on its face appeared to violate a specific provision of the Constitution, restricted political processes, or discriminated against particular religious and racial minorities. *Id.* at 155 n.4.

74. *March for Life*, 128 F. Supp. 3d at 127. The Establishment Clause prohibits the government from establishing a religion. U.S. CONST. amend. I. Despite the seemingly clear statement, the Court and scholars have interpreted the clause to mean different things over the years. The no aid separationist perspective states that there is a clear wall of separation between the church and the state. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 289–90 (2001). On the other hand,

B. Real Alternatives

In *Real Alternatives, Inc. v. Secretary HHS*, the plaintiff was a nonprofit, nonreligious, and antiabortion organization.⁷⁵ It provided pregnancy services, parenting support, and abstinence education programs to women and families in various states.⁷⁶ Real Alternatives considered the use of contraceptives to be morally wrong, so it opposed the use of all contraception.⁷⁷ Like March for Life, Real Alternatives only hired employees who shared the organization's belief that the use of contraceptives and abortion was morally wrong.⁷⁸

supporters of the nonpreferentialist perspective state that though the Establishment Clause was not meant to aid religion, the government can aid religion as long it does not favor one religion over another. *See id.* at 290. Finally, the proponents of the no jurisdiction interpretation believe that Framers did not include the Establishment Clause to address the relationship between government and religion but to address the concerns that the national government should have limited powers. *Id.* at 292.

75. 867 F.3d 338, 345 (3d Cir. 2017). In 2013, the University of Notre Dame sued the Obama Administration because the ACA mandated that universities provide contraception for their employees. *Univ. of Notre Dame v. Sebelius*, 988 F. Supp. 2d 912, 914 (N.D. Ind. 2013), *aff'd*, 786 F.3d 606 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016). Under the First Religious Exemption, Notre Dame was unable to be exempt from the Contraceptive Mandate because it did not specifically identify itself as a religious institution that only employed members of its own faith. *See discussion supra* Section II.C. However, under the Second Religious Exemption, Notre Dame qualified for the exemption. *See discussion supra* Section II.C. Despite its exemption, Notre Dame continued with its lawsuit. In *University of Notre Dame*, the university sought a preliminary injunction against the enforcement of the Contraceptive Mandate because it objected to the government's requirement that it fill out a form to opt out from compliance with the mandate. *Univ. of Notre Dame*, 988 F. Supp. 2d at 914. By filling out the form, Notre Dame's health insurer was notified of the university's objection and then it itself provided coverage for contraception. *Id.* at 915. Citing Catholic doctrine, Notre Dame refused to permit its health insurer provide the expenses for contraception to its employees and students. *Id.* Although the government allowed Notre Dame to opt out of the mandate, Notre Dame argued that its opting out triggered a third-party's delivery of contraception, which still violated its right to free exercise of religion. *See id.* However, the district court ultimately held that the government did not violate Notre Dame's First Amendment right and did not grant a preliminary injunction. *Id.* at 935. The Seventh Circuit affirmed the district court. *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 619 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016).

76. *Real Alts., Inc.*, 867 F.3d at 345.

77. *Id.*

78. *Id.* at 346. In 2018, Iowa lawmakers tried to pass the strictest abortion law in the United States at the time. Tony Leys, *Iowa 'Fetal Heartbeat' Abortion Restriction Declared Unconstitutional*, USA TODAY (Jan. 23, 2019, 7:44 AM), <https://www.usatoday.com/story/news/nation/2019/01/23/iowa-fetal-heartbeat-abortion-law-ruling/2655252002/> [<https://perma.cc/V5Z8-PA5J>]. The law, also known as the heartbeat bill, prohibited abortions once a heartbeat is detected. *Id.* This essentially prevented abortions past the sixth week of a woman's pregnancy. *Id.* However, in 2019 a state court judge struck down the law

Thus, before Congress enacted the ACA, Real Alternatives did not provide contraceptive services to its employees in its health plan.⁷⁹ However, because Congress enacted the ACA that contained the Contraceptive Mandate, Real Alternatives' health insurer provided employees with a new health plan that covered contraceptive services.⁸⁰ Additionally, because Real Alternatives held itself to be a nonreligious organization, the government did not exempt it from the Contraceptive Mandate.⁸¹

As a result, Real Alternatives sued the government arguing the Contraceptive Mandate violated the Equal Protection Clause in the Fifth Amendment because the religious exemption only exempted religious organizations and not nonreligious organizations that also opposed the Contraceptive Mandate.⁸² The district court rejected Real Alternatives' argument, and the Third Circuit affirmed.⁸³

Real Alternatives argued that the government did not have a rational basis to exempt religious organizations and not nonreligious organizations.⁸⁴

stating that it violated the Iowa constitution. *Id.* According to the Iowa Supreme Court in a previous challenge to an abortion-restriction law, a woman's decision to get an abortion is a fundamental right protected by the state's constitution. *Id.*

79. *Real Alts., Inc.*, 867 F.3d at 346.

80. *Id.* In *Griswold v. Connecticut*, Connecticut passed statutes against the use of contraception. 381 U.S. 479, 480 (1965). The Court held that the statutes were unconstitutional because they violated an individual's right to privacy. *Id.* at 486. Additionally, the majority reasoned that it would not follow *Lochner v. New York* or construe the Fourteenth Amendment to strike down the statutes. *Id.* at 481–82. Instead, the majority struck down the statutes based on an individual's right of privacy derived from the penumbra of the Bill of Rights. *Id.* at 482. In other words, the majority reasoned that there are various guarantees in the Constitution that created an individual's constitutional right to privacy. In contrast, Justice Harlan explicitly relied on the Fourteenth Amendment's substantive due process to hold that the statutes were unconstitutional. *Id.* at 499–500 (Harlan, J., concurring). Justice Harlan specifically believed that there were liberties under the Constitution which due process incorporated against the states and that were not specific guarantees in the Bill of Rights but still needed to be protected. *Id.* at 500.

81. *Real Alts., Inc.*, 867 F.3d at 342.

82. *Id.* at 346–47. In *Eisenstadt v. Baird*, the Court overturned a conviction under a law that banned the distribution on contraception. 405 U.S. 438, 440 (1972). The Court decided that the right of privacy is inherent in a marriage and that the government did not have the authority to intrude into matter that so fundamentally affected a couple's decision to have a child or not. *Id.* at 443. Additionally, the Court struck down the law on equal protection grounds, reasoning that the law's distinction between single and married people did not pass the rational basis test of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 447.

83. *Real Alts., Inc.*, 867 F.3d at 346, 352.

84. *Id.* at 348. Professor McGoldrick argues that there is no way to predict what cases get the rational basis test. James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 792 (2018). He advocates for a new test, a "reasonable basis test." *Id.* at 799. In applying a reasonable basis test, McGoldrick advocates that courts should ask themselves whether there is a legitimate

Specifically, Real Alternatives posited that the government only excluded it from the exemption because it was not a religious group or a church.⁸⁵ According to the court, Real Alternatives only had a one-sentence mission statement that stated its opposition to abortion and did not claim that it “play[ed] the same role in its members’ lives as religious methods and values play in the lives of adherents.”⁸⁶ In order for a nonreligious organization to be similarly situated to a religious organization exempted under the Contraceptive Mandate, the nonreligious organization needed to be a “comprehensive belief system.”⁸⁷ The court did not believe Real Alternatives’ one-sentence mission statement amounted to a “comprehensive belief system.”⁸⁸ Therefore, the court concluded that Real Alternatives was not similarly situated to religious organizations.⁸⁹

The court also stated that even if Real Alternatives was similarly situated to religious organizations, its equal protection violation claim still would have failed because the government had a rational basis for exempting religious organizations and not nonreligious organizations.⁹⁰ According to the court,

purpose for a law and then ensure that the law advances that purpose. *Id.* at 800. He further argues that such a test is so easy to apply it would go unnoticed when applied. *See id.*

85. *Real Alts., Inc.*, 867 F.3d at 348.

86. *Id.* at 349 (quoting *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 871 (7th Cir. 2014)). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed *Roe v. Wade* and upheld three of the five statutes that regulated abortions. 505 U.S. 833, 846, 900–01 (1992) (plurality opinion). The four statutes required a twenty-four hour waiting period, parental consent, husband notification, and hospital reporting before a woman decided to get an abortion. *Id.* at 900–01. In striking down the down the statutes, the Court used a new standard: it asked itself if the statutes imposed an undue burden on an individual’s right. *Id.* According to the new standard, the Court would uphold the law unless the law placed a substantial burden on an individual. *Id.* In the case of abortion, the Court held that it would uphold any statute restricting abortion unless the statute put a substantial burden on a woman seeking an abortion. *Id.*

87. *Real Alts., Inc.*, 867 F.3d at 349.

88. *Id.* In *Africa v. Pennsylvania*, Frank Africa, a self-proclaimed “Naturalist Minister” for the MOVE organization, argued that the state government was required to provide him with a special diet of raw foods while he was in prison because of his religion, MOVE. 662 F.2d 1025, 1025 (3d Cir. 1981). According to Africa, MOVE was a religion even though the organization did not practice any ceremonies or rituals. *Id.* at 1027. Nonetheless, the Third Circuit held that MOVE was not religion and therefore not protected by the First Amendment’s religion clauses because it focused on secular matters rather than religious ones and lacked the structural features of a traditional religion. *Id.* at 1036. However, the court was careful to include that it did not believe that Africa lacked sincerely held beliefs. *Id.*

89. *Real Alts., Inc.*, 867 F.3d at 349–50.

90. *Id.* at 351.

the old practice of recognizing religious autonomy justified the different treatment.⁹¹ Thus, the court held that there was no equal protection violation.⁹²

Although confronted with the same issue, the two courts reached different conclusions. In *March for Life*, the court stated that the government exempted religious employers from the Contraceptive Mandate because employees of religious organization were less likely than other employees to want contraceptives covered by their employers, and therefore the religious exemption was actually protecting a moral philosophy about the sanctity of human life.⁹³ Thus, the court held that a nonreligious organization is similarly situated to a religious organization if it has the same views about human life as a religious organization exempted from the Contraceptive Mandate.⁹⁴ Additionally, the court concluded that the government did not have a rational basis for denying nonreligious organizations an exemption.⁹⁵ In contrast, in *Real Alternatives*, the court held that a nonreligious organization is not similarly situated to a religious organization exempted from the Contraceptive Mandate if it is not a comprehensive belief system.⁹⁶ Unlike the court in *March for Life*, the court in *Real Alternatives* found it necessary that a nonreligious organization be a comprehensive belief system to be similarly situated to a religious organization.⁹⁷ Additionally, the court concluded that the government has a rational basis for exempting religious organizations and not nonreligious organizations.⁹⁸

Accordingly, answering whether the exclusion of a moral exemption for the Contraceptive Mandate violates the equal protection provision in the Fifth Amendment involves analyzing and answering the three questions posed in the cases above. First, what is the difference between religion and nonreligion? Second, what does it mean to be similarly situated? Lastly, does the government have a rational basis in treating religion differently than nonreligion?

91. *Id.*

92. *See id.* at 352.

93. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015).

94. *Id.* at 128.

95. *Id.*

96. *Real Alts., Inc.*, 867 F.3d at 349–50.

97. *Id.*

98. *Id.* at 351.

IV. ANALYSIS

*A. The ACA Should Include a Moral Exemption
to the Contraceptive Mandate*

Courts should and must protect nonreligious organizations' rights to exempt themselves from the Contraceptive Mandate, even if it goes against popular belief. Although the unfortunate effect of this protection will inhibit the ability of women working for nonreligious organizations that oppose the use of certain contraceptive methods from receiving certain contraception through their employers, there are ultimately two impositions of indignity here: the potential affront to women who are denied certain contraception from their employers, and the affront to nonreligious employers who are told their rights are not as important as those of religious employers. Despite the benefits of covering all forms of contraception for women, the government should not be able to discriminate against certain groups in the process.

The exclusion of a moral exemption for the Contraceptive Mandate violates the equal protection provision in the Fifth Amendment for three reasons. First, legislation and courts should not treat religious organizations differently than nonreligious organizations because there is evidence that the protection of religion serves as proxy that also protects nonreligious interests. Additionally, prominent court cases seem to suggest that the Supreme Court recognizes such a proxy. Second, nonreligious organizations are similarly situated to religious organizations when it comes to the exemption to the Contraceptive Mandate because the HHS's stated purpose in creating a religious exemption justifies the extension of such an exemption to nonreligious organizations, and the underlying reasons justifying the protection of religious beliefs also justify the protection of nonreligious beliefs. Third, the HHS does not have a rational basis in treating religious organizations differently from nonreligious organizations because the HHS's own statements regarding the purpose of the religious exemption negates any conceivable reason for dissimilar treatment.

1. Religion v. Nonreligion

The First Amendment provides special rules regarding religion. It expressly prohibits the establishment of religion and guarantees the free exercise of

religion.⁹⁹ The Supreme Court has stated “[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.”¹⁰⁰ Additionally, the Court has made clear that under the Establishment Clause, the government cannot pass laws that aid one religion and not another or prefer one religion over another.¹⁰¹ Yet, the Constitution does not define religion, and the Supreme Court has never given a specific definition of religion.¹⁰² This affects the Contraceptive Mandate because what constitutes religion affects whether a nonreligious organization that opposes providing certain contraceptive services for the same reason a religious organization opposes providing them is exempt.

Courts are breaching their duty to protect nonreligious organizations’ rights to equal protection when it comes to the Contraceptive Mandate. First, there are strong arguments that suggest the protection of religion serves as a proxy to protect nonreligious interests. This is especially relevant in furthering the position that the ACA should include a moral exemption to the Contraceptive Mandate. Additionally, there is evidence that such a proxy is consistent with the law because the Supreme Court has previously granted conscience-based objections under a statute that was only meant to protect religious objectors. Consequently, the *Real Alternatives, Inc. v. Secretary HHS* court violated an organization’s right to equal protection because it did not follow Supreme Court precedent that has prohibited distinctions between religious and secular beliefs that hold the same place in individuals’ lives.

99. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). There are prominent religious figures who believe that the founding fathers intentionally shaped the government influenced by Christian morals. See JERRY FALWELL, *LISTEN, AMERICA!* 16, 21 (1980). They believe that the government should intertwine Christian morals into the political atmosphere to ultimately guard and encourage the role of Christianity in society. See *id.* at 16–19. Jerry Falwell, a pastor and conservative activist, argued that though the founding fathers had constructed a law separating the church and the state, they never intended for the American public to completely exclude God from the government. See *id.* at 20–22. Falwell argued that God gave the American people certain unalienable rights in exchange for society’s obedience, and so society has the duty to promote Christian ideals throughout government. See *id.*

100. *Thomas v. Rev. Bd.*, 450 U.S. 707, 713 (1981) (first citing *Sherbert v. Verner*, 374 U.S. 398, 405 (1963); and then citing *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972)).

101. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947). Additionally, it has been debated and argued that while the Establishment Clause prohibits the establishment of religion, “[i]t does not prohibit the establishment of nonreligious ethical or moral views.” Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352–53 (2012).

102. See, e.g., *Thomas*, 450 U.S. at 714 (stating that defining what constitutes as a religious belief is “more often than not a difficult and delicate task”). See generally Ben Clements, Note, *Defining “Religion” in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989).

a. Religion Is Not Special

There has long been a debate among legal scholars about whether religion is special.¹⁰³ There is scholarship arguing it is,¹⁰⁴ and there is scholarship arguing it is not.¹⁰⁵ Laying out the arguments for each side deserves an entirely separate paper. Thus, this Comment will only briefly lay out two arguments made by two professors relevant in helping further the argument that the ACA should include a moral exemption to the Contraceptive Mandate.

Professor Andrew Koppelman has suggested that the freedom of religion and religious exemptions are in actuality just proxies that act as forms of protection for, not only religious interests, but also for many interests that include nonreligious interests.¹⁰⁶ In so doing, Koppelman concedes that there is nothing that makes religion particularly special; however, he still endorses the status quo of giving religion special treatment.¹⁰⁷ He states that American legal tradition gives religion preferential treatment because

103. Schwartzman, *supra* note 101, at 1427.

104. See, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 572 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 78 (1990); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 193 (2000).

105. See, e.g., Anthony Ellis, *What Is Special About Religion?*, 25 LAW & PHIL. 219, 238 (2006); Gedicks, *supra* note 104, at 572–74; Marshall, *supra* note 104, at 202–07. Many scholars argue that religious freedom is different from protecting freedom of conscience because the founding founders believed that religion deserved special constitutional treatment and that religion is a “unique source of individual and personal identity for many” that involves carrying out a duty owed to the creator. John Witte, Jr. & Joel A. Nichols, “Come Now Let Us Reason Together”: *Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 444–45 (2016) (citing James Madison, *Article on Religion Adopted by Convention, [12 June 1776]*, in 1 THE PAPERS OF JAMES MADISON 175 (William T. Hutchinson & William M.E. Rachal eds., 1962)).

106. Andrew Koppelman, *Religion’s Specialized Specialness: A Response to Micah Schwartzman, What If Religion Is Not Special?*, 79 U CHI L REV 1351 (2011), 79 U. CHI. L. REV. 71, 75 (2013).

107. See Andrew Koppelman, “*Religion*” as a Bundle of Legal Proxies: Reply to Micah Schwartzman, 51 SAN DIEGO L. REV. 1079, 1079 (2014); see also *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by Romer v. Evans*, 517 U.S. 620 (1996). The Establishment Clause prohibits the government from establishing a religion. U.S. CONST. amend. I. According to the Lemon Test, the government can only assist religion if the primary purpose of the assistance is secular, the assistance neither promotes nor inhibits religion, and there is no excessive entanglement between the church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

freedom of religion and religious exemptions protect important religious interests that cannot be protected with some other justification.¹⁰⁸

Professor Micah Schwartzman, on the other hand, argues that giving religion special preference will lead to substantial disparities.¹⁰⁹ In doing so, Schwartzman takes Koppelman's argument a step further and proposes the creation of a second proxy that would catch interests that fell through the cracks of the first proxy.¹¹⁰ In other words, Schwartzman advocates the protection of nonreligious interests through a second proxy.

If Koppelman and Schwartzman's arguments are combined, there is a strong argument to be made that the ACA should include a moral exemption to the Contraceptive Mandate. If it is true that freedom of religion and religious exemptions are just proxies that act as protection for many interests, including nonreligious interests, then courts should be able to accommodate both religious and nonreligious organizations in cases involving the Contraceptive Mandate. However, in order for courts to apply that type of framework, there must evidence the framework is consistent with the law. Accordingly, an important question to answer is whether there is evidence that a proxy type of framework is consistent with law.¹¹¹ This Comment argues that the framework of giving accommodations to both religious and nonreligious beliefs can be derived from Supreme Court precedent and is thus consistent with the law.

1. Providing Identical Accommodations to Both Religious and Nonreligious Organizations

Despite Congress's early attempt to require religion to include belief in a Supreme Being, its efforts eventually fizzled, and the Supreme Court, through two prominent cases, rendered the definition of Supreme Being meaningless.

The 1917 Draft Act exempted members of churches historically categorized as peace churches from participating in war.¹¹² The exemption for peace churches did not extend to conscientious objectors.¹¹³ In the early 1930s, the Supreme Court indicated that it was up to the legislature to decide

108. See Koppelman, *supra* note 107, at 1079.

109. Micah Schwartzman, Religion as a Legal Proxy, 51 SAN DIEGO L. REV. 1085, 1091 (2014).

110. See *id.* at 1093. Schwartzman also once supported expanding the definition of "religious" to include secular and moral beliefs if they are comparable to their religious counterparts. *Id.*

111. See generally Jonathan P. Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 WASH. U. L. REV. 191 (2016).

112. See Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76; T. Oscar Smith & Derrick A. Bell, *The Conscientious-Objector Program—A Search for Sincerity*, 19 U. PITT. L. REV. 695, 708 (1958).

113. Smith & Bell, *supra* 112, at 708.

whether any exemption for conscientious objectors should exist because the Free Exercise Clause did not provide a right to such an exemption.¹¹⁴ Therefore, conscientious objectors were only afforded an exemption if Congress chose to relieve the objectors of the imposition.

Shortly thereafter, Congress passed the Selective Service Act of 1940, which broadened the exemption to include members of religious institutions that were not historically defined as peace churches but not so far as to include organizations or individuals who objected for nonreligious or moral beliefs.¹¹⁵ Then, in 1948, Congress attempted to define religion in the Selective Service Act.¹¹⁶ Congress revised the Act to define religion in terms of a belief in and duties toward a Supreme Being by stating that an objector to war may be exempt if his objection was related to his “belief in a relation to a Supreme Being [that involved] duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.”¹¹⁷ However, the phrase “Supreme Being” was essentially rendered meaningless by *United States v. Seeger* and *United States v. Welsh* and was eliminated by Congress in 1967.¹¹⁸

In *Seeger*, three individuals, who espoused beliefs outside the traditional religious model, sought to be exempt under Section 6(j) of the Universal Military Training and Service Act.¹¹⁹ The Universal Military Training and Service Act exempted individuals “by reason of religious training and belief” and defined that phrase as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . . but [not including

114. See *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 264 (1934); *United States v. MacIntosh*, 283 U.S. 605, 623 (1931), *overruled in part by* *Girouard v. United States*, 328 U.S. 61 (1946). Up until the end of the nineteenth century, the Supreme Court believed religion only referred to an individual’s relationship to “his Creator” and to the obligations it imposed on him as a result of his obedience to his creator. *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by* *Romer v. Evans*, 517 U.S. 620 (1996).

115. Selective Training and Service Act of 1940, Pub. L. 76-783, § 5(g), 54 Stat. 885, 889.

116. See Selective Service Act of 1948, Pub. L. 80-759, § 6(j), 62 Stat. 604, 613 (codified as amended 50 U.S.C. app. § 456(j) (1948)).

117. *Id.* According to the Third Circuit, “programs or positions that entangle the government with issues . . . that might be classified as ‘ultimate concerns’” do not establish a religion. *Malnak v. Yogi*, 592 F.2d 197, 212 (3d Cir. 1979).

118. See Military Selective Service Act of 1967, Pub. L. No. 90-40, § 6(j), 81 Stat. 100, 104 (codified as amended at 50 U.S.C. app. 456(j) (1967)).

119. *United States v. Seeger*, 380 U.S. 163, 166, 168–69 (1965).

a] . . . personal moral code.”¹²⁰ The plaintiffs challenged the constitutionality of the statute’s requirement that their objection be based on religious training and belief, specifically taking issue with the statute’s definition of religious training and belief.

Although the Court did not address the constitutionality of the statute, it interpreted and ultimately expanded the statute to include the plaintiffs even though they did not have religious objections.¹²¹ The Court posited that Congress intentionally used the phrase Supreme Being instead of “God” because it did not want to limit or constrain what it meant to have a religious belief.¹²² The Court further explained that “[t]he validity of what [an applicant for the exemption] believes cannot be questioned.”¹²³ Instead, the “task is to decide whether the beliefs professed by [the applicant] are sincerely held and whether they are, in his own scheme of things, religious.”¹²⁴ Accordingly, the Court held that individuals who had a belief that was sincere and occupied a place in their life that was similar to that filled by the belief in a Supreme Being qualified for the exemption just like the individuals who professed a belief in a Supreme Being.¹²⁵

In *Welsh v. United States*, the Supreme Court interpreted *Seeger* even more broadly.¹²⁶ Although the legislature amended the conscientious objection statute in 1967 after the *Seeger* decision to eliminate the phrase Supreme Being,¹²⁷ and the Court decided this case in 1970, the statute containing the phrase Supreme Being was still in effect at the time the plaintiff first applied for the exemption. The plaintiff objected to military service for nonreligious

120. 50 U.S.C. app. § 456(j) (1958); see *Seeger*, 380 U.S. at 165.

121. *Seeger*, 380 U.S. at 163.

122. *Id.* at 175–76. Scholars have argued that the “[F]ree [E]xercise [C]lause should apply to beliefs and practices that are ‘arguably religious’ whereas the [E]stablishment [C]lause should not apply to beliefs and practices that are ‘arguably nonreligious.’” Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 651 n.229 (1987). However, there are other scholars that disagree that under the Constitution, religion does not have two definitions. In *Everson v. Board of Education*, Justice Rutledge stated: “‘Religion’ appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid ‘an establishment’ and another, much broader, for securing ‘the free exercise thereof.’” 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

123. *Seeger*, 380 U.S. at 184.

124. *Id.*

125. *Id.* at 165–66. In *Welsh v. United States*, 398 U.S. 333, 335, 341–44 (1970) (plurality opinion), a plurality of the Court extended *Seeger*.

126. *Welsh*, 398 U.S. at 341–44 (plurality opinion).

127. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 6(j), 81 Stat. 100, 104 (codified as amended at 50 U.S.C. app. § 456(j) (1967)); see also *Welsh*, 398 U.S. at 336 nn.2–3 (plurality opinion).

reasons.¹²⁸ Nevertheless, the lower court denied the plaintiff's objection because it was nonreligious.¹²⁹

However, the Court overturned the lower court's denial of a nonreligious exemption, reasoning that the exemption applies to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."¹³⁰ Consequently, the plaintiff was entitled to the same exemption as provided in *Seeger*.¹³¹

In *Seeger* and *Welsh*, the Court accommodated both religious and nonreligious objectors under a statute that was superficially only meant to protect religious objectors. Although the Selective Service Act required a belief in a Supreme Being, the Supreme Court did not interpret that to mean only objectors who based their objection in a belief in a higher being were exempt. Instead, the Court interpreted the statute to include objectors who had a belief that was sincere and occupied a place in their life that was similar to one filled by the belief in a Supreme Being. Had the Court found it absolutely necessary to treat religion specially, it would not have interpreted the Selective Service Act to include objectors who based their objections on nonreligious grounds. This bolsters the argument that religious exemptions are just proxies that act as protection for many interests, including nonreligious

128. *Welsh*, 398 U.S. at 335–38 (plurality opinion).

129. *Id.* at 335. A conscientious objection is a "firm, fixed, and sincere objection to participation in war in any form . . . because of religious training and/or belief." DEP'T OF DEF., INSTRUCTION NUMBER 1300.06 § 3.1, at 2 (2007), <https://www.hsdl.org/?view&did=474921> [<https://perma.cc/DX6M-8V3M>].

[I]n order to qualify as a conscientious objector, the applicant must prove by clear and convincing evidence that he or she is "conscientiously opposed to war in any form," that his or her "opposition is grounded in religious training and beliefs," and that his or her "position is firm, fixed, sincere, and deeply held."

Jonah Beckley, Comment, *Military Law-Army Denies Conscientious-Objector Status Without Basis in Fact*-Hanna v. Secretary of the Army, 513 F.3d 4 (1st Cir. 2008), 42 SUFFOLK U. L. REV. 419, 421 (2009) (quoting DEP'T OF DEF., *supra*, § 5.1, at 4).

130. *Welsh*, 398 U.S. at 344 (plurality opinion).

131. *Id.* at 343. In *Sherbert vs. Verner*, the Supreme Court gave a religious exemption from a general law for first time. 374 U.S. 398, 402 (1963). In that case, the Court allowed Seventh Day Adventists to collect unemployment benefits even though they did not work on Saturdays as conditioned by the law. *Id.* at 399–402. According to the Court, if a general law imposes a burden on an individual's religion, the law can be objected to unless the government has a compelling interest. *See id.* at 406. The Court gave a second religious exemption in *Wisconsin v. Yoder*, where it allowed an Amish community's children to be exempted from a law that require compulsory school attendance. 406 U.S. 205, 207, 234 (1972).

interests. Consequently, courts should be able to give identical accommodations to both religious and nonreligious organizations in cases involving the Contraceptive Mandate.

a. Real Alternatives *Does Not Follow Seeger and Welsh*
While March for Life Does

Thus, in cases related to the Contraceptive Mandate, if courts were to incorporate the approach adopted by a plurality of the Supreme Court in *Welsh*, then a nonreligious organization's claim can be considered "religious" if it is based on "moral, ethical, or religious beliefs about what is right and wrong," and those beliefs are "held with the strength of traditional religious convictions."¹³² This means that moral beliefs that occupy the life of an individual parallel to those filled by God are legally equivalent to religious beliefs traditionally recognized by exemptions.

This directly affects the decision in *Real Alternatives*. Real Alternatives considered the use of contraceptives to be morally wrong, so it opposed the use of all contraception.¹³³ Thus, it only hired employees who shared the organization's belief that the use of contraceptives and abortion was morally wrong.¹³⁴ Additionally, because Real Alternatives held itself to be a nonreligious organization, it could not use the religious exemption under the Contraceptive Mandate.¹³⁵ Although Real Alternatives proclaimed to have a sincerely held moral belief, the court ignored the *Welsh* and *Seeger* decisions and held that Real Alternatives could not be exempted.¹³⁶

In contrast, the court in *March for Life v. Burwell* followed the decision in *Welsh* and *Seeger* to find that a nonreligious organization with sincerely held pro-life beliefs could be exempted from the Contraceptive Mandate.¹³⁷ Unlike the Court in *Real Alternatives*, the *March for Life* court held that the government cannot give advantages to religious organizations and not to their nonreligious equals solely because it has historically done so.¹³⁸ In effect, the court's ruling followed precedent and embodied the principles set forth in *Welsh* and *Seeger*. The court used precedent from *Welsh* and *Seeger* to expand the legal definition of "religious" to include secular, but

132. *Welsh*, 398 U.S. at 339–40 (*plurality opinion*).

133. *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 345–46 (3d Cir. 2017).

134. *Id.* at 346.

135. The suit was filed prior to the new interim final rules issued by the HHS and other agencies that include a moral exemption to the ACA's Contraceptive Mandate. See Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 26 C.F.R. 54; 29 C.F.R. 2590; 45 C.F.R. 147).

136. *Real Alts., Inc.*, 867 F.3d at 349–53.

137. *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127–28 (D.D.C. 2015).

138. *Id.* at 127.

nevertheless deeply held, ethical and moral beliefs, which resulted in giving equal treatment to a nonreligious organization.¹³⁹

2. *The Supreme Court Has Prohibited Distinctions Between Religious and Secular Beliefs that Hold the Same Place in Individuals' Lives*

The Supreme Court has prohibited differences in treatment between religious beliefs and secular beliefs that hold the same place in individuals' lives;¹⁴⁰ this prohibition supports the argument that religious exemptions are just proxies that act as protection for many interests, including nonreligious interests. Requiring a nonreligious organization to be associated with a church or some type of house of worship or qualify as a religious organization per the tax code to be exempt from the Contraceptive Mandate does not align with precedent. Many nonreligious organizations are "religious" enough for the government to give them the same treatment as religious organizations.

In *Torcaso v. Watkins*, the Maryland legislature appointed Torcaso to the office of notary public but later denied his commission because he would not proclaim a belief in God as required by Maryland's Constitution.¹⁴¹ Torcaso claimed that the requirement violated his right to freedom of religion because he did not believe in the existence of God and did not want to proclaim such a belief.¹⁴² Although the Maryland courts disagreed with Torcaso, the Supreme Court held that government could not give preferential treatment to religions that acknowledged the existence of God over religions that did not.¹⁴³

Unlike the Court in *Torcaso*, the court in *Real Alternatives* treated religious and secular beliefs that hold the same place in individuals' lives differently in the context of the Contraceptive Mandate. In the court's view, *Real Alternatives* did not "play the same role in its members' lives as religious methods and values play in the lives of adherents."¹⁴⁴ Specifically, the court

139. *See id.*

140. *See United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

141. 367 U.S. 488, 489 (1961).

142. *See id.*

143. *See id.* at 495.

144. *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 871 (7th Cir. 2014). In this case, Center for Inquiry, a self-proclaimed secular and humanist organization, claimed that an Indiana law that required marriage licenses to be only signed by clergy, judges, mayors, or local government clerks violated the Constitution. *Id.* at 871. It argued that the law created a preference for religion over nonreligion. *See id.* Center for Inquiry

took issue with the fact that Real Alternative's main purpose was to help implement programs that reflected its opposition to contraceptives and abortion.¹⁴⁵ The court reasoned that in order for the government to treat a nonreligious organization like Real Alternatives the same as a religious organization, it had to resemble a "religion in everything except belief in a deity."¹⁴⁶ The court further reasoned that the implementation of programs reflecting a certain belief did not qualify as resembling a religion.¹⁴⁷ This imposes a stricter standard on a nonreligious organization desiring to claim the same exemption given to a religious organization.¹⁴⁸

To claim an exemption to the Contraceptive Mandate, a religious organization need not prove that, as an individual organization, it actually resembles a religion. In fact, it only needs to be one of the types of organizations the exemption covers and hold a sincerely held religious belief against contraception.¹⁴⁹ Additionally, if the court's requirement from *Real Alternatives* were applied to both religious and nonreligious organizations, this would preclude many religious organizations from claiming an exemption to the Contraceptive Mandate. Take for instance Salvation Army.

Salvation Army is a religious organization that implements programs to address the needs of different groups.¹⁵⁰ One program provides shelter for transgender people who are homeless,¹⁵¹ and another program educates first responders and the public about what to do in a natural disaster.¹⁵² In

also argued that its practices and beliefs played the same role in its members' lives as did religious practices and beliefs in the lives of religious individuals. *Id.* However, the district court did not agree. *Id.* at 872. The court reasoned that because marriage has religious roots, the government is able to regulate marriage as a religious accommodation. *Id.* Subsequently, the Seventh Circuit reversed the lower court's holding because a religious accommodation cannot treat religion more preferably when nonreligious organizations are similarly situated in relation to the reason why the accommodation was created in the first place. *Id.* at 872–73. According to Seventh Circuit, the accommodation needed to be neutral. *Id.*

145. *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 349 (3d Cir. 2017).

146. *Id.* (quoting *Ctr. for Inquiry, Inc.*, 758 F.3d at 872).

147. *See id.*

148. *See* Eugene Volokh, *Religious Exemptions—A Guide for the Confused*, WASH. POST (Mar. 24, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/?utm_term=.75c95f1deed1 [<https://perma.cc/9QWX-7TV2>].

149. Katie Keith, *Religious, Moral Exemptions From Contraceptive Coverage Mandates: Second Verse, Same As The First*, HEALTH AFFAIRS (Nov. 9, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20181109.87594/full> [<https://perma.cc/MT37-VE5K>].

150. *See About Us*, SALVATION ARMY, <https://www.salvationarmy.org/ihq/about> [<https://perma.cc/CUU3-HLJZ>].

151. *The LGBTQ Community and The Salvation Army*, SALVATION ARMY, <https://www.salvationarmyusa.org/usn/the-lgtbq-community-and-the-salvation-army/> [<https://perma.cc/BY5C-A3WE>].

152. *After The Unspeakable, We Speak Hope.*, SALVATION ARMY, <https://www.salvationarmyusa.org/usn/help-disaster-survivors/> [<https://perma.cc/9V2X-MJVA>].

addition, it opposes abortion.¹⁵³ Yet, despite Salvation Army's obvious religious convictions, if the *Real Alternatives* court's reasoning was applied to religious organizations, it would not be able to claim an exemption to the Contraceptive Mandate because Salvation Army does not resemble a religion. Salvation Army's main purpose is the implementation of programs. It does not have buildings dedicated to worship; its own pastors or priests; or its own set of religious rules, teachings, and interpretation.¹⁵⁴ The organization was not created for the purposes of replacing or even resembling religion in an individual's life. However, if the reasoning from the *Real Alternatives* court applied, it would need to. This departs from Supreme Court precedent.

In *Burwell v. Hobby Lobby Stores, Inc.*, two for-profit companies owned by a single family sued the government objecting to the Contraceptive Mandate.¹⁵⁵ The for-profit companies did not satisfy the ACA's definition of a religious employer at the time of the lawsuit, so they could not claim the religious exemption to the Contraceptive Mandate.¹⁵⁶ The government specifically argued that it did not afford the two companies the religious exemption because the companies could not exercise religion.¹⁵⁷ However, the Court found the government's argument unpersuasive.¹⁵⁸

The Court first reasoned that the companies' corporate form did not prevent for-profit companies from exercising religion.¹⁵⁹ Like the nonprofit corporations the government gave the exemption to, for-profit companies that furthered their own religious beliefs also furthered the religious beliefs of individuals.¹⁶⁰ The government also argued that having a profit-making objective disqualified for-profit organizations from being able to exercise religion.¹⁶¹ However, the Court held that having a profit-making objective did not necessarily disqualify for-profit organizations from proving they could participate in the exercise of religion because the exercise of religion included physical

153. *Abortion*, SALVATION ARMY, http://www1.salvationarmy.org/IHQ/www_ihq_isjc.nsf/vw-sublinks/FE3C992C78838853802577DF0071D796?openDocument [<https://perma.cc/E5KZ-QG47>].

154. *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).

155. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765–66 (2014).

156. *See id.* at 2772.

157. *Id.* at 2769.

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.* at 2769–71.

acts that are “engaged in for religious reasons.”¹⁶² The two for-profit corporations made money from engaging in business practices that were meant to honor God.¹⁶³ In deciding that the for-profit corporations were exempt from the Contraceptive Mandate, the Court did not require the corporations prove they resembled a religion.¹⁶⁴

Although the facts of *Hobby Lobby* and *Real Alternatives* are different, the Court’s reasoning from *Hobby Lobby* is still instructive. Similar to the government’s argument in *Hobby Lobby* that the for-profit corporations did not exercise religion because they had profit-making objectives,¹⁶⁵ the court in *Real Alternatives* found a problem with the fact that Real Alternative’s main purpose was to implement programs that reflected its opposition to contraceptives and abortion.¹⁶⁶

Yet, despite the for-profit corporation’s profit-making objectives, the Court in *Hobby Lobby* concluded that the corporations did exercise religion.¹⁶⁷ The Court recognized that Hobby Lobby was a nationwide arts and crafts chain that operated according to Christian principles.¹⁶⁸ Among other things, this meant that it closed its stores on Sundays and donated a portion of its profits to Christian ministries and missionaries.¹⁶⁹ The Court reasoned that the exercise of religion included participating in physical acts for religious reasons.¹⁷⁰

The substance rather than the form of an organization should be scrutinized in cases involving nonreligious organizations looking to be exempt from the Contraceptive Mandate. Unlike the court in *Real Alternatives*, the court in *March for Life* did not require that March for Life prove it resembled a religion.¹⁷¹ The court recognized that March for Life had a sincerely held belief opposing abortion.¹⁷² The form of the organization and the purpose of the organization was never brought into question by the court.¹⁷³

162. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990). In this case, the plaintiffs filed for unemployment benefits, but the state refused to administer them to the plaintiffs because they used peyote, an illegal drug in Oregon. *Id.* at 874. The majority ruled against the plaintiffs using a newly-created neutrality test. *See id.* at 883–84. The Court reasoned that because the Oregon law was generally applicable and did not specifically target religion, the law was not unconstitutional. *Id.* at 890.

163. *Hobby Lobby*, 134 S. Ct. at 2766.

164. *See generally id.* at 2759–85.

165. *Id.* at 2759–60.

166. *Real Alts., Inc. v. Sec’y HHS*, 867 F.3d 338, 349 (3d Cir. 2017).

167. *Hobby Lobby*, 134 S. Ct. at 2771, 2775.

168. *Id.* at 2765–66.

169. *Id.* at 2766.

170. *See id.* at 2770.

171. *See generally March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015).

172. *Id.* at 127.

173. *See generally March for Life*, 128 F. Supp. 3d 116.

Real Alternatives resembles a religion in the same way a religious organization afforded an exemption to the Contraceptive Mandate does. Like religious organizations, nonreligious organizations are often created to reflect a specific belief. They often act as supplements to religion rather than replacements. Real Alternatives implements programs because of its sincere belief that life begins at conception, which is no different from religious organizations that the government exempts from the Contraceptive Mandate.¹⁷⁴ Religious organizations participate and implement certain practices and programs because of their religious belief. And like nonreligious organizations, religious organizations do not literally resemble a religion. Accordingly, it would be contrary to Supreme Court precedent to require that nonreligious organizations resemble a religion or be a comprehensive belief system before the government treats them the same as their religious counterparts.

2. Religious and Nonreligious Organizations Are Similarly Situated

The equal protection provision of the Fifth Amendment ensures that “all persons similarly situated should be treated alike.”¹⁷⁵ Although the phrase “similarly situated” is not a part of the Fifth Amendment of the Constitution,¹⁷⁶ the phrase is a common component of equal protection case law.¹⁷⁷ Although the meaning of similarly situated in the context of equal protection appears easy to define, its definition is not as intuitive as it seems.¹⁷⁸ At first glance, similarly situated seems to mean that everyone in the class of people a law

174. For various courts’ holdings concerning religious beliefs and discrimination, see generally *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 869 (7th Cir. 2014); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

175. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); see also *Plyler*, 457 U.S. at 216 (stating that those “similarly circumstanced” should be treated similarly).

176. U.S. CONST. amend. V.

177. See U.S. CONST. amend. XIV, § 1; Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 581 (2011). The idea of being “similarly situated” was first addressed by the Supreme Court in an 1884 equal protection case involving an ordinance targeting laundries run by Chinese immigrants. *Id.* at 583 (citing *Barbier v. Connolly*, 113 U.S. 27, 32 (1884)).

178. Although frequently invoked in the equal protection context, the concept of similarly situated is not always employed by courts. Shay, *supra* note 177, at 586. Notable equal protection cases like *United States v. Virginia*, 518 U.S. 515 (1996), and *Romer v. Evans*, 517 U.S. 620 (1996), lack a similarly situated analysis. Shay, *supra* note 177, at 586.

is trying to protect possesses a singular classifying trait.¹⁷⁹ However, Professors Joseph Tussman and Jacobus tenBroek argued in an influential 1949 Article that the purpose of the statute is what determines whether two things are similarly situated.¹⁸⁰ Thus, the question to ask for purposes of this Comment is not whether nonreligious organizations are similarly situated to religious organizations because they look like churches and act like churches, but rather, given the purpose of the exemption to the Contraceptive Mandate, whether religious organizations and nonreligious are similarly situated.

Consequently, in the context of the Contraceptive Mandate, nonreligious organizations are similarly situated to religious organizations for two reasons. First, the HHS's stated purpose in creating a religious exemption to the Contraceptive Mandate also was broad enough to justify exempting nonreligious organizations. Second, the underlying reasons of why religion is generally protected also justify exempting nonreligious organizations. In addition, relative to the purpose of the religious exemption to the Contraceptive Mandate, the similarities, and not the dissimilarities, between religious and nonreligious organizations matter in determining whether the organizations are similarly situated.

*a. HHS's Stated Purpose in Creating a Religious Exemption
Justifies the Extension of Such an Exemption to
Nonreligious Organizations*

According to the HHS, the purpose of the Contraceptive Mandate was to provide contraceptive coverage “to individuals who want it.”¹⁸¹ The HHS created a religious exemption to the Contraceptive Mandate because of the “unique relationship between a house of worship and its employees.”¹⁸² In creating the exemption, the HHS clearly stated the mandate’s purpose. The HHS stated that the unique relationship referred to the fact that “houses of worship and their integrated auxiliaries” are less likely than other groups to want contraceptives and more likely to employ people who share the same

179. Shay, *supra* note 177, at 587 (citing Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 345 (1949)).

180. Tussman & tenBroek, *supra* note 179, at 346.

181. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

182. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

objection, and would thus be less likely to even want contraceptives.¹⁸³ As a result, through the religious exemption, the HHS wanted to protect individuals that it believed are less likely than other individual to want contraceptives. Further, although the HHS claimed to be protecting religious beliefs when it promulgated an interim final rule that only included a religious exemption, it actually meant to protect all employers that had beliefs, religious or moral, regarding the sanctity of human life. Although the court in *March for Life* recognized this conclusion, the court in *Real Alternatives* did not.

The main reason for this difference stems from the *Real Alternatives* court's incorrect analysis of what it means to be similarly situated. Unlike the court in *March for Life*, the court in *Real Alternatives* dictated its similarly situated analysis by asking whether nonreligious organizations are similarly situated to religious organizations. However, the question the court should have asked and answered was: given the purpose of the exemption to the Contraceptive Mandate, whether religious organizations and nonreligious are similarly situated. Had it done so, it would have answered in the affirmative because *Real Alternatives* was a nonreligious organization that considered the use of contraceptives to be morally wrong, so it opposed the use of all contraception and only hired employees who shared in its belief. It held its belief so strongly that its main purpose for existence was to provide pregnancy services, parenting support, and abstinence education programs. Thus, *Real Alternatives*, though a nonreligious organization, fits the type of organization the HHS intended to exempt from the Contraceptive Mandate. Because of this, prohibiting an exemption for nonreligious organizations like *Real Alternatives* violates their right to equal protection.

b. The Underlying Reasons Justifying the Protection of Religious Beliefs Also Justify the Protection of Nonreligious Beliefs

In addition, although it may be true that the HHS's stated reason for creating the religious exemption to the Contraceptive Mandate was to protect individuals that it believed were less likely than other individual to want contraceptives, the HHS also likely created the exemption to protect religion. Though historically it was viewed that protecting religion meant protecting

183. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 & 2590; 45 C.F.R. pts. 147 & 156).

what people perceived as their duty to God,¹⁸⁴ today protecting religion can mean respecting sincere beliefs that may or may not include a relationship with a higher being.¹⁸⁵ Additionally, although there are many reasons why religion is protected, this section will only mention two.

1. A Moral Exemption to the Contraceptive Mandate Should Protect Nonreligious Organizations' Sincerely Held Beliefs

The first reason for protecting religion is that individuals feel that their obligations to their religious beliefs outweigh their obligations to the government.¹⁸⁶ In other words, many individuals hold their religious beliefs deeply, and if they were put in a situation to choose between their obligations to the government and their respective religions, they would choose the latter. Hence, governments should make an effort not to interfere with an individual's religious belief. If this is a possible reason the HHS created the religious exemption to the Contraceptive Mandate, then it is reasonable to conclude the government should also exempt nonreligious organizations with sincerely held beliefs regarding the use of contraceptives from the mandate. Like religious beliefs, moral beliefs play an important role in peoples' and organizations' lives. It is obvious that if put in a situation to choose between their moral obligation and their obligations to the government, people and organizations would choose the latter. That is in

184. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990).

185. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 204 (1991). Professor Smith argues that the decline in constitutional commitment to religious freedom is due to the fact that the commitment to religious freedom contains a self-cancellation element to it. See *id.* at 149. Smith states that the self-cancellation stems from the relationship between the historical justification of religious freedom and the current interpretation of religious freedom. *Id.* Historically, the justification of religious freedom has been that an individual's religious duties or obligations are more important to the individual than his or her other duties, so the government should not interfere with religion. *Id.* at 154–55. Additionally, religious freedom is currently interpreted as forbidding the government from relying on religious justifications for public policies or decisions. *Id.* at 181. According to Smith, both the historical justification of religious freedom and the current interpretation of religious freedom prevents judges and legal scholars from being able to apply the Constitution's commitment to religious freedom in a coherent and uniform way. See *id.* at 149–150.

186. See 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 400–01 (2006). Some legal scholars state that religious beliefs “are strong because they are deeply embedded in the person's self.” Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 N.W. U. L. REV. 1113, 1165 (1988). Because of this, they believe that religion should be afforded a special protection. *Id.* at 1166. However, some qualify that argument by also stating that there is practically no difference in protecting religious or moral beliefs that are essential to an individual's self-identity. See, e.g., William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L. J. 351, 361 n.56 (1991) (citing Conkle, *supra*, at 1165–66).

fact what Real Alternatives and March for Life did. Both nonreligious organizations had sincerely held beliefs regarding contraceptives, and despite the government mandate to provide employees with coverage, they chose not to.

A second reason commonly given for protecting religion relates to personal autonomy.¹⁸⁷ The argument is that individuals should be free to practice their religious beliefs. Therefore, the government should not try to control people, their beliefs, and the actions that result from their beliefs. Again, this is a possible reason the HHS created the religious exemption to the Contraceptive Mandate, then it is also reasonable to conclude that the government should exempt nonreligious organizations with sincerely held beliefs regarding the use of contraceptives from the mandate. If individuals should be free to practice their religious beliefs without government interference, then individuals and organizations should be free to practice their moral beliefs without government interference as well. This is especially true in light of the fact that the percentage of Americans who do not consider themselves religious has been rising.¹⁸⁸ Thus, the government should not force nonreligious organizations like Real Alternatives and March for Life that have moral objections to the Contraceptive Mandate to give up their moral beliefs and the choices that result from those beliefs just because it says so.

*c. The Similarities Between Religious and Nonreligious Organizations
Matter in Determining Whether the Organizations Are
Similarly Situated*

The substance rather than the form of an organization should be scrutinized in cases involving nonreligious organizations looking to be exempt from

187. 1 GREENAWALT, *supra* note 186, at 401. Legal scholars such as John Garvey have criticized the legitimacy of the personal autonomy rationale. See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 791 (1986). For example, Garvey argues that religious or even sincerely held beliefs may not be the only type of beliefs that are important to an individual's self identity. See *id.* Garvey posed the question: if an individual claims wearing a cowboy hat is essential to his or her identity or "conception of self," should that individual be given the same amount of protection as an individual who claims that religion makes up his or her identity? *Id.*

188. Michael Lipka, *A Closer Look at America's Rapidly Growing Religious 'Nones,'* PEW RES. CTR. (May 13, 2015), <http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/> [https://perma.cc/QHM8-YJ9G].

the Contraceptive Mandate.¹⁸⁹ In many cases, organizations appear different because they are in fact different. Their structural forms, the activities they participate in, and the programs they choose to implement are dissimilar. For example, there are obvious differences between a church and a religious organization such as Samaritan's Purse. Although one would expect a church to hold weekly sermons and prayer meetings led by a pastor, one would not expect that from an organization such as Samaritan's Purse. Instead, Samaritan's Purse implements programs such as Operation Christmas Child that sends toys to families in need worldwide.¹⁹⁰ The main purpose of a church is to cater to the spiritual needs of the community it is located in, and the main purpose of global religious organizations is often to provide resources and basic services, which are often not spiritual to those who are in need.¹⁹¹ Despite the differences, both organizations are considered to be religious and exempt from the Contraceptive Mandate. The religious exemption focuses on the similarities of the organizations and not on the dissimilarities. The same should apply to nonreligious organizations.

Like religious organizations, nonreligious organizations are often created to reflect a specific belief. For instance, Real Alternatives implements programs because of its sincere belief that life begins at conception.¹⁹² This is no different from religious organizations, which the government gives an exemption to the Contraceptive Mandate.¹⁹³ Religious organizations participate and implement certain practices and programs because of their religious belief. Nonreligious organizations participate and implement certain practices and programs because of their sincerely held belief. The fact that one belief is religious and the other is not should not result in different treatment, especially if the beliefs are identical. Assuming that protecting religion means respecting sincerely held beliefs regardless of belief in a higher being, then differences in structure and activities should not matter in deciding whether an organization should be exempt from the Contraceptive Mandate.

189. See discussion *supra* Section IV.A.1.a.2.

190. See generally *The Amazing Journey of a Simple Shoebox Gift*, SAMARITAN'S PURSE, <https://www.samaritanspurse.org/operation-christmas-child/the-journey-of-a-shoebox/> [<https://perma.cc/A74A-GYU8>].

191. See generally Joanne Fritz, *What Is the Difference Between a Church and a Religious Organization?*, BALANCE SMALL BUS. (June 25, 2019), <https://www.thebalancesmb.com/church-vs-religious-organization-2501877> [<https://perma.cc/5SRL-4JW8>].

192. *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 368 (3d Cir. 2017) (Jordan, J., concurring in part in the judgment and dissenting in part).

193. For analysis on religious exemptions granted by federal courts, see generally *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Lown v. Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

3. *The Contraceptive Mandate with Only a Religious Exemption Does Not Pass a Rational Basis Review*

The Supreme Court has applied equal protection principles to the federal government under the Due Process Clause of the Fifth Amendment.¹⁹⁴ Usually, the Court makes a determination of the appropriate standard of review it will apply to the challenged statute. The Court can apply three standards: rational basis scrutiny,¹⁹⁵ intermediate scrutiny,¹⁹⁶ and strict scrutiny.¹⁹⁷ Each level of scrutiny entails a specific test with increasingly demanding requirements that must be satisfied if the challenged statute is to survive constitutional challenge.

The level of scrutiny that applies is important because if the statute is subject to strict scrutiny, the government will have to prove that the policy is narrowly tailored to serve a compelling state interest.¹⁹⁸ That is a much

194. See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954). There has been a history of controversy over what is included in substantive due process under the Fourteenth Amendment. See, e.g., G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 88–89 (1997). In *Allgeyer v. Louisiana*, the Supreme Court invalidated a state law on substantive due process grounds for the first time. 165 U.S. 578, 593 (1897). This began what scholars call the *Lochner* Era, in which the Supreme Court invalidated several laws on substantive due process grounds. See generally Bernstein, *supra* note 59, at 1261–69. In *Lochner v. New York*, New York passed a law that restricted work in bakeries to sixty hours a week. See 198 U.S. 45, 45–46 (1905). *Lochner*, an owner of a bakery, sued the state and argued that the law burdened his right to contract, which was protected by substantive due process. See *id.* at 52–53. The state argued that the law was meant to protect public health and safety and so it was not unconstitutional. See *id.* at 51. However, the Court sided with the plaintiff because it did not believe there was a reasonable argument for the hour restriction. *Id.* at 64–65. The *Lochner* Era seem to have ended when Court decided *Nebbia v. New York*, 291 U.S. 502 (1934). In that case, the Court upheld a statute which fixed the price of milk on the basis that the law was not unreasonable and that the state seemingly had a legitimate reason for the law. *Id.* at 504, 539.

195. E.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

196. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”).

197. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (Courts will uphold laws subjected to the strict scrutiny standard “if they are suitably tailored to serve a compelling state interest.” (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).

198. E.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (stating that because the town imposed content-based restrictions on speech through its code, the Court would

higher standard than rational basis, which only requires a legitimate government interest.¹⁹⁹ Thus, it will be harder for the government to win a case if the Court interprets the statute under strict scrutiny.²⁰⁰ Therefore, it follows that claimants will argue a statute should be subject to strict scrutiny, and the government will try to argue a statute should be subject to rational basis review.²⁰¹ However, in most cases strict scrutiny only applies to statutes dealing with race and national origin.²⁰² Intermediate scrutiny applies to gender discrimination cases.²⁰³ And rational basis review applies to cases dealing with most other classifications. Rational basis review applies to laws that do not burden a fundamental right or target a suspect class.²⁰⁴ This means that to overcome an equal protection challenge, the statute must rationally relate to a legitimate governmental purpose.²⁰⁵

As a result, religion falls under rational basis review. Additionally, the plaintiffs in both *March for Life* and *Real Alternatives* do not dispute this.²⁰⁶ However, they do dispute whether the ACA with only the religious

uphold the specific provisions if they passed strict scrutiny, “which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest” (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010))).

199. See *Beach Commc’ns, Inc.*, 508 U.S. at 313–14.

200. The rational basis standard confers “a strong presumption of validity” on a challenged statute. *Heller v. Doe*, 509 U.S. 312, 319 (1993). The government has “no obligation to produce evidence to sustain the rationality” of the challenged statute. *Id.* at 320. Instead, a plaintiff challenging the statute must “negative every conceivable basis which might support it.” *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

201. See Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 *GEO. J.L. & PUB. POL’Y* 401, 402, 410 (2016). Some scholars such as Erwin Chemerinsky argue that the rational basis standard is a form of review that is “almost empty” and “enormously deferential.” *Id.* However, in rare circumstances, a court may strike down a challenged statute even though rational basis applies, and strict scrutiny does not, if the court speculates animus. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 *NOTRE DAME L. REV.* 1317, 1319 (2018).

202. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”).

203. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720, 733 (1982) (applying strict scrutiny in striking down the single-sex admissions policy of a state-funded nursing school); *Craig v. Boren*, 429 U.S. 190, 191–92, 210 (1976) (striking down an Oklahoma statute that prohibited the sale of “nonintoxicating” 3.2% beer to males under the age of 21 and to females under the age of 18” under intermediate scrutiny).

204. *Beach Commc’ns, Inc.*, 508 U.S. at 313.

205. See *id.*

206. *Real Alts., Inc. v. Sec’y HHS*, 867 F.3d 338, 348 (3d Cir. 2017); *March for Life v. Burwell*, 128 F. Supp. 3d 116, 125–26 (D.D.C. 2015).

exemption passes a rational basis review.²⁰⁷ This section argues that it does not.

Under a rational basis review, a court gives the government a lot of deference in providing some explanation of a legitimate purpose for a statute.²⁰⁸ For example, a statute that is underinclusive and overinclusive is acceptable under a rational basis review.²⁰⁹ Even if the government does not articulate a legitimate reason for the statute, the statute can still pass a rational basis review so long as the court can come up with a legitimate reason after the fact.²¹⁰ However, a statute does not pass a rational basis review if there is no conceivable reason for the difference in treatment created by the statute.²¹¹

The court in *March for Life* argues that the HHS had no legitimate reason for the difference in treatment regarding nonreligious organizations and religious organizations.²¹² In contrast, the court in *Real Alternatives* reasoned that the HHS does have a legitimate reason because there has historically been respect for the autonomy of religion.²¹³ The court also relied on the holding from *United States Railroad Retirement Board v. Fritz* to hold that the religious exemption can still pass a rational basis review even if the government did not state a legitimate reason for treating nonreligious and religious organizations differently.²¹⁴

In *Fritz*, Congress passed a statute that eliminated certain railroad employees' benefits depending on their employment history.²¹⁵ The statute divided the employees into different classes based on their employment history and gave out benefits accordingly.²¹⁶ A group of plaintiffs sued the Railroad Retirement

207. Compare *Real Alts., Inc.*, 867 F.3d at 353, with *March for Life*, 128 F. Supp. 3d at 134.

208. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319 (1993) (stating that under the rational basis standard, courts give “a strong presumption of validity” in regard to a challenged statute.).

209. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955). In this case, the Court held that an Oklahoma law that allowed only doctors to fix the frames of glasses was constitutional. *Id.* at 485, 487–88. Although the law created a lot of administrative waste, the legislature may have concluded that the law was meant to help promote the public good. *Id.* at 487. The Court reasoned that a law that creates waste is not automatically unreasonable; the law must only be minimally rational. See *id.* at 491.

210. See, e.g., *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

211. See *id.*

212. See *March for Life*, 128 F. Supp. 3d at 125.

213. See *Real Alts., Inc. v. Sec’y HHS*, 867 F.3d 338, 350 (3d Cir. 2017).

214. *Id.* at 351–52.

215. See *Fritz*, 449 U.S. at 171–72.

216. See *id.*

Board alleging the statute treated them differently from other employees, which violated the Due Process Clause.²¹⁷ The district court held the statute did not pass rational basis review because it was unclear whether the government had a reason for dividing the employees in the first place.²¹⁸ However, the Supreme Court reversed the district court's holding, stating that the statute passed rational basis review because one could reasonably conceive that the government divided the employees into different groups to ensure the solvency of the entire retirement system.²¹⁹

The HHS does not allow nonreligious organizations like March for Life and Real Alternatives that are against the use of certain contraceptives to claim the exemption. The HHS justifies this distinction through a historically recognized respect for the autonomy of religion. This fails for two reasons.

First, the underlying reasons justifying the protection of religious beliefs also justify the protection of nonreligious beliefs.²²⁰ Protecting religion can mean respecting sincere beliefs that may or may not include a relationship with a higher being. Religion is protected for two common reasons: individuals feel that their obligations to their beliefs outweigh their obligations to the government²²¹ and individuals value their personal autonomy.²²² In the case of Real Alternatives, its loyalty to its moral beliefs is more important than its obligation to the government. So important, that it was willing to forgo complying with a mandated provision. Additionally, Real Alternatives' sincerely held belief that abortion is wrong promotes personal autonomy. If the government allows organizations to freely practice their religious beliefs, why should it not allow organizations that hold moral beliefs to do the same.

Second, as previously argued, in creating a religious exemption, the HHS wanted to protect individuals that it believed are less likely than other individuals to want contraceptives.²²³ If this is true, then it seems like there is no conceivable reason for the difference in treatment between nonreligious

217. See *id.* at 173.

218. See *id.* at 174.

219. See *id.* at 168–69, 179–80. All of the payroll taxes and other earmarked incomes are deposited in the Social Security trust fund. *Policy Basics: Understanding the Social Security Trust Funds*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/social-security/policy-basics-understanding-the-social-security-trust-funds> [https://perma.cc/2257-T8RG] (last updated July 23, 2018). Additionally, Social Security is a pay-as-you-go system. *Id.* This means that the benefits beneficiaries are currently receiving are funded by the payroll taxes collected from people working today. *Id.* However, reports predict the Social Security trust fund is expected to be completely depleted in 2034. *Id.* In recent years, there is more money leaving the trust fund than being deposited into it. *Id.*

220. See discussion *supra* Section IV.A.2.b.

221. See, e.g., 1 GREENAWALT, *supra* note 186, at 400–01.

222. See, e.g., *id.*

223. See discussion *supra* Section IV.A.2.a.

organizations and religious organizations. In that sense, the application of *United States Railroad Retirement Board v. Fritz* in the *Real Alternatives* case seems misplaced because, although rational basis review does not require the government to articulate its reasons for enacting a statute, there still must be a conceivable reason for the difference in treatment created by the statute.²²⁴

In *Fritz*, the conceivable reason for the difference in treatment was ensuring the solvency of the entire retirement system.²²⁵ In *March for Life* and *Real Alternatives*, the HHS claimed the conceivable reason for the difference in treatment was the historical respect for the autonomy of religion.²²⁶ However, unlike in *Fritz*, the HHS's own statements regarding the purpose of the religious exemption negated its conceivable reason. Therefore, the difference in treatment regarding nonreligious organizations and religious organizations by the religious exemption to the Contraceptive Mandate does not pass rational basis review.

V. SOLUTION

Revisiting the dichotomy from the hypothetical presented at the start of this Comment, courts should and must protect nonreligious organizations' rights to exempt themselves from the Contraceptive Mandate, even if it goes against popular belief. Courts are split on whether the government should give an exemption to the Contraceptive Mandate to a nonreligious organization that has the same views about contraception as a religious organization does.²²⁷ The lower courts have been unable to agree on whether the exclusion of a moral exemption for the Contraceptive Mandate violates the Equal Protection Clause in the Fifth Amendment. Additionally, courts cannot look to the Supreme Court for an answer because it has not yet directly addressed the issue. This lack of conformity is troubling because it appears that the protection of a nonreligious organization's right to equal protection depends on the court the nonreligious organization files suit in. Thus, this Comment proposes a uniform factor test that courts can use when specifically confronted with a case alleging an equal protection violation regarding the exemption

224. See *supra* note 214 and accompanying text.

225. 449 U.S. 166, 174 (1980).

226. See discussion *supra* Part III.

227. See *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 348 (3d Cir. 2017); *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015).

to the Contraceptive Mandate.²²⁸ This solution specifically proposes a factor test courts can use to help courts identify a deeply and sincerely held belief.²²⁹

A. *Uniform Factor Test to Identify a Sincerely Held Belief*

In *Welsh* and *Seeger*, the Supreme Court expanded the legal definition of “religious” to include secular, but nevertheless deeply held, ethical and moral beliefs.²³⁰ This resulted in giving equal treatment to nonreligious individuals. Likewise, the substance rather than the form of an organization should be scrutinized in the identification of a sincerely held belief. Courts should take into consideration three factors: (1) the activities, events, and programs the organization is a part of; (2) whether the organization is made up of a group of like-minded individuals who have the desire to further the organization’s mission; and (3) the level of time commitment an organization has for its sincerely held belief. This factor test is meant to be broad enough to include nonreligious organizations such as March for Life and Real Alternatives but not broad enough to include organizations that obviously do not have a sincerely held belief about not using contraceptives.

In analyzing an organization under the first factor, courts should look to the substance rather than the form of the organization. Courts can look at the kinds of activities and programs an organization is a part of. Presumably, an organization with sincere beliefs regarding the use of contraceptives will organize events or programs that reflect its belief. For example, March

228. Although Congress could resolve the split by drafting a statute that clarifies the Contraceptive Mandate, passage of such a statute would be difficult in today’s political climate. Even if a moral exemption clause was successfully added to the Contraceptive Mandate, the Mandate will still likely continue to be one of the most heavily litigated topics relating to the ACA. See Amanda Michelle Gomez, *Trump’s Rollback of Birth Control Mandate Could Go Into Effect Next Week Unless Courts Block It*, THINKPROGRESS (Jan. 10, 2019, 8:21 AM), <https://thinkprogress.org/trumps-rollback-of-birth-control-mandate-could-go-into-effect-next-week-unless-courts-block-it/> [<https://perma.cc/A83G-R5CZ>]. In November 2018, the Trump Administration introduced a set of final rules that included a moral exemption clause. See *id.* The rules are set to go in effect on January 14, 2019, but are already being challenged. See *id.* Democrat-led states have already filed suit in federal district court. See, e.g., *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017), *aff’d*, Nos. 17-3752, 18-1253, 19-1129 & 19-1189, 2019 WL 3057657 (3d Cir. July 12, 2019), *amended in part by* Nos. 17-3572, 18-1253, 19-1129 & 19-1189, 2019 WL 3228336 (3d Cir. July 18, 2019) (mem.). Accordingly, this Comment proposes a way in which courts can resolve the legal disputes without amending the Contraceptive Mandate or issuing a new set of rules—actions that will only lead to more lawsuits.

229. See discussion *supra* Section IV.A.1.a.1.

230. See *supra* notes 118–31 and accompanying text.

for Life puts on an annual pro-life conference and demonstration in Washington, D.C.²³¹ It often invites speakers who are pro-life.²³²

In analyzing an organization under the second factor, courts must ask whether the organization is made up of a group of like-minded individuals who have the desire to further the organization's mission. This factor is meant to ensure that an exemption to the Contraceptive Mandate is only given to the organizations the HHS intended.²³³ For example, the government should not afford an exemption to the Contraceptive Mandate to a nonreligious organization whose director is personally against the use of contraceptives and consequently does not want to give any of the employees contraceptives. The HHS created a religious exemption for organizations that are less likely than other organizations to want contraceptives and more likely to employ people who share the same objection and would thus be less likely to even want contraceptives.²³⁴ Additionally, the HHS created the exemption to respect sincere beliefs because organizations feel that their obligations to their beliefs outweigh their obligations to the government, and they value their personal autonomy.²³⁵ To allow an exemption for a nonreligious organization just because its director or board of directors are personally opposed to the use of certain contraceptives goes against the HHS's purpose in creating the exemption. A court should not take the director or the board of directors' personal beliefs into consideration if they have nothing to do with the purpose of the organization.

Finally, in analyzing an organization under the third factor, courts must look at the level of time commitment an organization commits to its sincerely held belief. This factor is meant to separate those organizations with actual sincere beliefs regarding contraceptives from those with shallow beliefs. A nonreligious organization with a sincere belief against the use of certain contraceptives will spend a good amount of time participating and organizing events that reflect its belief. Accordingly, courts should consider a nonreligious organization that exhibits the necessary characteristics for each of the three factors to have a sincerely held belief and should not for an organization that does not exhibit such characteristics.

231. *About the March for Life*, *supra* note 5.

232. *See 46th Annual March for Life*, MARCH FOR LIFE, <http://marchforlife.org/mfl-2019/rally-march-info/> [<https://perma.cc/PV3D-HRZ6>].

233. *See* discussion *supra* Section IV.A.2.a.

234. *See supra* note 65 and accompanying text.

235. *See* discussion *supra* Section II.C.1.

For example, applying the factor test to a nonreligious organization such as the Heritage Foundation leads to the conclusion that it would not have the necessary sincerely held belief to be exempt from the Contraceptive Mandate. The Heritage Foundation is a conservative think tank that wants “to formulate and promote conservative public policies based on principles of free enterprise, limited government, [and] individual freedom.”²³⁶ It is known for advocating a right-wing agenda.²³⁷

Analyzing the Heritage Foundation under the first factor, the factor does not weigh in favor of giving the organization an exemption. Presumably, an organization with a sincere belief regarding the use of contraceptives will organize events or programs that reflect its belief. However, unlike March for Life and Real Alternatives, the extent of the Heritage Foundation’s pro-life activities is limited to writing and publishing a few reports indicating its stance on the funding of abortion.²³⁸ The Heritage Foundation was not created on the basis of promoting pro-life principles. The second factor also does not weigh in favor of giving the organization an exemption because it cannot be said that the Heritage Foundation only hires employees who believe that the use of certain contraceptives and abortion are morally wrong.²³⁹ Although the organization may require employees to support its mission and vision for America,²⁴⁰ a vision of “an America where freedom, opportunity, prosperity, and civil society flourish”²⁴¹ is very broad and arguably does not require a belief that the use of certain contraceptives and abortion is morally wrong. The purpose of the Heritage Foundation goes beyond opposing abortion; in fact, that may not even be an important issue for the organization. Finally, the third factor also does not weigh in favor of providing the organization with an exemption because, although it is reasonable to assume that it spends some time advocating for pro-life policies, it is just as reasonable to assume it spends a majority of its time advocating for other conservative public policies that have nothing to do with having a sincerely held belief that the use of certain contraceptives is morally wrong.

236. *About Heritage*, HERITAGE FOUND., <https://www.heritage.org/about-heritage/mission> [<https://perma.cc/8W2X-PPVC>].

237. See Jonathan Mahler, *How One Conservative Think Tank Is Stocking Trump’s Government*, N.Y. TIMES MAG. (June 20, 2018), <https://www.nytimes.com/2018/06/20/magazine/trump-government-heritage-foundation-think-tank.html> [<https://perma.cc/URR5-N9GA>].

238. See, e.g., THOMAS M. MESSNER & EDMUND F. HAISLMAIER, THE RICHARD & HELEN DEVOS CTR. FOR RELIGION & CIVIL SOC’Y, ON CONTRACEPTION MANDATE, THE OBAMA ADMINISTRATION’S POTENTIAL PROPOSED “ACCOMMODATION” FAILS TO PROTECT RELIGIOUS AND MORAL CONSCIENCE 1 (2012), https://thf_media.s3.amazonaws.com/2012/pdf/SR112.pdf [<https://perma.cc/86BK-FNHK>].

239. See *About Heritage*, *supra* note 236.

240. See *id.*

241. *Id.*

In contrast, applying the factor test to March for Life and Real Alternatives, leads to the conclusion that both organizations have sincerely held beliefs. First, March for Life puts on an annual pro-life conference and demonstration in Washington, D.C.,²⁴² and Real Alternatives provided pregnancy services, parenting support, and abstinence education programs to women and families.²⁴³ Second, both March for Life and Real Alternatives only hired employees who shared the organization's belief that the use of certain contraceptives and abortion is morally wrong.²⁴⁴ Third, although the exact amount of time both organizations spend on their sincerely held belief that the use of certain contraceptives and abortion is morally wrong is undeterminable, it is reasonable to assume that they spend a majority of their time because they were both created as organizations meant to promote pro-life ideals.

VI. CONCLUSION

The exclusion of a moral exemption for the Contraceptive Mandate violates the equal protection provision in the Fifth Amendment for three reasons. First, legislation and courts should not treat religious organizations differently than nonreligious organizations because there is evidence that the protection of religion serves as a proxy to protect nonreligious interests. Additionally, prominent court cases suggest that the Supreme Court recognizes such a proxy. Second, nonreligious organizations are similarly situated to religious organizations when it comes to the exemption to the Contraceptive Mandate because the HHS's stated purpose in creating a religious exemption justifies the extension of such an exemption to nonreligious organizations, and the underlying reasons justifying the protection of religious beliefs also justify the protection of nonreligious beliefs. And third, the HHS does not have a rational basis in treating religious organizations differently from nonreligious organizations because the HHS's own statements regarding the purpose of the religious exemption negate any conceivable reason for dissimilar treatment.

242. *About the March for Life*, *supra* note 5.

243. *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338, 345 (3d Cir. 2017).

244. *See id.* at 346; *March for Life v. Burwell*, 128 F. Supp. 3d 116, 123 (D.D.C. 2015).

Despite the controversy that has ensued over exemptions to the Contraceptive Mandate,²⁴⁵ there is much more at stake than just prohibiting an exemption for nonreligious organizations. Prohibiting an exemption for nonreligious organizations means accepting that moral beliefs do not play the same important role in people's and organization's lives as religious beliefs. This creates a risky precedent that if something is unpopular, the courts are willing to relinquish equal protection and accept unequal treatment between two groups.²⁴⁶

Courts may soon resolve the fate of the moral exemption to the Contraceptive Mandate. Following the argument put forward in this Comment, future courts that hear challenges to the exemption should be open to a more expansive protection of religion, which at times may include nonreligion. Though the exemption will slightly reduce the availability of employer-provided contraception, the benefit of this exemption is that it will preserve the governmental practice of not favoring one group over another. This is important because such protections will ensure that the federal government treats two employers like Employer A and Employer B, which have the same views about contraception but base their beliefs in different entities or sources, equally.

245. See, e.g., Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://perma.cc/P4ML-P6N5>].

246. See Samantha Schmidt, *Trump Administration Set to Expand Religious Exemptions to Birth Control Coverage*, WASH. POST (Oct. 19, 2018), <https://www.washingtonpost.com/religion/2018/10/19/trump-administration-set-expand-religious-exemptions-birth-control-coverage> [<https://perma.cc/LJ37-9BHL>].