NOTE

Religious Protection or Religious Privilege? The Threat Religious Claimants Pose to Protecting Health in the HIV Epidemic

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ABSTRACT

As tensions rise between the right to religious freedom and the rights of LGBTQ persons, a recent challenge to a preventive health service threatens the people's ability to protect their health. The United States District Court for the Northern District of Texas recently held the mandated insurance coverage of preexposure prophylaxis ("PrEP") violated the Religious Freedom Restoration Act ("RFRA") after plaintiffs claimed providing coverage for PrEP facilitated homosexual and other purported morally objectionable behaviors that violated their religious beliefs. In reality, PrEP is a drug that prevents the contraction of human immunodeficiency virus ("HIV")—a potentially deadly disease that can infect anyone. As the United States continues to fight the ongoing HIV epidemic, PrEP is essential in stopping the spread of HIV,

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and it should be treated with such importance by courts. However, with the difficulties adjudicating what exactly is a "substantial burden" on a plaintiff bringing a RFRA complicity claim, courts are ill-prepared to appropriately measure the government interest in mandating coverage for PrEP against the burden on religious objectors. This Note proposes a new framework for courts to apply when addressing RFRA challenges to preventive health services. In applying the framework, this Note additionally argues why the facts of the PrEP challenge do not show a sufficient substantial burden on the plaintiffs' religious exercise and why the PrEP mandate is necessary in the government's efforts to stop the spread of HIV. When the Supreme Court reviews the issue of whether the PrEP mandate violates RFRA, the claim should fail because of the factually tenuous link between the plaintiff's complicity claim and the alleged objectionable behavior along with the government's interest in stopping the spread of a deadly disease.

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Introduction

In the United States, 1.2 million people live with human immunodeficiency virus ("HIV"), and 36,136 of those individuals were diagnosed in 2021.[1] One of the best defenses to the ongoing spread of HIV is pre-exposure prophylaxis ("PrEP"), a drug taken by HIV-negative persons at risk of contracting HIV.[2] PrEP is ninety-nine percent effective at preventing HIV infection from sexual activity and seventy-four percent effective at preventing HIV infection among people who inject drugs.[3] PrEP coverage, meaning the percentage of individuals at risk for HIV and taking PrEP, is tracked as part of the Centers for Disease Control and Prevention's ("CDC") "Ending the HIV Epidemic in the U.S." initiative.[4] The CDC hopes to increase PrEP coverage so that by 2025 at least fifty percent of the population that needs the drug is prescribed PrEP.[5]

The preventive services requirement in the Affordable Care Act ("ACA")[6] mandates insurance coverage of PrEP.[7] In 2010, when the ACA was enacted, it amended the Public Health Services Act[8] and added section 2713, which requires coverage without cost sharing of certain preventive health services recommended by a group of administrative agencies.[9] Codified as 42 U.S.C. § 300gg-13, the preventive services requirement ensures group and individual insurance plans cover essential preventative care like vaccines, cancer screenings, PrEP, and more without any cost-sharing requirements.[10] The preventive services

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1 *U.S. Statistics*, HIV.gov (Dec. 7, 2023), https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics [https://perma.cc/BM8Z-MKKF].

2 *See PrEP (Pre-Exposure Prophylaxis)*, Ctrs. for Disease Control & Prevention (June 3, 2022), https://www.cdc.gov/hiv/basics/prep.html [https://perma.cc/B93W-PT9W].

3 *PrEP Effectiveness*, Ctrs. for Disease Control & Prevention (June 6, 2022), https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html [https://perma.cc/4Z97-UA6D].

4 *PrEP Coverage*, Ctrs. for Disease Control & Prevention (June 21, 2023), https://www.cdc.gov/hiv/statistics/overview/in-us/prep-coverage.html [https://perma.cc/4J2A-MHTK].

5 *Id.*

6 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

7 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015).

8 42 U.S.C. §§ 201–300mm-64.

9 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

10 42 U.S.C. § 300gg-13(a); *see also Preventive Care*, U.S. Dep't Health & Hum. Servs. (Mar. 17, 2022), https://www.hhs.gov/healthcare/about-the-aca/preventive-care/index.html [https://perma.cc/UJM4-JATR]; *Preventive Care Benefits for Adults*, HealthCare.Gov (Sept. 23, 2023), https://www.healthcare.gov/preventive-care-adults/ [https://perma.cc/2JTM-49ES]; *Prevention of Acquisition of HIV: Preexposure Prophylaxis*, U.S. Preventative Servs. Task Force (Aug. 22, 2023), https://uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis [https://perma.cc/8A75-FVNZ].

requirement is no stranger to the Religious Freedom Restoration Act of 1993 ("RFRA")[11] as it also created the contraceptive mandate, a decision challenged on the basis of RFRA several times in the past decade.[12]

Insurance coverage is a strong indicator of whether an individual at risk uses PrEP, underscoring the need for mandating coverage in the fight to stop the spread of HIV.[13] Those at risk are much less likely to use PrEP when they are uninsured or PrEP is not covered by their plan.[14] In a 2017 study, insured individuals were four times as likely to use PrEP when compared with uninsured individuals.[15] This is understandable because PrEP is a very expensive drug, costing anywhere from $8,000 to $24,000 a year for someone without insurance.[16] Thus, lack of insurance coverage can be a significant barrier to a person at risk for HIV who wants to take PrEP, and the potential harm to an individual denied insurance coverage for PrEP is significant.[17]

A recent challenge to PrEP insurance coverage threatens to undermine the government's efforts in stopping the spread of HIV. The United States District Court for the Northern District of Texas recently held the preventive services requirement mandating insurance coverage for PrEP violated an employer's rights under RFRA.[18] The plaintiffs in *Braidwood Management Inc. v. Becerra*[19] are a group of individuals and businesses who seek to purchase health insurance that excludes the

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11 42 U.S.C. §§ 2000bb to 2000bb-4.

12 The three Supreme Court cases addressing RFRA challenges to the contraceptive mandate gradually expanded who may be allowed a religious exemption to the mandate. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 662–63 (2020); Zubik v. Burwell, 578 U.S. 403, 403 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014). The term "contraceptive mandate" stems from language in the federal statute mandating coverage of preventive health services, specifically "such additional preventive care and screenings" for women recommended by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13(a)(4).

13 *See* Emma Sophia Kay & Rogério M. Pinto, *Is Insurance a Barrier to HIV Preexposure Prophylaxis? Clarifying the Issue*, 110 Am. J. Pub. Health 61, 61–63 (2020); Rupa R. Patel, Leandro Mena, Amy Nunn, Timothy McBride, Laura C. Harrison, Catherine E. Oldenburg, Jingxia Liu, Kennenth H. Mayer & Philip A. Chan, *Impact of Insurance Coverage on Utilization of Pre-exposure Prophylaxis for HIV Prevention*, PLOS One, May 2017, at 1, 3.

14 *See* Kay & Pinto, *supra* note 13, at 63.

15 Patel et al., *supra* note 13, at 3.

16 Kay & Pinto, *supra* note 13, at 61; *see also* Sarah Varney, *HIV Preventive Care Is Supposed to Be Free in the US. So, Why are Some Patients Still Paying?*, KFF Health News (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/ [https://perma.cc/CH7A-K9KR].

17 Kay & Pinto, *supra* note 13, at 61.

18 *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022). The district court also ruled the agency recommending PrEP was unconstitutional because the agency's members were unconstitutionally appointed in violation of the Appointments Clause. *Id.* at 646. In the interest of fully addressing the implications of the RFRA challenge to PrEP, this Note will not address the plaintiff's Appointments Clause challenge.

19 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022).

coverage of PrEP because of their religious beliefs.[20] They claim PrEP "facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman" and that providing coverage for the drug would make them complicit in those behaviors.[21] When making a RFRA claim, the plaintiff must show the government "substantially burden[ed]" the exercise of their religion.[22] To overcome this substantial burden, the government in response must show a "compelling governmental interest," and that this interest is being achieved by the "least restrictive means."[23] In *Braidwood*, the court found the mandate requiring PrEP insurance coverage violated RFRA because the government did not show a compelling enough governmental interest to overcome the substantial burden on the plaintiff's religious beliefs.[24]

The challenge to PrEP in *Braidwood* is not entirely unexpected; more than eight years ago, LGBTQ advocates were raising concerns for the future of PrEP following growing exceptions to the contraceptive mandate.[25] In fact, the court in *Braidwood* compares PrEP to contraceptives to justify why the PrEP mandate violates RFRA.[26] Other courts are likely to continue relying on this analogy as contraceptives are the only other preventive service to be challenged by religious objectors. Because anyone can be infected with HIV, it is important that all Americans have the power to protect themselves from such a deadly disease without the interference of an employer and their religious or moral objections. Further, federal courts cannot rely on the contraceptive cases as precedent because of the large differences between PrEP and contraceptives as preventive health services.[27]

Part I of this Note discusses the history and function of the preventive services requirement and the PrEP mandate. Part II lays out the

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20 *Id.* at 633.

21 *Id.* at 652.

22 42 U.S.C. § 2000bb-1(a).

23 *Id.* § 2000bb-1(b).

24 *Braidwood*, 627 F. Supp. 3d at 653–54.

25 *See, e.g.*, Travis Gasper, Comment, *A Religious Right to Discriminate*: Hobby Lobby *and Religious Freedom as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 411–13 (2015); Kellan Baker, *LGBT Protections in Affordable Care Act Section 1557*, HEALTH AFFS. (June 6, 2016), https://www.healthaffairs.org/do/10.1377/forefront.20160606.055155/full/ [https://perma.cc/45QN-X2HD]. In the first Supreme Court case addressing RFRA challenges to the contraceptive mandate, Justice Ginsburg expressed concern for future complicity-based RFRA challenges and exemptions coming into conflict with LGBTQ rights. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 770 (2014) (Ginsburg, J., dissenting) (questioning how the Court in the future will "divine which religious beliefs are worthy of accommodation, and which are not" following the decision to exempt corporations from the contraceptive mandate and noting specific concerns for any person "'antagonistic to the Bible', including 'fornicators and homosexuals'" (citations omitted)).

26 *Braidwood*, 627 F. Supp. 3d at 653–54.

27 *See infra* Section IV.A.

legislative and judicial history of RFRA and explains the RFRA balancing test. Part III analyzes the RFRA challenges to the contraceptive mandate and discusses the difficulties courts have in determining "substantial burdens" under RFRA, especially when it comes to complicity claims like the objection to PrEP in *Braidwood*.[28] Lastly, Part IV proposes a new framework for courts to apply when addressing complicity claims against the preventive services mandate. Part IV also argues that PrEP is factually distinct from contraceptives, making the connection between the PrEP mandate and the alleged objectionable behavior in *Braidwood* insufficient to meet the substantial burden requirement; and that even if there were a substantial burden, the government's interest in protecting the public from contracting HIV overcomes that burden, such that the PrEP mandate survives.

I. Protecting Low-Cost Preventive Health Care

The PrEP mandate is a product of the preventive services requirement and requires insurance companies to provide PrEP to consumers with no cost sharing.[29] Insurance coverage for PrEP is a vital tool in stopping the spread of HIV because of the power of preventive medicine and the effectiveness of PrEP in preventing HIV infections.[30] The following Sections discuss the function of the preventive services requirement and the importance of PrEP when facing the severity of HIV and acquired immunodeficiency syndrome ("AIDS").

A. Explaining the ACA's Preventive Services Requirement

Under the Obama Administration, on March 23, 2010, Congress enacted the ACA, amending a section of the Public Health Service Act relating to group and individual insurance plans and markets.[31] The ACA's purpose was, and still is, "to increase the number of Americans covered by health insurance and decrease the cost of health care."[32] Congress hoped to achieve this goal by (1) increasing access to affordable health care for individuals close to the federal poverty line, (2) expanding Medicaid coverage, and (3) supporting medical care delivery methods that decreased the cost of care.[33] To increase access to affordable health care for Americans and improve health outcomes at

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28 *Braidwood*, 627 F. Supp. 3d at 652–53.

29 *See* 42 U.S.C. § 300gg-13(a).

30 *See infra* Section I.B.

31 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015).

32 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).

33 *See About the Affordable Care Act*, U.S. Dep't Health & Hum. Servs. (Mar. 17, 2022), https://www.hhs.gov/healthcare/about-the-aca/ [https://perma.cc/AN8Q-LVKD].

the lowest cost, the ACA specifically focuses on public health and preventive care initiatives.[34]

Preventive health care mainly consists of services utilized before the onset of illness, like immunizations and screenings for health problems such as cancer and sexually transmitted infections ("STIs").[35] The purpose of preventive care is to catch health problems early on when treatment is easiest and to reduce the risk of comorbidities and death.[36] With the enactment of the ACA, Congress recognized the historical underutilization of preventive health services in the American health care system and understood that increased insurance coverage and decreased cost of preventive services would increase consumer use.[37] Because it is cheaper to prevent the onset of disease rather than to treat it,[38] focusing on increasing coverage of preventive health services is also a cost-effective plan in protecting public health.

The preventive services requirement lowers the cost of preventive health care by mandating group and individual insurance plans cover preventive health services without any cost sharing requirements.[39] Enacted as section 2713 of the Public Health Service Act, the preventive services requirement did not list which services should have mandated coverage but delegated that decision to three different agencies.[40] These agencies make recommendations for which services require coverage, and these recommendations are reviewed by private insurance companies to ensure compliance with section 2713.[41] The Health Resources

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34 *See, e.g.*, Laura Anderko, Jason S. Roffenbender, Ron. Z. Goetzel, Francois Millard, Kevin Wildenhaus, Charles DeSantis & William Novelli, *Promoting Prevention Through the Affordable Care Act: Workplace Wellness*, 9 PREVENTING CHRONIC DISEASE 1 (2012); Nadia Chait & Sherry Glied, *Promoting Prevention Under the Affordable Care Act*, 39 ANN. REV. PUB. HEALTH 507, 513–14 (2018).

35 *See, e.g.*, Kate Sahnow, *Preventive Care 101: What, Why and How Much*, HEALTHPARTNERS, https://www.healthpartners.com/blog/preventive-care-101-what-why-and-how-much/ [https://perma.cc/EEM4-YXRU].

36 *See id.*

37 *See* 42 U.S.C. § 300gg-13(a); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,332 (July 14, 2015); Chait & Glied, *supra* note 34, at 514.

38 *See, e.g.*, Kimberly Amadeo, *How Preventive Care Lowers Health Care Costs*, THE BALANCE (Oct. 28, 2022), https://www.thebalancemoney.com/preventive-care-how-it-lowers-aca-costs-3306074 [https://perma.cc/AH6X-Y38Q].

39 *See* 42 U.S.C. § 300gg-13(a); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

40 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

41 *See Procedure Manual Appendix I. Congressional Mandate Establishing the U.S. Preventive Services Task Force*, U.S. PREVENTIVE SERVS. TASK FORCE (April 2019), https://uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/procedure-manual/procedure-manual-appendix-i [https://perma.cc/7QPN-S2SH]. Some experts critique the preventive services requirement's fragmented and vague recommendation system. The lack of clarity in how insurance companies are meant to implement the agency's recommendations is a specific

and Services Administration ("HRSA") is responsible for preventive care and screening recommendations for women and children, including contraceptives.[42] The Advisory Committee on Immunization Practices is responsible for recommending immunization for routine use in children, adolescents, and adults.[43] Lastly, the United States Preventive Services Task Force ("USPSTF") is responsible for most of the clinical preventive services covered under the statute, including screenings for cancer, heart disease, and other illnesses.[44] The USPSTF is also responsible for recommending HIV preventive screenings and the drug PrEP.[45]

The USPSTF makes its recommendations depending upon scientific research and benefit-risk analyses and, using a grading system, decides which health services should be given mandatory coverage.[46] The USPSTF is made up of sixteen nominated members who are all "nationally recognized experts in prevention, evidence-based medicine, and primary care."[47] The board of members use scientific and unbiased methodology to recommend preventive health services and assign them a letter grade—i.e., A, B, C, D, or I—depending on the net benefit and potential harms in providing the service.[48] Then, as explicitly stated by Congress in section 2713, insurance companies are required to provide services recommended with a grade of "A" or "B" by the USPSTF at

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concern because differences in implementing the recommendations cause disparate access to services across insurance plans. For more information, see, for example, Neil Rosacker, Richard Hughes IV & Reed Maxim, *Lack of Clarity on Preventive Services Recommendations May Create Access Barriers*, AVALERE (Dec. 20, 2018), https://avalere.com/insights/lack-of-clarity-on-preventive-services-recommendations-may-create-access-barriers [https://perma.cc/6J8M-VPYP].

42 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *see also Preventive Services Coverage*, CTRS FOR DISEASE CONTROL AND PREVENTION (May 5, 2020), https://www.cdc.gov/nchhstp/highqualitycare/preventiveservices/index.html [https://perma.cc/HRQ9-GKFL].

43 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *Preventive Services Coverage*, *supra* note 42.

44 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *Preventive Services Coverage*, *supra* note 42; Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, STATELINE (Aug. 9, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/08/09/lawsuit-could-end-free-preventive-health-checkups [https://perma.cc/K4QK-J3SX].

45 *See* U.S. Preventive Services Task Force, *Screening for HIV Infection*, J. AM. MED. ASS'N, June 11, 2019, at E1, E2 (explaining why USPTF made their recommendation for HIV screening); U.S. Preventive Services Task Force, *Preexposure Prophylaxis for the Prevention of HIV Infection*, 321 J. AM. MED. ASS'N 2203, 2203–06 (2019) [hereinafter PrEP Recommendation Statement] (explaining why USPTF made their recommendation for PrEP).

46 *See Methods and Processes*, U.S. PREVENTIVE SERVS. TASK FORCE (July 2023), https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes [https://perma.cc/9CXJ-TZUY]; *Grade Definitions*, U.S. PREVENTIVE SERVS. TASK FORCE (June 2018), https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/grade-definitions [https://perma.cc/LR8J-AAL7].

47 *See Our Members*, U.S. PREVENTIVE SERVS. TASK FORCE, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/current-members [https://perma.cc/VJ3Q-PT4R].

48 *See id.*; *Grade Definitions*, *supra* note 46.

no cost to the consumer.[49] A grade of less than "A" or "B" means the agency either discourages the service or suggests it only be used in particular patient circumstances because of the relatively small net benefit compared with the potential harms.[50]

B. The Importance of Mandatory Insurance Coverage for PrEP

In the effort to stop the spread of HIV, PrEP is an effective tool at preventing an individual from passing HIV to another person. Individuals can take PrEP as a daily pill by mouth, a bimonthly shot, or "on-demand" for moments when a person is most at risk of contracting HIV.[51] In a study of 74,541 participants, the HIV infection rate dropped seventy-four percent over a period of less than four years after PrEP was offered compared with before PrEP was offered.[52] In USPSTF's most recent recommendation statement for PrEP, the agency "found convincing evidence that PrEP is of substantial benefit in decreasing the risk of HIV infection in persons at high risk of HIV acquisition."[53] The agency recommended PrEP with a Grade A rating, meaning the agency is of "high certainty" that the net benefit of PrEP is substantial, thereby requiring that insurance companies cover PrEP.[54]

The population of patients on PrEP is diverse and not exclusively LGBTQ persons. This may come as a surprise to some because PrEP is mainly advertised to LGBTQ persons and a common perception that HIV is a disease that only affects LGBTQ people.[55] In reality, HIV is a disease that can affect anyone, and PrEP is used by people of all sexual orientations. In fact, heterosexual contact accounts for almost a quarter of all HIV diagnoses in the United States.[56] Individuals taking PrEP include people who are sexually active but want to stay HIV negative, people who have a sexual partner with HIV, and people who have had vaginal or anal sex in the last six months but are not consistently using condoms or were diagnosed with a sexually transmitted infection during

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49 *See* 42 U.S.C. § 300gg-13(a)(1); *id.* § 1395l(a)–(b).

50 *See Grade Definitions*, *supra* note 46.

51 *See What Is PrEP?*, Planned Parenthood, https://www.plannedparenthood.org/learn/stds-hiv-safer-sex/hiv-aids/prep [https://perma.cc/4S2Y-6R68].

52 Gus Cairns, *PrEP Prevents an Estimated Three-Quarters of HIV Infections in People at Risk in Large African Study*, NAM aidsmap (July 4, 2020), https://www.aidsmap.com/news/jul-2020/prep-prevents-estimated-three-quarters-hiv-infections-people-risk-large-african-study [https://perma.cc/CZ4P-N5DY].

53 PrEP Recommendation Statement, *supra* note 45, at 2210.

54 *See id.* at 2203–04.

55 *See* Brian Mastroianni, *HIV Prevention: Why Aren't More Heterosexual People Using PrEP?*, Healthline (Jan. 3, 2023), https://www.healthline.com/health-news/hiv-prevention-why-arent-more-heterosexual-people-using-prep [https://perma.cc/4R8L-6VXL].

56 *See Basic Statistics*, Ctrs. for Disease Control & Prevention (May 22, 2023), https://www.cdc.gov/hiv/basics/statistics.html [https://perma.cc/UP6R-EPCB].

those six months.[57] Anyone is able to begin taking PrEP after first testing negative for HIV and then obtaining a prescription from a doctor.[58]

When left untreated, an individual with HIV has an estimated eight to ten years to live.[59] The first few weeks of HIV infection manifests as flu-like symptoms which eventually progress to the final stage of HIV, AIDS.[60] The symptoms of AIDS are much more severe: rapid weight loss, body sores, memory loss, extreme tiredness, and more.[61] These symptoms start after the HIV virus kills enough white blood cells responsible for fighting off infection, eventually destroying the body's immune system.[62] Thankfully, there are effective treatments that increase the life expectancy of a person with HIV by preventing the onset of AIDS.[63]

Nonetheless, even with proper treatment, people with HIV have lower life expectancies and less years in good physical health than people who do not contract HIV.[64] In a recent study, HIV-positive people lived on average nine years less than their HIV-negative counterparts.[65] The study also found HIV-positive people live about sixteen fewer healthy years free from cancer, chronic lung disease, cardiovascular disease, chronic liver disease, or renal diseases when compared with uninfected adults.[66]

While the difference in overall life expectancy has decreased over the years, the difference in number of healthy years has stayed consistent since 2000.[67] The current improvements in HIV treatment have, therefore, not improved quality of life or reduced the risk of developing other serious illnesses for HIV-positive people. The CDC acknowledges the significant harm caused by a positive-HIV diagnosis

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57 *See Deciding to Take PrEP*, Ctrs. for Disease Control & Prevention (July 6, 2022), https://www.cdc.gov/hiv/basics/prep/prep-decision.html [https://perma.cc/U9S4-4BJU].

58 *See Starting and Stopping PrEP*, Ctrs. for Disease Control & Prevention (June 6, 2022), https://www.cdc.gov/hiv/basics/prep/starting-stopping-prep.html [https://perma.cc/VL2Z-3BBX].

59 Caroline A. Sabin, *Do People with HIV Infection Have a Normal Life Expectancy in the Era of Combination Antiretroviral Therapy?*, BMC Med., Nov. 27, 2013, at 1.

60 *See Symptoms of HIV*, HIV.gov (June 15, 2022), https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/symptoms-of-hiv [https://perma.cc/GD9S-MS3X].

61 *See id.*

62 *See HIV and AIDS and Mental Health*, Nat'l Inst. of Mental Health (Nov. 2022), https://www.nimh.nih.gov/health/topics/hiv-aids [https://perma.cc/ME79-7E4M].

63 *See Symptoms of HIV*, HIV.gov (June 15, 2022), https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/symptoms-of-hiv [https://perma.cc/624K-XBPN].

64 *See* Julia L. Marcus, Wendy A. Leyden, Stacey E. Alexeeff, Alexandra N. Anderson, Rulin C. Hechter, Haihong Hu, Jennifer O. Lam, William J. Towner, Qing Yuan, Michael A. Horberg & Michael J. Silverberg, *Comparison of Overall and Comorbidity-Free Life Expectancy Between Insured Adults With and Without HIV Infection, 2000–2016*, J. Am. Med. Ass'n Network Open, June 15, 2020, at 1, 8.

65 *Id.*

66 *Id.* at 5.

67 *See id.* at 4–5.

and so has focused its efforts on preventing the contraction of HIV in the first place.[68] Because PrEP prevents an HIV infection, the medicine has the effect of not only preventing serious illness and death but also ensuring as many healthy years as possible for people at risk of HIV.[69]

PrEP is important to the health care industry not only because it protects individuals at risk of contracting HIV, but the drug helps keep healthcare costs low. PrEP is significantly cost-effective because it prevents the even higher costs of treating HIV and the comorbidities that follow.[70] The government's federal budget for HIV totaled $34.8 billion in 2019 with $21.5 billion dedicated only to care and treatment programs under Medicare, Medicaid, and other government programs.[71] In a 2015 study, the estimated lifetime healthcare costs for an HIV-positive person are $326,500 compared with only $96,700 for HIV-negative individuals at high risk of infection.[72] For each HIV infection that is prevented, an estimated $229,800 to $338,400 is saved in medical costs.[73] By preventing HIV infections, the federal government saves hundreds of thousands of dollars that could be utilized elsewhere—instead of treating a preventable disease.

These cost savings are only realized, however, if PrEP is covered by insurance because individuals at risk are much less likely to use PrEP when they are uninsured or PrEP is not covered by their plan.[74] When compared with the uninsured, insured individuals were four times more likely to use PrEP in a 2017 study.[75] This is likely because PrEP costs $8,000 to $24,000 a year for someone without insurance.[76] Lack of insurance coverage is therefore a significant barrier to a person at risk of HIV and needing PrEP, and decreasing insurance coverage of PrEP

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68 *See HIV-Related Death Rate in U.S. Fell by Half from 2010 to 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 19, 2020), https://www.cdc.gov/nchhstp/newsroom/2020/hiv-related-death-rate-press-release.html [https://perma.cc/HQ8F-SYV5].

69 *See supra* notes 64–66 and accompanying text.

70 *See generally HIV Cost-effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/programresources/guidance/costeffectiveness/index.html [https://perma.cc/3GC5-A7VP] (illustrating the significant cost-effective benefits in preventing HIV infections rather than treating HIV).

71 *U.S. Federal Funding for HIV/AIDS: Trends over Time*, KAISER FAM. FOUND. (Mar. 5, 2019), https://www.kff.org/hivaids/fact-sheet/u-s-federal-funding-for-hivaids-trends-over-time [https://perma.cc/AMD9-UQZB].

72 Bruce R. Schackman, John A. Fleishman, Amanda E. Su, Bethany K. Berkowitz, Richard D. Moore, Rochelle P. Walensky, Jessica E. Becker, Cindy Voss, David Paltiel, Milton C. Weinstein, Kenneth A. Freedberg, Kelly A. Gebo & Elena Losina, *The Lifetime Medical Cost Savings from Preventing HIV in the United States*, 53 MED. CARE 293, 297 (2015).

73 *Id.* at 297–98.

74 *See* Kay & Pinto, *supra* note 13, at 63; Patel et al., *supra* note 13, at 3.

75 Patel et al., *supra* note 13, at 3.

76 *See* Kay & Pinto, *supra* note 13, at 61; Sarah Varney, *HIV Preventive Care Is Supposed to Be Free in the US. So, Why Are Some Patients Still Paying?*, KHN (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/ [https://perma.cc/XCK3-N6BF].

means increased medical costs as more individuals are forced to treat an HIV-positive diagnosis because they could not afford to prevent it.

The plaintiffs in *Braidwood* alleged the PrEP mandate violates RFRA by requiring they buy or provide insurance which covers PrEP—a drug that in their eyes facilitates morally objectionable behavior.[77] The next Part outlines the creation and purpose of RFRA and explains how a court addresses a RFRA challenge.

II. The Creation of RFRA and Understanding its Statutory Balancing Test

The road to enacting RFRA began with the 1990 Supreme Court case, *Employment Division v. Smith*.[78] In the case, a private drug rehabilitation organization fired the respondents because, during a religious ceremony for the Native American Church, they ingested peyote—an illegal drug under Oregon law—as a sacrament.[79] Respondents then applied to the Employment Division for unemployment compensation but were denied as ineligible because respondents were fired for "work-related 'misconduct.'"[80] Respondents sued the Employment Division for denying their benefits and argued for a religious exemption from the criminal law against ingesting peyote.[81] But the Court upheld the Employment Division's denial of the respondents' benefits because the respondents violated Oregon's law prohibiting the use of peyote, and the Constitution does not require religious exemptions for "neutral, generally applicable" laws.[82]

The Court also held that the government is not required to show a "compelling governmental interest" in instances involving generally applicable laws.[83] Before *Smith*, in cases where a plaintiff argued a government action unduly burdened the exercise of their religion, the Court balanced the burden on the religious person against the government's compelling interest behind their action.[84] This balancing test is called the *Sherbert* test, named after the case that developed it, *Sherbert v. Verner*.[85] According to the Court, if the government's compelling interest were to be considered in *Smith* and a religious exception granted,

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77 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 633 (N.D. Tex. 2022).

78 494 U.S. 872 (1990); *see* 42 U.S.C. § 2000bb-1(a).

79 *Smith*, 494 U.S. at 874.

80 *Id.*

81 *See id.* at 874–75.

82 *Id.* at 880, 884–85, 890.

83 *Id.* at 883, 885–86.

84 *Id.* at 883.

85 374 U.S. 398 (1963); *see* Gregory D. Wellons, Employment Division, Department of Human Resources v. Smith*: The Melting of* Sherbert *Means a Chilling Effect on Religion*, 26 U.S.F. L. Rev. 149, 150 (1991).

the result would be a "constitutional anomaly" as the respondents would be carving out "a private right to ignore generally applicable laws."[86]

The Supreme Court's decision to minimize the use of the compelling governmental interest test in religious freedom cases caused distress in Congress.[87] Three years later, Congress enacted RFRA by a unanimous vote from the House and a nearly unanimous vote in the Senate.[88] With RFRA, Congress restored the *Sherbert* test used in religious objection claims pre-*Smith* and required the Supreme Court balance the government's compelling interest against the burden on the religious plaintiff.[89] RFRA provides an opportunity for religious persons to seek relief when a law or government action "substantially burden[s]" the practice of their religion.[90] The statute states that the "[g]overnment shall not substantially burden a person's exercise of religion" except in instances where the government shows that the specific burden on that person is (1) "in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest."[91]

The RFRA balancing test first requires the plaintiff to show the government action at issue substantially burdens their free exercise of religion.[92] The court must determine if there is an actual burden on the plaintiff claiming relief.[93] For instance, in *Sherbert*, the Court held that South Carolina's Unemployment Compensation Act[94] posed a substantial burden on the plaintiff because the government forced the plaintiff to choose between observing the Sabbath, a day of rest for her faith, and forfeiting unemployment benefits or, alternatively, "abandoning one of the precepts of her religion in order to accept work."[95] Similarly, in *Wisconsin v. Yoder*,[96] the Court found Amish respondents were sufficiently burdened by the compulsory school attendance laws for children up to age sixteen because the state law would force the

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86 *Smith*, 494 U.S. at 886.

87 *See Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 102d Cong. 121 (1992) (statement of Rep. Stephen J. Solarz).

88 *H.R.1308 - Religious Freedom Restoration Act of 1993*, CONG., https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions [https://perma.cc/KT8N-QU7N]. Only three senators—two democrats and one republican—voted nay on RFRA. *Roll Call Vote 103rd Congress - 1st Session*, SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00331.htm [https://perma.cc/CEE4-4LPX].

89 *See* 42 U.S.C. § 2000bb-1(a)–(b).

90 *Id.* § 2000bb-1(a).

91 *Id.* § 2000bb-1(b).

92 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406–09 (1963).

93 *See id.* at 399 n.1, 403.

94 S.C. CODE ANN. §§ 68-1 to 68-404 (1952).

95 *Sherbert*, 374 at 404.

96 406 U.S. 205 (1972).

respondents to "perform acts undeniably at odds with fundamental tenets of their religious beliefs" and would undermine "the Amish community and religious practice."[97] If the court finds there is a substantial burden on the plaintiff, the government then must show (1) that there is a compelling governmental interest that justifies the burden on the plaintiff, and (2) that the governmental interest cannot be achieved by any other less restrictive means.[98] According to *Sherbert*, the government cannot rely on hypotheticals in showing a compelling interest but must rely on a real and present danger to that interest.[99]

III. Expanding Exceptions and the Issues with Adjudicating Substantial Burden

To understand the court's analysis of the RFRA challenge to PrEP in *Braidwood*, it is necessary to discuss the first challenge to the preventive services requirement: the contraceptive mandate.[100] The contraceptive mandate challenge uniquely illustrates the difficulties in adjudicating a substantial burden for a complicity claim that implicates the health care choices of others. The following Sections discuss the contraceptive mandate cases, the challenges of adjudicating the substantial burden prong under RFRA, and the current case with the challenge to PrEP.

A. The First Strike Against Section 2713: Religious Exceptions to the Contraceptive Mandate

The "contraceptive mandate" is the provision of the preventive services requirement mandating insurance companies to provide coverage for "additional preventive care and screenings" specific to women.[101] Contraceptives are included in the "additional preventive care and screenings" category because they are recommended by HRSA, the agency that specializes in women's health and gender-specific issues.[102] HRSA's reasoning for mandating coverage for the "full range of contraceptives" is to "prevent unintended pregnancies and improve birth outcomes."[103]

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97 *Id.* at 218.

98 *See Sherbert*, 374 U.S. at 406–07.

99 *See id.* at 406; *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945).

100 *See* 42 U.S.C. § 300gg-13.

101 *Id.* § 300gg-13(a)(4).

102 *Id.*; *Women's Preventive Services Guidelines*, Health Res. & Services Admin. (Dec. 2022), https://www.hrsa.gov/womens-guidelines [https://perma.cc/NP6U-HTQJ]; *see also About the Office of Women's Health*, Health Res. & Services Admin. (June 2022), https://www.hrsa.gov/office-womens-health/about-us [https://perma.cc/4BDK-3MMT].

103 *Women's Preventive Services Guidelines*, *supra* note 102.

Following the enactment of the preventive services requirement, the Departments of Health and Human Services, Labor, and the Treasury ("Departments") published interim final rules implementing section 2713.[104] In response to the rules, several commenters raised concerns regarding the lack of a religious exemption for individuals and employers whose religious beliefs would be violated by the contraceptive mandate.[105] Several commentators claimed that the mandate violated the religious freedom of employers by requiring that they cover services adverse to the "tenets" of their religion.[106]

In response, the Departments amended the interim final rules to allow a religious exemption for the contraceptive mandate, but only for certain religious employers.[107] The Departments' exemption only applied to houses of worship and nonprofit organizations that primarily employ and serve people who "share its religious tenets."[108] This exemption was later clarified and simplified by requiring eligible religious employers to self-certify as an organization needing an exemption from the contraceptive mandate.[109] The self-certification form notified the insurance company that the employer would not be paying for contraceptive coverage for their employees.[110] After receiving the notice, the insurance company would automatically enroll the employees in a separate plan that covers contraceptives with no cost-sharing.[111] In the Departments' words, the self-certification requirement furthered "government interests in safeguarding public health and ensuring that women have equal access to health care" by providing women access to contraceptives without harming religious organizations and their religious beliefs.[112]

The three Supreme Court cases addressing the challenges to the contraceptive mandate focused on (1) the limitations on who was eligible for a religious exemption, and (2) the self-certification accommodation for religious employers.[113] In 2014, *Burwell v. Hobby Lobby*[114]

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104 *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).

105 *See* 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).

106 *Id.*

107 *Id.*

108 *Id.*

109 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,875 (July 2, 2013).

110 *See id.*

111 *See id.*

112 *Id.* at 39,872.

113 *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657 (2020); Zubik v. Burwell, 578 U.S. 403 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

114 573 U.S. 682 (2014).

was the first RFRA challenge to the contraceptive mandate and asked whether closely held corporations could seek a religious exemption from the contraceptive mandate.[115] Plaintiffs in the case, three closely held corporations, sought a religious exemption from the contraceptive mandate because of the business owners' religious objections to abortion and their belief that several forms of contraceptives were abortifacients.[116] The majority held that because the mandate imposes an enormous sum in fees for noncompliance and the plaintiffs sincerely believe that providing these contraceptives violates their religious beliefs, the mandate imposes a substantial burden on those beliefs, and it is not for the Court to "say that their religious beliefs are mistaken or insubstantial."[117]

For the sake of the argument, the Court conceded that the government has a compelling governmental interest in ensuring that all women have access to contraceptives without cost-sharing.[118] The Court then turned to whether the contraceptive mandate was the least restrictive means of furthering that interest. The majority held that the mandate failed the least restrictive means test because the government already provides accommodation for nonprofit organizations with religious objections, and the self-certification accommodation can simply be expanded to include closely held corporations.[119] The Court stated that such an approach would not "impinge on the plaintiffs' religious belief[s]" and serve the government's interests "equally well."[120]

The cases that followed *Hobby Lobby*, *Zubik v. Burwell*[121] and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[122] addressed religious objections to the Departments' self-certification requirement. In *Zubik*, the Supreme Court consolidated several cases and considered whether the required self-certification notice informing an insurance plan of an employer's religious objection to providing

115 *See Burwell*, 573 U.S. at 688–91.

116 *See id.* at 691, 700–04. The plaintiffs in the case were the founders of the three closely held corporations: Conestoga Wood Specialties, Hobby Lobby, and Mardel. *See id.*

117 *Id.* at 725–26.

118 *See id.* at 728.

119 *See id.* at 728–31.

120 *Id.* at 731. The majority also proposed the idea of the government "assum[ing] the cost of providing" the contraceptives religious objectors have issue with to the women employed by an exempt employer. *Id.* at 728. But this suggestion minimizes the potential administrative and financial costs of such a new program and how those costs may be imposed on the women attempting to access contraceptives. *See id.* at 728–30. In her dissent, Justice Ginsburg discussed exactly this problem, noting how female employees may be subject to tax credits or other burdens if employers refuse to pay for contraceptives. *Id.* at 767–68 (Ginsburg, J., dissenting).

121 578 U.S. 403 (2016).

122 591 U.S. 657 (2020).

contraceptives substantially burdens the exercise of a person's religion.[123] Without expressing any views on the merits, the Court remanded the cases so that the respective courts could hear further arguments by the parties and decide on an approach that respects the petitioners' religious rights while ensuring that the women impacted by petitioners' beliefs "receive full and equal health coverage, including contraceptive coverage."[124]

Then, *Little Sisters* picked up where *Zubik* left off after the Departments could find no alternative to the self-certification accommodation.[125] Because the Departments could not see any other less restrictive means to facilitate exemptions besides the self-certification requirement, they decided to expand exemptions to not only religious objectors but moral objectors to appease the plaintiffs in *Zubik*.[126] Following the Departments' decision to expand exemptions, the Commonwealth of Pennsylvania sued the Departments arguing the new rules were "procedurally and substantively invalid" under the Administrative Procedure Act.[127] The Court upheld the Departments' decision as procedurally valid and stated that the Departments had the authority to make such a decision.[128]

The holdings of *Zubik* and *Little Sisters* show where the law is today on religious exemptions to a preventive health service, and if these cases are used by courts to justify an exemption to the PrEP mandate, the result would likely mirror the expanding exemptions to contraceptives. Additionally, since the Court's adjudication of the complicity claim in *Hobby Lobby*, the adjudication of substantial burden under the RFRA statutory test has become unpredictable. The next Section discusses the difficulties courts have when addressing whether a person's religious practice is actually "substantially burdened."

B. Flaws in Adjudicating Substantial Burden with Complicity Claims

Plaintiffs bringing complicity claims emphasize the issues courts have adjudicating substantial burden under RFRA. Complicity claims are unique in that they condemn the conduct of a third party and depend

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123 *See Zubik*, 578 U.S. at 405–07.

124 *Id.* at 408–09 (citation omitted).

125 *See Little Sisters*, 591 U.S. at 670–72; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,603 (Nov. 15, 2018).

126 *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,603 (Nov. 15, 2018).

127 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.); *Little Sisters*, 140 S. Ct. at 2378.

128 *See Little Sisters*, 591 U.S. at 682–86.

on the claimant's relationship to that third-party actor.[129] Professors Douglas Nejaime and Reva Siegel describe these claims as "faith claims about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful."[130] For instance, the case in *Hobby Lobby* centered on a complicity claim that by providing coverage for certain contraceptives, the plaintiffs would be complicit in abortions allegedly caused by the contraceptives.[131] But because of the nature of complicity claims, the actual burden on the plaintiffs rests on whether the third party ever does the perceived-immoral act the plaintiff objects to.[132] These complicity claims are thus controversial for courts in determining if a substantial burden exists for the purposes of RFRA.

Judges, in their adjudication of "substantial burden," typically consider two factors: (1) the *sincerity* of a person's religious belief and (2) the secular costs (i.e., monetary fines) on the religious objector.[133] Because sincerity is virtually never questioned by the court absent real evidence the claim is fraudulent, claimants are taken for their word that their beliefs are sincere.[134] Secular costs, however, apply to all citizens, regardless of whether a person chooses to not comply because of a religious or a secular reason. For example, the fine for not complying with the contraceptive mandate would still apply to an employer who chooses not to cover contraceptives because she believes contraceptives are dangerous to a woman's health and wants to protect her employees from them. The secular cost therefore burdens all individuals who choose not to comply with a law and is not limited to religious persons, so the fine tells the courts arguably nothing about the substantial *religious* burden on the claimant.[135] In the words of Professor Frederick Mark Gedicks, "If judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant's mere say-so."[136] With complicity claims, courts continue to look at sincerity and secular costs in adjudicating substantial burden, but they do not deeply analyze how

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129 Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015).

130 *Id.*

131 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); *see also* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897, 1911–13 (2015).

132 *See* Nejaime & Siegel, *supra* note 129, at 2519.

133 *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96–97 (2017).

134 *See id.* at 110 (noting that "[s]ince the development of religious liberty jurisprudence in the early 1960s, the government has conceded claimant sincerity in virtually every religious exemption case to reach the Supreme Court").

135 *See id.* at 105, 114.

136 *Id.* at 98.

claimants are complicit in the religiously objectionable behavior. The substantial burden instead relies on the secular consequences of the plaintiff not complying with the law rather than the religious burdens on the plaintiff for complying with the law.[137]

The focus on secular costs in evaluating a religious claim ignores what makes a religious claim unique and worthy of protection: its religiosity. A religious claim is protected by the courts while a challenge to a law for secular beliefs is not because religious exercise is protected by the Constitution.[138] Thus, more is needed than just an evaluation of the secular costs to show why these religious claims require a higher bar of protection, and because complicity claims hinge on third parties participating in religiously objectionable behavior, courts need to analyze the nature of the religious plaintiff's complicity to determine if there is a substantial burden.

Unfortunately, for reasons unnamed by the courts but likely attributed to the religious question doctrine, courts irresponsibly shy away from analyzing whether there is a rational connection between the complicit behavior and the third-party action. The religious question doctrine—a doctrine that precludes courts from deciding religious questions—and the Establishment Clause are the biggest reasons for courts' reluctance in evaluating religious burdens.[139] Together these legal constraints restrain courts from adjudicating issues of religious doctrine or questioning the reasonableness of a person's religious belief.[140] Because judges cannot be experts in every person's religion, the religious question doctrine and the Establishment Clause keep judges from inadvertently favoring a certain belief or religion over another and inadvertently discriminating against religions.[141] Therefore, judges tend to lean on secular costs in measuring a substantial burden out of fear of drawing a conclusion on the person's religion.

The consideration of only secular costs and failure to analyze religious costs also stems from a misinterpretation of dicta. In *Hobby Lobby*, the majority cited to *Thomas v. Review Board of Indiana Employment Division*[142] in holding that the Court's "narrow function" in analyzing the substantial burden on the claimant is to determine whether the plaintiff's claimed restriction of their religious exercise

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137 *See* Sepinwall, *supra* note 131, at 1914.

138 U.S. CONST. amend. I.

139 *See* 42 U.S.C. § 2000bb-4; Gedicks, *supra* note 133, at 97; Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion under RFRA and the First Amendment*, 97 WASH. U. L. REV. 1755, 1775–76 (2020).

140 *See* 42 U.S.C. § 2000bb-4; Gedicks, *supra* note 133, at 97; Girgis, *supra* note 139, at 1775–76.

141 *See* Girgis, *supra* note 139, at 1776.

142 450 U.S. 707 (1981).

reflects an "honest conviction."[143] But claiming that the Court has a "narrow function" misinterprets the *Thomas* Court and leads the Court to accept complicity claims as fulfilling the "substantially burden" prong of RFRA without partaking in thorough analysis of the religious burdens on the plaintiff.[144]

In *Thomas*, the Court merely meant that judges cannot interrogate or dissect a plaintiff who was struggling with their religious beliefs.[145] Instead, the Court must take the plaintiff's religious beliefs as they are given, as it is an "honest conviction" by the plaintiff.[146] Although courts are not allowed to dissect religious doctrine nor a person's struggles with their religion, they are allowed to evaluate what religious burdens and costs are put on a plaintiff in having to adhere to the government's laws and actions. And in the case of complicity claims where the religious objection lives inside the internal conscience of the plaintiff, it is more difficult but even more important, considering the burden these religious exemptions have on third parties, to evaluate the actual burdens on the plaintiff.[147]

Hobby Lobby held that the secular penalty of not complying with the contraceptive mandate amounts to a substantial burden on a religious person, but the Court did not address what burdens are *not* sufficient to succeed under an RFRA claim. Not all complicity claims are created equal and not all complicity claims amount to a substantial burden in the Court's eyes.[148] In fact, RFRA challenges often dismissed by courts are religious objections to paying taxes or paying for social welfare programs like Social Security.[149] In *United States v. Lee*,[150] an Amish employer refused to pay social security taxes because the Amish religion "prohibits the acceptance of social security benefits" and "bars

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143 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 686, 725 (2014) (quoting *Thomas*, 450 U.S. at 716); *see also* Ira C. Lupu & Robert W. Tuttle, Response, Little Sisters of the Poor v. Pennsylvania*: The Misuse of Complicity*, GEO. WASH. L. REV. ON THE DOCKET (July 19, 2020), https://www.gwlr.org/little-sisters-of-the-poor-v-pennsylvania-the-misuse-of-complicity/ [https://perma.cc/YP5G-9R25].

144 *See* Lupu & Tuttle, *supra* note 143.

145 *Thomas*, 450 U.S. at 715*; see also* William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71, 114–15 (2015).

146 *See Thomas*, 450 U.S. at 716.

147 *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 244–45 (2021); *see also* Lupu & Tuttle, *supra* note 143.

148 *See* United States v. Lee, 455 U.S. 252, 257 (1982).

149 *See The Truth About Frivolous Tax Arguments—Section I (D to E)*, INTERNAL REVENUE SERV. (Mar. 2022), https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-section-i-d-to-e [https://perma.cc/A4WZ-JRT9]; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 359 (2014).

150 United States v. Lee, 455 U.S. 252 (1982).

all contributions by Amish to the social security system."[151] The Supreme Court held that while it is necessary for courts to be sensitive to the constitutional liberties afforded by the First Amendment,

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[152]

The Court is therefore willing to draw lines regarding what complicity claims can succeed, but it is still up for debate what exactly pushes a complicity claim into viable territory. Complicity claims exist on a spectrum, and the Court recognizes this by upholding some claims while dismissing others. When addressing complicity claims against the preventive services mandate, courts should recognize the "commercial" sphere employers voluntarily enter and the burdens third parties must bear when employers deny them access to life-protecting medical services. Such a threat facing third parties requires a clear bar that complicity-based claimants must meet to show they are substantially burdened under RFRA. The final Part of this Note presents a new framework for the Court to apply when determining whether a complicity claim against preventive health services meets the bar of a substantial burden under RFRA.

C. Braidwood Management Inc. v. Becerra*: The Case Against the Mandate for PrEP*

In the case of *Braidwood Management Inc. v. Becerra*, the plaintiffs are six individuals and two businesses seeking to obtain or provide health insurance that does not cover PrEP.[153] The plaintiffs argued the PrEP mandate violates RFRA because PrEP facilitates "homosexual behavior, intravenous drug use," and sex outside of heterosexual marriage, and that by providing coverage for PrEP, they would be complicit in those behaviors.[154] The court initially decided on the RFRA claim for only Braidwood Management Inc. ("Braidwood"), a Christian for-profit corporation that self-insures its seventy employees, because the

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151 *Id.* at 255.

152 *Id.* at 261; *see also* Tayla Seidman, *The Strictest Scrutiny: How the* Hobby Lobby *Court's Interpretation of the "Least Restrictive Means" Puts Federal Laws in Jeopardy*, 14 Cardozo Pub. L. Pol'y & Ethics J. 133, 145–46 (2015).

153 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022).

154 *Id.* at 633–34, 652.

business presented the "easiest case for standing" and found the PrEP mandate did violate RFRA.[155]

First, the court held that Braidwood was substantially burdened by the PrEP mandate because of the sincerity of its belief and the substantial penalty Braidwood would face by not complying with the law.[156] Second, the court held that the government did not show that the PrEP mandate furthers a compelling governmental interest.[157] The court rejected the government's argument that reducing the spread of HIV is a compelling governmental interest because, in the court's view, the government framed the interest too broadly.[158] Third, the court held that even if a compelling governmental interest had been shown, the PrEP mandate is not the least restrictive means of achieving that interest.[159] The court stated the government did not bring sufficient evidence that the PrEP mandate is the least restrictive means of reducing the spread of HIV because the government did not prove why a religious exemption to the PrEP mandate or other similar alternative is not feasible.[160]

The importance of this case cannot be understated as its reach goes beyond PrEP insurance coverage, which alone is incredibly important to those at risk of HIV. If on later appeal the Supreme Court agrees with the district court and decides to expand the contraceptive mandate exceptions to include PrEP, this would be an incredible setback in the effort to stop the spread of HIV.[161] Such a decision will also show the public that employers will likely receive an exemption when attacking other preventative services on a religious basis.

IV. A Fresh Analysis of the RFRA Challenge to PrEP

This Part proposes a new framework for courts to apply when determining whether a plaintiff bringing a complicity claim against the preventive services requirement is sufficiently burdened under RFRA. This Part also argues that providing insurance coverage for PrEP is not a substantial enough burden on the *Braidwood* plaintiffs because of the realities of PrEP and HIV, but even if the Supreme Court does find a

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155 *Id.* at 634, 636, 655. The court later determined the standing of the other plaintiffs after further briefing from both parties and held the other parties did have standing and were entitled to relief. *See* Braidwood Mgmt. Inc. v. Becerra, 666 F. Supp. 3d 613, 621–25 (N.D. Tex. 2023). For the purpose of simplicity, this Note will only focus on the analysis of Braidwood's claim.

156 *Braidwood*, 627 F. Supp. 3d at 652–53.

157 *Id.* at 653.

158 *Id.*

159 *Id.* at 654.

160 *Id.* at 654–55.

161 *See, e.g.*, Richard Hughes IV, Nija Chappel & William Walters, *Will the US Supreme Court Strike Down the ACA's Preventive Services Coverage Requirement?*, Health Affs. (Sept. 23, 2022), https://www.healthaffairs.org/content/forefront/us-supreme-court-strike-down-aca-s-preventive-services-coverage-requirement [https://perma.cc/K8VU-H4R4].

substantial burden, the government's interest in not allowing a religious exemption to the PrEP mandate is compelling and achieved through the least restrictive means.

A. Substantial Burden: A New Framework for RFRA Challenges to Preventive Health Services

As the Court is willing to draw lines for what complicity claims meet the bar for substantial burden, a clear line needs to be drawn for what complicity claims against the preventive services requirement amount to a substantial burden on the plaintiff. The proposed framework evaluates the facts of the health service related to the complicity claim and the nature of the intervening act by the third-party participating in the alleged objectionable behavior.

Because complicity claims affect the rights of a third party, courts need to consider whether the plaintiffs' complicity claims are objectively inaccurate and thus cannot warrant interference with a person's freedom to make personal healthcare decisions. Courts cannot and should not contest the feelings and beliefs of a plaintiff, but courts have the power to call plaintiffs out when their claim of complicity does not factually line up. Courts should determine whether the health service challenged *actually causes or facilitates* the outcome or behavior that plaintiffs religiously object to. The framework requires factual analysis from the courts—not a questioning of the plaintiffs' religious beliefs.[162] Such analysis would be one factor in determining if a complicity claim meets the bar of "substantial burden."

Courts should also consider whether the third-party action triggering the plaintiff's complicity is too attenuated to the plaintiff's legally required action to make them *legally* complicit. Although a plaintiff may sincerely believe themselves complicit in an objectionable act, this may not mean they are legally complicit and entitled to a religious exemption.[163] If the third party's choice or act breaks complicity for the employer's actions, then the plaintiff is not legally complicit and cannot demand a religious exemption.

In applying the third-party intervening act analysis to contraceptives, plaintiffs could argue they are legally complicit in providing abortions because of the automatic function of contraceptives, so the complicity begins with providing the service for their employees to use. The complicity is meaningfully tied to the employer providing that service because the contraceptives could theoretically perform the objectionable act without any choice being made by the third party. In contrast, if an employer provides PrEP, an employee may use this service

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162 Gedicks, *supra* note 133, at 131–35.

163 *Id.*

for any reason, including a reason the plaintiff does not find religiously objectionable. The complicity thus depends on why the employee is taking PrEP and whether that reason is religiously objected to by the plaintiffs. Therefore, complicity does not depend on the plaintiff's action or even the functioning of PrEP itself but the third party's reasoning for taking PrEP which breaks legal complicity and would not warrant an exception to the PrEP mandate.

When looking at whether PrEP factually facilitates homosexual and other alleged morally objectionable behavior, Braidwood fails to show sufficient evidence of legal complicity. This is because the behavior that the plaintiff has moral and religious objections to is not related to the goal or purpose of a drug like PrEP; PrEP is a drug that protects people's lives by preventing HIV infection. This is unlike opposing the use of contraceptives, whose primary purpose is a form of birth control and to prevent pregnancy.[164] There is significant controversy surrounding whether the four contraceptives at issue in *Hobby Lobby* actually facilitate or cause abortions because of disagreement over whether these contraceptives prevent pregnancy before or after an egg is fertilized.[165] This controversy is, however, absent from the use and function of PrEP. PrEP does not inherently achieve the activities that the plaintiffs in *Braidwood* have religious issue with because PrEP is used by all kinds of people for the single reason of preventing an HIV infection. Even though Braidwood does face a "substantial monetary penalty" by not following the PrEP mandate and claims the PrEP mandate violates their religious beliefs,[166] this alone should not make Braidwood legally complicit because PrEP factually does not facilitate the purported morally objectionable behavior.

Because there are several reasons why people use PrEP that are not objected to by Braidwood, the third-party's reason for using PrEP is

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164 *See* Rachel K. Jones, Guttmacher Inst., Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills 3 (2011) (finding eighty-six percent of current contraceptive users do so with the purpose of preventing pregnancy).

165 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014). The issue of whether these contraceptives work as abortifacients as the plaintiffs in *Hobby Lobby* believe hinges on two issues: (1) whether pregnancy begins at fertilization or implantation, and (2) whether these contraceptives function to prevent fertilization or implantation. *See* June Ng, *Why There's Confusion over Whether Plan B, Ella, and IUDs Cause Abortions*, Slate (Aug. 1, 2022, 4:28 PM), https://slate.com/technology/2022/08/iuds-plan-b-ella-fertilization-not-abortifacients.html [https://perma.cc/Y6RD-EJRW]. Doctors disagree over whether certain contraceptives could cause an abortion, and misconceptions about contraceptives and differing ideas about the stages of pregnancy further plague this issue. *See* Laura E.T. Swan, Abigail S. Cutler, Madison Lands, Nicholas B. Schmuhl & Jenny A. Higgins, *Physician Beliefs About Contraceptive Methods as Abortifacients*, 228 Am. J. Obstetrics & Gynecology 237, 237 (2023). I will not attempt to solve this controversy in this Note, but I recommend readers do their own research and think critically about how recent medical research squares with the Court's reasoning in *Hobby Lobby*.

166 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 652 (N.D. Tex. 2022).

an intervening act that negates Braidwood's legal complicity. Although people who are LGBTQ, or use intravenous drugs, or have sex outside of marriage can and may take PrEP, PrEP is also a lifesaving medicine for people outside of these groups. Furthermore, PrEP does not facilitate the participation in these behaviors, but simply protects people from contracting HIV in risky situations. Someone who identifies as LGBTQ, for instance, may choose not to take PrEP because they openly communicate with all of their sexual partners and test regularly for HIV. In a different hypothetical, if a woman identifies as heterosexual and is married to a man whose HIV-positive status predates their relationship, she may choose to use PrEP to prevent contracting HIV while having sexual contact with her husband. This behavior does not fall into the category of behaviors that the plaintiffs in *Braidwood* object to, but PrEP is necessary to protect this couple nonetheless. Situations like this are not rare or unique as heterosexual sexual contact accounts for twenty-two percent of all HIV diagnoses.[167]

The court in *Braidwood* follows the framework of *Hobby Lobby*'s analysis in holding the plaintiff is substantially burdened by the PrEP mandate.[168] The analysis starts and ends with the facts that the ACA requires Braidwood to provide coverage for PrEP or face substantial financial penalty and Braidwood sincerely believes that providing coverage for PrEP violates its religious beliefs.[169] The court relied almost entirely on *Hobby Lobby* and *Little Sisters* in its analysis and inappropriately analogized PrEP to contraceptives.[170] This substantial burden analysis is not adequate in determining whether Braidwood is actually substantially burdened under RFRA, and it inappropriately equates PrEP and contraceptives when the two are vastly different. With the alternative framework, the determination of a sufficient substantial burden on Braidwood turns on a legal analysis of Braidwood's complicity and demonstrates the lack of evidence that Braidwood's exercise of religion is sufficiently burdened by the PrEP mandate.

B. The Government's Defense: Protecting the Public from HIV

If the Court disagrees with this Note's analysis of the insufficient burden on Braidwood, the government then bears the responsibility of showing a compelling interest achieved through the least restrictive means to justify restricting a person's constitutional liberties.[171] With the challenge to PrEP, the government has a compelling interest in not

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167 *Basic Statistics*, *supra* note 56.

168 627 F. Supp. 3d at 637.

169 *See id.*

170 *See id.* at 654.

171 42 U.S.C. § 2000bb-1(b).

allowing a religious exemption for the PrEP mandate and so providing access to PrEP for all people.

1. Compelling Interest

The government's interest in providing access to PrEP is not limited to only certain communities but ensures the ability of *all* persons to protect their life and health even if this infringes on an employer's religious beliefs. Everyone should have the power to protect themselves from a potentially deadly disease without the interference of an employer and their religious or moral objections. Thus, the government's interest in not allowing a religious exemption to the PrEP mandate is compelling because anyone can be infected with HIV. This is true even though prejudice and stigma label HIV as a disease affecting only certain communities, like LGBTQ persons. Additionally, significant benefits are attached to insurance coverage of PrEP. These benefits stem from the severity of HIV, the effectiveness of PrEP at preventing HIV, and the higher utilization rates of PrEP when insurance covers the drug.[172]

When someone is diagnosed with HIV and is not treated, the person has eight to ten years to live, at which point AIDS eats away at the body and fatally destroys the immune system.[173] There are now drugs to treat HIV and prevent the onset of AIDS, increasing the life expectancy of someone with HIV, but this does not change the fact that HIV-positive individuals are sicker than their HIV-negative counterparts.[174] Even with the proper treatment preventing death, a person with HIV will have nearly sixteen fewer years of good health because of comorbidities like cancer and chronic lung and liver diseases.[175]

HIV infections, however, can be prevented, and PrEP is highly effective at preventing infection by reducing the risk of contracting HIV by ninety-nine percent.[176] Further, the best method to controlling an infectious, highly deadly disease is preventing more infections.[177] In the effort to stop the spread of HIV, increasing access to PrEP is one of the four key strategies the CDC is employing in its "Ending the HIV Epidemic in the U.S." program.[178] The other three key strategies focus on controlling the spread of HIV after there already *is* an infection: responding quickly to HIV outbreaks, diagnosing individuals as early

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172 *See supra* Section I.B.

173 Sabin, *supra* note 59, at 1.

174 *See* Marcus et al., *supra* note 64, at 5.

175 *Id.*

176 *PrEP Effectiveness*, *supra* note 3.

177 *See supra* Section I.B.

178 *See Ending the HIV Epidemic in the U.S.*, Ctrs. for Disease Control & Prevention (June 13, 2022), https://www.cdc.gov/endhiv/prevent.html [https://perma.cc/8AW4-2G85].

as possible, and starting treatment immediately after a positive diagnosis.[179] Ensuring access to PrEP is the only strategy that protects the public before infection occurs, and it is the only strategy that stops the spread of HIV before it starts.

PrEP is an incredibly expensive drug, and without mandatory insurance coverage, PrEP's price tag creates serious barriers to individuals who cannot afford PrEP otherwise.[180] Depending on the specific brand of PrEP used, the drug can cost up to tens of thousands of dollars, and if an uninsured person forgoes PrEP because of the high cost, they will likely be forced to pay for the more expensive treatment for HIV.[181] And with lifetime healthcare costs for an HIV-positive person being hundreds of thousands of dollars more than an HIV-negative person, there is a large incentive for the government to encourage the use of PrEP and prevent HIV infections.[182]

In *Braidwood*, the court rejects the government's compelling interest in stopping the spread of HIV as framed too broadly and that mandating coverage for PrEP is not narrowly tailored in achieving such an interest.[183] The court states that requiring everyone to provide insurance coverage for PrEP does not further the government's compelling interest absent evidence that religious exemptions to the PrEP mandate would harm the government's interest in stopping the spread of HIV.[184] In making this decision, however, the court fails to acknowledge the reality of exempting religious and morally objecting companies from providing insurance coverage for PrEP and the effect this would have on the spread of HIV. The government does have an interest in not allowing a religious exemption to the PrEP mandate because of the possibility of expanding exemptions, like with the contraceptive mandate, and the necessity of stopping the spread of an infectious, deadly disease.

The court seems to imply that religious communities play no part in the spread of HIV because of their beliefs and have no interest in stopping its spread.[185] The court points to the preexisting exemptions for grandfathered plans and plans that cover less than fifty people to justify more exemptions for religious and moral objectors.[186] But by allowing

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179 *See id.*

180 *See* Kay & Pinto, *supra* note 13, at 61.

181 *See supra* Section I.B.

182 *See supra* Section I.B.

183 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 653–54 (N.D. Tex. 2022).

184 *See id.* at 654.

185 *See id.* (finding "[d]efendants provide no evidence of the scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant 'to the marginal interest' in enforcing the PrEP mandate in these cases").

186 *See id.*

exemptions for religious and morally objecting employers, a significant size of the population is left unprotected from contracting HIV. In the Unites States, over 1.6 million people are employed by religious organizations.[187] After *Little Sisters*, exemptions for contraceptives were expanded to include companies with moral objections,[188] and there is no way to know how many companies might claim moral objections to providing PrEP, a drug that is incredibly expensive to cover. Expanding exceptions to the insurance mandate pose a serious threat to the effectiveness of preventive tools like PrEP and undermines the effort in stopping the spread of HIV because of increasing infection rates when people are left vulnerable and unprotected.[189]

Additionally, an HIV-negative person whose employer does not cover PrEP is more likely to contract HIV, but this is even more evident with employees of religious employers.[190] Because of the longstanding stigma and prejudice attached to having a positive-HIV diagnosis, disclosing HIV status can be incredibly difficult.[191] And with the stigma being greater in religious communities, talking about HIV status is more difficult.[192] Employees of religious organizations and businesses likely know less about preventing HIV because it is discussed less in their community, and they are less able to advocate for their need for PrEP because of fear of retribution from their peers.[193] Employees then would be pressured into not speaking up about their personal risks of contracting HIV,[194] and if their company were permitted an exemption

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187 *Religious Organizations in the US—Employment Statistics 2004–2029*, IBISWorld (Dec. 28, 2023), https://www.ibisworld.com/industry-statistics/employment/religious-organizations-united-states/ [https://perma.cc/B7K8-UXHJ].

188 *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 670–72 (2020); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,603 (Nov. 15, 2018).

189 *See supra* notes 51–54 and accompanying text.

190 *See* Patel et al., *supra* note 13, at 3–4; *Braidwood*, 627 F. Supp. 3d at 633.

191 *HIV Stigma and Discrimination*, Ctrs. for Disease Control & Prevention (June 1, 2021), https://www.cdc.gov/hiv/basics/hiv-stigma/index.html [https://perma.cc/A2G4-VVXS].

192 While more studies are needed evaluating the impact religious communities have on their members using PrEP, several researchers have focused on black religious communities as black individuals are at a greater risk for HIV than any other racial group. *See* Yusuf Ransome, Laura M. Bogart, Amy S. Nunn, Kenneth H. Mayer, Keron R. Sadler & Bisola O. Ojikutu, *Faith Leaders' Messaging Is Essential to Enhance HIV Prevention Among Black Americans: Results from the 2016 National Survey on HIV in the Black Community*, BMC Pub. Health, Dec. 2018, at 1, 6–8 (finding black men more likely to use PrEP when hearing positive messages about HIV and HIV prevention from religious leaders); Trisha Arnold, Lauren Brinkley-Rubinstein, Philip A. Chan, Amaya Perez-Brumer, Estefany S. Bologna, Laura Beauchamps, Kendra Johnson, Leandro Mena & Amy Nunn, *Social, Structural, Behavioral and Clinical Factors Influencing Retention in Pre-Exposure Prophylaxis (PrEP) Care in Mississippi*, PLOS ONE, Feb. 2017, at 1, 5 (finding fear of church members learning that they take PrEP as a reason individuals stop using PrEP).

193 *See* Arnold et al., *supra* note 192, at 5.

194 *See id.*

from the PrEP mandate, they would be powerless in preventing an HIV infection unless they had thousands of dollars to pay for the drug out-of-pocket.[195] Instead, these vulnerable employees will likely engage in risky behaviors that could expose them to an HIV infection and eventually infect others.

The government's interest in not allowing a religious exemption to PrEP is compelling in its efforts to stop the spread of HIV. Increasing access and use of PrEP is a cost-effective method to preventing HIV infections. PrEP protects people from suffering from serious illnesses that come with a positive HIV diagnosis. Lastly, PrEP protects everyone, not only the stigmatized communities that religious objectors claim PrEP protects.

2. Least Restrictive Means

Of the four key strategies the CDC employs in its "Ending the HIV Epidemic in the U.S." program ensuring access to PrEP is the only strategy that proactively stops the spread of HIV.[196] Thus, the PrEP mandate is essential in stopping the spread of HIV because it is the main tool the government has to quickly prevent infections. By not allowing a religious exemption to the PrEP mandate, the government is empowering all individuals to protect themselves from an HIV infection and participate in the effort to stop the spread of HIV.

After determining the government had no compelling interest, the *Braidwood* court held that the PrEP mandate was not the least restrictive means in achieving its interest.[197] The court based its decision on an idea raised by the majority in *Hobby Lobby*—that the government can assume the costs of contraceptives for women who work for an exempted employer.[198] Similarly, here, the court claimed the government showed no evidence that they are incapable of assuming the costs of PrEP for individuals who work for an exempted employer.[199]

The least restrictive means here does not compel the government to pay for a substitute plan providing exempted health services to employees. First, the court does not consider the significant administrative difficulties in developing a system which attempts to cover exempted plans that already exist in a patchwork, disaggregated health system.[200] Even if the government made the effort to implement such

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195 Kay & Pinto, *supra* note 13, at 61.

196 *See Ending the HIV Epidemic in the U.S.*, *supra* note 178.

197 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 654 (N.D. Tex. 2022).

198 *See id.*; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

199 *Braidwood*, 627 F. Supp. 3d at 654.

200 *See* Harris Meyer, *How a Texas Court Decision Threatens Affordable Care Act Protections*, NAT'L PUB. RADIO (Sept. 14, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/09/14/1122789505/aca-preventive-health-screenings [https://perma.cc/54J8-FBSQ].

a complex system, this would likely take several years—years where people in need of PrEP may lose access.[201] The public should not have to spend years living in fear of losing access to a potentially lifesaving drug, or worse, actually losing access and having to risk HIV infection because they cannot afford PrEP out-of-pocket.[202] In the meantime, it is likely more people would become infected with HIV and then require increased medical costs as a result.[203] Implementing such a system to allow exemptions for employers with religious or moral objections to PrEP is not realistic in the face of so many risks to the public and the incredible costs it would impose on the government.

Second, with other preventive health services waiting to be challenged in the future, the government needs to draw a line regarding what services allow for exemptions and could be covered by the government. The expense on the government to build such a system has limits, and although currently the only services which would need coverage are hypothetically contraceptives and PrEP, it may not stay limited to those two health services for long.[204] Plaintiffs in *Braidwood* also raised religious objections to other preventive health services—the human papillomavirus ("HPV") vaccine and screenings and behavioral counseling for STIs and drug use—but these challenges were dropped after a mistake with an amended complaint.[205] Given the deference courts give to plaintiffs bringing complicity-based RFRA claims, there would be little to stop claimants from continuing to object to health services that conflict with their beliefs and require the government to foot the bill instead.

Congress gave the USPSTF, an agency made up of experts in preventative and evidence-based medicine, the authority to decide what health services are so essential to be given mandated insurance coverage.[206] The USPSTF, in analyzing the effectiveness of PrEP and the severity of HIV, decided that the public should be afforded the benefit of access to PrEP without cost-sharing.[207] Although the rights of religious persons to be protected are held in high esteem, this should not overcome the ability of employees to protect themselves and the

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201 *See* Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, STATELINE (Aug. 9, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/08/09/lawsuit-could-end-free-preventive-health-checkups [https://perma.cc/KN3F-TGZX].

202 *See id.*

203 *See U.S. District Court Ruling Jeopardizes Access to Proven, Life-Saving Cancer Screenings*, AM. CANCER SOC'Y CANCER ACTION NETWORK (Sept. 7, 2022), https://www.fightcancer.org/releases/us-district-court-ruling-jeopardizes-access-proven-life-saving-cancer-screenings [https://perma.cc/RLN7-GG7S].

204 *See* Meyer, *supra* note 200.

205 *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 633, 637 n.3 (N.D. Tex. 2022).

206 *See* 42 U.S.C. § 300gg-13(a)(1).

207 *See* PrEP Recommendation Statement, *supra* note 45, at 2205.

federal government to protect the public from deadly disease. Ultimately, the substantial burden on the plaintiff is too far removed from the PrEP mandate for the plaintiff to succeed on that prong of RFRA, but if courts were to decide otherwise, the government has a compelling interest achieved through the lease restrictive means by not allowing a religious exemption to the mandate. The PrEP mandate survives this RFRA challenge and limits the ability of religious plaintiffs to bring attenuated challenges to the preventive services requirement.

Conclusion

The recent challenge to PrEP raises several issues about the power of religious rights to overcome all else. Religious persons should not be privileged in denying their employees potentially lifesaving drugs. Further, it is not sensible to deny all Americans access to a drug because some people are unwilling to extend access to a certain segment of society. Religious protection has an important place in the history of the United States, and people's religious practices and beliefs need to be protected. However, these protections need to be balanced against the interests of the whole public, and especially against the interest people have in protecting their health. If exemptions to preventive health services continue to expand, the HPV vaccine and behavioral counseling for STIs and drug use are likely to be the next ones threatened and certainly would not be the last. Already, organizations like the American Medical Association and the American Cancer Society have expressed concerns for the deteriorating insurance coverage of preventative health services.[208] And with increasing religious exemptions, there will be little to prevent more preventive health services from being challenged, leaving the majority to watch as the minority strips the power from the preventive services requirement—unless the Supreme Court judges this complicity challenge appropriately.

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208 *See* Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, Stateline (Aug. 9, 2022, 12:00 AM), https://stateline.org/2022/08/09/lawsuit-could-end-free-preventive-health-checkups/ [https://perma.cc/G8PD-P66E]; Press Release, Am. Cancer Soc'y, U.S. Dist. Ct. Ruling Jeopardizes Access to Proven, Life-Saving Cancer Screenings (Sept. 7, 2022), https://www.fightcancer.org/releases/us-district-court-ruling-jeopardizes-access-proven-life-saving-cancer-screenings [https://perma.cc/76LG-QC7G]; Meyer, *supra* note 200.