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ABSTRACT

What do apple pie, religious discrimination, a global pandemic, and federal employees all have in common? They are each part of the landscape surrounding the intersection of Title VII and RFRA. But the landscape is in dire need of rejuvenation pruning. To date, many lower courts have held that Title VII preempts RFRA in cases where a federal employee claims they have suffered religious discrimination in the workplace. This is problematic because, not only was RFRA passed with the intention that it would cover all cases and preempt laws passed before and after it, but more importantly, RFRA's strict scrutiny standard provides federal employees' religious beliefs greater protection than Title VII's reasonable accommodation requirement.

Under the current landscape of the law, which is riddled with misunderstanding and misapplication, religious liberties for federal employees are being threatened in unprecedented ways. In order to restore this vital landscape, it is important to begin with an appreciation for the purposes behind both Title VII and RFRA and an understanding of how each statute provides a different level of protection to federal employees who wish to exercise their religion in the workplace.

In hopes of starting the necessary pruning process, this Comment proposes that when the federal government passes or publishes a facially neutral law, regulation, or mandate that directly causes a substantial burden on a federal employee's religious exercise, a federal employee's RFRA claim

should not be preempted by Title VII. Additionally, in cases where the federal employer could present an undue hardship defense under Title VII by claiming that accommodating the employee's religious belief would require a violation of the federal law, regulation, or mandate, and thus an undue hardship, the federal employee should be permitted to bring a RFRA claim.

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COMMENT

STANDING AT A CROSSROADS: HOW TO NAVIGATE THE INTERSECTION OF TITLE VII AND RFRA IN FEDERAL EMPLOYMENT RELIGIOUS DISCRIMINATION CASES

Rylee B. Seabolt[†]

ABSTRACT

What do apple pie, religious discrimination, a global pandemic, and federal employees all have in common? They are each part of the landscape surrounding the intersection of Title VII and RFRA. But the landscape is in dire need of rejuvenation pruning. To date, many lower courts have held that Title VII preempts RFRA in cases where a federal employee claims they have suffered religious discrimination in the workplace. This is problematic because, not only was RFRA passed with the intention that it would cover all cases and preempt laws passed before and after it, but more importantly, RFRA's strict scrutiny standard provides federal employees' religious beliefs greater protection than Title VII's reasonable accommodation requirement.

Under the current landscape of the law, which is riddled with misunderstanding and misapplication, religious liberties for federal employees are being threatened in unprecedented ways. In order to restore this vital landscape, it is important to begin with an appreciation for the purposes behind both Title VII and RFRA and an understanding of how each statute provides a different level of protection to federal employees who wish to exercise their religion in the workplace.

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In hopes of starting the necessary pruning process, this Comment proposes that when the federal government passes or publishes a facially neutral law, regulation, or mandate that directly causes a substantial burden on a federal employee's religious exercise, a federal employee's RFRA claim should not be preempted by Title VII. Additionally, in cases where the federal employer could present an undue hardship defense under Title VII by claiming that accommodating the employee's religious belief would require a violation of the federal law, regulation, or mandate, and thus an undue hardship, the federal employee should be permitted to bring a RFRA claim.

I. INTRODUCTION

In 1976, the Supreme Court held in *Brown v. GSA* that Title VII of the Civil Rights Act of 1964 is the exclusive remedy[1] for federal employment discrimination.[2] Title VII requires employers to accommodate their employees' sincerely held religious beliefs unless doing so would cause an undue hardship.[3] The Supreme Court has defined "undue hardship" as imposing more than a "*de minimis* cost" on the employer.[4] Typically, when an employee alleges religious discrimination, the employee subsequently files a Title VII claim with the Equal Employment Opportunity Commission (EEOC). Depending on what happens during the EEOC complaint process, the employee may be permitted to bring their claim in Federal District Court. Therein lies the problem that this Comment seeks to resolve.

To date, most lower courts have held that, because Title VII is viewed as the exclusive judicial remedy for federal employment discrimination, employees cannot bring a claim under the Religious Freedom Restoration Act of 1993 (RFRA) parallel to, or in place of, their Title VII claim.[5] This is problematic because, not only was *Brown* decided almost twenty years before

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[1] By "exclusive remedy," the Court means that Title VII is the only path to rectification for a federal employee who has suffered discrimination in the workplace. *See* Brown v. GSA, 425 U.S. 820 (1976).

[2] *Id.* at 835.

[3] 42 U.S.C. § 2000e(j).

[4] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

[5] *See infra* note 164.

RFRA even existed, but more importantly, RFRA's strict scrutiny standard provides the employee's religious beliefs greater protection than Title VII's undue hardship standard. Further, RFRA, which prohibits the federal government from substantially burdening a person's exercise of religion, even if the burden is the result of a neutrally applied rule, clearly created a broad cause of action for individuals who have suffered from religious discrimination at the hands of the federal government.[6] While the Supreme Court has not yet directly addressed the intersection between RFRA and Title VII in this context, in the most recent case addressing RFRA in relation to Title VII, the Supreme Court explained in dicta that "[b]ecause RFRA operates as a kind of *super statute*, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too."[7] Thus, there may be circumstances when it is logical to allow RFRA to preempt Title VII. This Comment presents such a circumstance—COVID-19 vaccination mandates for federal employees.

II. BACKGROUND

To recognize the problems addressed in this Comment, it is important to understand the purposes behind both Title VII and RFRA and the different levels of protection each statute provides to federal employees who wish to exercise their religion in the workplace. Therefore, this section begins with an overview of the Civil Rights Act of 1964 and, more specifically, the development of Title VII, which prohibits employment discrimination based on race, sex, national origin, color, and religion.[8] In addition, this section provides a discussion of the history of RFRA, which Congress enacted to restore the strict scrutiny standard that was eliminated by the Supreme Court's decision in *Employment Division v. Smith*.[9]

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[6] *See* 42 U.S.C. §§ 2000bb-1, 2000bb-3.

[7] Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (emphasis added) (citation omitted).

[8] 42 U.S.C. § 2000e-2.

[9] Emp. Div. v. Smith, 494 U.S. 872 (1990); *see also* H.R. REP. NO. 103-88, at 1 (1993); S. REP. NO. 103-111, at 2 (1993).

A. *Title VII: A Brief History*

On January 9, 1963, opening day of the first Session of the Eighty-eighth Congress, various senators and representatives introduced a "plethora of civil rights" legislation.[10] While some of the legislation provided broad, comprehensive civil rights protections, others primarily focused on equal employment opportunity.[11] Among the proposed legislation primarily dealing with equal employment opportunity was H.R. 405, introduced by Representative James Roosevelt.[12] Entitled "A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age," H.R. 405 is viewed as the "nominal ancestor of Title VII."[13] The bill was the subject of extensive hearings followed by a tedious amendment process.[14] Nevertheless, the House Committee on Education and Labor ultimately recommended the bill's passage.[15] However, H.R. 405 would soon be incorporated into a more comprehensive piece of civil rights legislation proposed by President Kennedy's administration—H.R. 7152.[16]

Following President Kennedy's second special message on civil rights, which he gave to Congress on June 19, 1963, H.R. 7152 was introduced by Representative Celler of New York and referred to the House Committee on the Judiciary.[17] After months of hearings, debates, and amendments, H.R. 7152 was passed by the House on February 10, 1964, by a vote of 290–130.[18] Subsequently, the bill was referred to the Senate, where its consideration faced substantial contestation.[19]

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[10] Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433 (1966) (discussing the legislative history of Title VII of the Civil Rights Act of 1964).

[11] *Id.*

[12] *Id.* Fun fact—James Roosevelt was the son of President Franklin D. Roosevelt.

[13] *Id.*

[14] *See id.*

[15] *Id.*

[16] Vaas, *supra* note 10, at 435.

[17] 109 CONG. REC. 11174 (1963); Vaas, *supra* note 10, at 434.

[18] 110 CONG. REC. 2804–05 (1964); Vaas, *supra* note 10, at 443.

[19] Vaas, *supra* note 10, at 443; 110 CONG. REC. 2882 (1964); *see* 110 CONG. REC. 6417 (1964).

After arriving in the Senate, H.R. 7152 underwent seventeen long days of debate regarding whether the bill would even be approved for consideration by the Senate, as well as the procedures that would accompany consideration.[20] Finally, on March 30, 1964, the Senate began its debate on the merits of H.R. 7152.[21] The historic months that followed included hundreds of amendments, weeks of heated debates, and even a fourteen-hour filibuster.[22] Ultimately, H.R. 7152, including Title VII, became the Civil Rights Act of 1964, which the Senate approved on June 19, 1964—exactly one year after President Kennedy's message to Congress.[23] About two weeks later, on July 2, 1964, President Johnson signed the Act into law.[24] The Civil Rights Act of 1964 is arguably one of the most significant pieces of legislation in American history.

While the Civil Rights Act of 1964 provides broad civil rights protections for individuals, Title VII specifically focuses on employment-based discrimination and "endeavors to achieve true equality in the American workplace by eliminating discriminatory employer practices."[25] Title VII prohibits employment discrimination based on "an individual's race, color, religion, sex, or national origin."[26] Additionally, with the adoption of Title VII, Congress created the Equal Employment Opportunity Commission (EEOC), which is the administrative body charged with processing and overseeing Title VII claims.[27] Early on, most of the claims processed by the EEOC dealt with racial discrimination.[28] However, over time, the EEOC started to see more claims based on sex, national origin, and religion.[29]

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[20] Vaas, *supra* note 10, at 445.

[21] *Id.*

[22] *Id.* at 457; *Civil Rights Filibuster Ended*, U.S. SENATE (June 10, 1964), https://www.senate.gov/about/powers-procedures/filibusters-cloture/civil-rights-filibuster-ended.htm.

[23] 110 CONG. REC. 14511 (1964).

[24] History.com Editors, *Civil Rights Act of 1964*, HISTORY (Jan. 20, 2022), https://www.history.com/topics/black-history/civil-rights-act.

[25] RAYMOND F. GREGORY, ENCOUNTERING RELIGION IN THE WORKPLACE 27 (2011).

[26] 42 U.S.C. § 2000e-2.

[27] *Id.* § 2000e-4.

[28] GREGORY, *supra* note 25, at 28.

[29] *Id.*

Specifically, in recent years, claims of religious discrimination have "increased dramatically."[30]

Eight years after the passage of the Civil Rights Act of 1964, Congress passed the Equal Employment Opportunity Act of 1972 (EEOA), which consequently made "very significant amendments" to Title VII.[31] Originally, government employees were excluded from Title VII's coverage, but the EEOA extended coverage to employees of "governments, governmental agencies, [and] political subdivisions."[32] Thus, under the current state of the law, not only does Title VII apply to private employers with fifteen or more employees, but it also applies to "the entire federal government, and to all state and local government agencies with at least [fifteen] employees."[33]

1. Title VII's Religious Discrimination Framework

Under Title VII, an employer is prohibited from discriminating against an employee because of religion.[34] The statute defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business."[35] The protections of Title VII apply "whether the religious beliefs or practices in question are common or non-traditional, and regardless of whether they are recognized by any organized religion."[36] When determining whether an employer has violated an employee's religious beliefs or practices,

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[30] *Id.*

[31] STATE HUMAN RESOURCES MANUAL, TITLE VII OF THE CIVIL RIGHTS ACT 45 (1989); *see* 42 U.S.C. § 2000e.

[32] *See* 42 U.S.C. § 2000e.

[33] *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/timeline-important-eeoc-events (last visited Sept. 17, 2022); *see* 42 U.S.C. § 2000e.

[34] 42 U.S.C. § 2000e–2000e-17; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION (2021) [hereinafter EEOC COMPLIANCE MANUAL].

[35] 42 U.S.C. § 2000e(j).

[36] EEOC COMPLIANCE MANUAL, *supra* note 34.

"[v]irtually every circuit court has adopted the same three-pronged test."[37] First, the employee must demonstrate that they have a sincerely held religious belief that conflicts with a requirement of employment.[38] Second, the employee must prove that the employer knew, or had reason to know, of the conflict.[39] Third, the employee must prove that they suffered an adverse employment action due to their religious beliefs or practices.[40] Once the employee has satisfied these requirements, the burden shifts to the employer who must prove that they offered the employee a reasonable accommodation or that accommodation would cause an undue hardship.[41]

a. Reasonable accommodation

According to the EEOC Compliance Manual on Religious Discrimination, a reasonable religious accommodation is "an adjustment to the work environment that will allow the employee to comply with his or her religious beliefs."[42] Essentially, the purpose of the accommodation requirement is to "relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others."[43] A reasonable accommodation often entails the employer "making a special exception from, or adjustment to, the particular requirement that creates a conflict so that the employee or applicant will be able to observe or practice his or her religion."[44] However, the burden of finding a reasonable accommodation does not fall solely on the employer. The employee must respond appropriately when the employer suggests an accommodation.[45] In *Ansonia Board of Education v. Philbrook*, the Supreme Court held that

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[37] MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE 67 (1998); *see* Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2517 (1996).

[38] WOLF ET AL., *supra* note 37, at 68.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] EEOC COMPLIANCE MANUAL, *supra* note 34.

[43] *Id.*

[44] *Id.*

[45] WOLF ET AL., *supra* note 37, at 76.

"bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."[46] It is important to emphasize that an employee is not, under any circumstances, required to compromise their religious beliefs in order to find a reasonable accommodation.[47] But if the employer provides a *reasonable* accommodation, then the employer has satisfied their Title VII duty.

b. Undue hardship

Although an employer must attempt to propose a reasonable accommodation for an employee's religious beliefs, in some circumstances an accommodation cannot be provided without causing the employer undue hardship.[48] In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court defined "undue hardship" under Title VII as imposing "more than a *de minimis* cost" on the employer.[49] Typically, "the determination of whether a particular proposed accommodation imposes an undue hardship 'must be made by considering the particular factual context of each case.'"[50] In addition, the *de minimis* cost standard includes more than monetary accommodations.[51] It is possible for a nonmonetary accommodation to cause an employer undue hardship. For example, "depriv[ing] another employee of a job preference or other benefit guaranteed by a bona fide seniority system or collective bargaining agreement" could be considered an undue

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[46] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986) (quoting Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46 (5th Cir. 1982).

[47] WOLF ET AL., *supra* note 37, at 77.

[48] 29 C.F.R. § 1605.2 (1980); *see* EEOC v. Townley Eng'n & Mfg. Co., 859 F.2d 610, 615 (9th. Cir. 1988) ("When an employer does not propose an accommodation, or when its proposed accommodation does not eliminate the employee's religious conflict, the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship.").

[49] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

[50] EEOC COMPLIANCE MANUAL, *supra* note 34 (quoting Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981)).

[51] *Hardison*, 432 U.S. at 84–85 (evaluating the difference between the nonmonetary accommodation of abandoning the seniority system and the monetary accommodation of incurring extra costs to pay a different employee).

hardship.[52] Further, "an employer may establish that an accommodation poses a greater than de minimis cost if it would lead to a violation of law."[53] For example, if there were a federal law that required employees to receive certain medical treatment with no exemptions allowed, the employer could claim that they could not accommodate an employee's religious belief against the treatment because an accommodation would require a violation of the law and thus an undue hardship. Unless an employer can prove that an undue hardship exists, they must reasonably accommodate the employee's religious beliefs or practices.[54]

2. The Title VII Complaint Process

"The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, . . . national origin, age, . . . disability or genetic information."[55] According to § 705 of Title VII, the EEOC "shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years."[56] The EEOC also has a General Counsel who is appointed by the President for a term of four years and has the responsibility to handle Title VII litigation.[57] The Commission has certain powers, such as paying witnesses and "interven[ing] in a civil action brought under [Title VII] by an aggrieved party against a respondent other than a government, governmental agency or political subdivision."[58] Furthermore, under § 706, "[t]he

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[52] EEOC COMPLIANCE MANUAL, *supra* note 34; *see Hardison*, 432 U.S. at 83 (holding employer "was not required by Title VII to carve out a special exception to its seniority system in order to help [employee] to meet his religious obligations" of observing the Sabbath).

[53] WOLF ET AL., *supra* note 37, at 118.

[54] 42 U.S.C. § 2000e(j).

[55] *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (last visited Oct. 6, 2022).

[56] 42 U.S.C. § 2000e-4(a).

[57] *Id.* § 2000e-4(b).

[58] *Id.* § 2000e-4(g).

Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in [Title VII]."[59]

a. Filing a religious discrimination claim

Before filing a Title VII lawsuit against an agency in federal court, a federal employee who believes they have faced employment discrimination must endure the tedious process of filing a claim with their agency's EEO Office.[60] The EEO Office will provide the aggrieved employee with instructions regarding the process the employee must undergo before the employee can file suit in federal district court.[61] The first step in the filing process is to contact an EEO Counselor.[62] A federal employee has forty-five days from the date the discrimination occurred to file their complaint.[63] The EEO Counselor will inform the employee of the opportunity to participate in EEO counseling or in an alternative dispute resolution (ADR) program.[64] If the employee declines to participate in ADR or EEO counseling, or participates but does not resolve the dispute, they can file a formal discrimination complaint with the EEO Office against the offending agency within fifteen days of receiving notice about how to file.[65] Once a formal complaint has been filed with the EEO Office, the Office will review the complaint and then decide whether the case should be dismissed for a procedural reason or an investigation should be launched.[66] The agency has 180 days from the filing date to investigate the employee's complaint.[67] When the investigation is complete, the agency provides the employee with two choices: the employee

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[59] *Id.* § 2000e-5(a).

[60] *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process (last visited Oct. 6, 2022) ("You must go through the administrative complaint process before you can file a lawsuit.").

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Overview of Federal Sector EEO Complaint Process*, *supra* note 60.

[67] *Id.*

can "either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred."[68]

If the employee chooses to request an EEOC Administrative Judge decision and no discrimination is found, or if the employee disagrees with the finding, the decision can be appealed to the EEOC or challenged in federal district court.[69] If the employee desires a hearing with the agency, they must "make [the] request in writing or via the EEOC Public Portal . . . ."[70] Once the agency receives the Administrative Judge's decision, the agency has forty days to issue a "final order," which will inform the employee whether the agency agreed with the Administrative Judge and the relief ordered and provide a statement of the employee's right to file a civil action in federal district court.[71]

Within thirty days, the employee can appeal the agency's final order even if the final order was a dismissal of the employee's claim.[72] If the employee appeals the final order, an "EEOC appellate attorney[] will review the [employee's] entire file, including the agency's investigation, the decision of the Administrative Judge, the transcript of what was said at the hearing (if there was a hearing), and any appeal statements."[73] If the employee disagrees with the EEOC's decision on appeal, they can ask for reconsideration within thirty days, which may be granted only if the employee shows the decision was based on a mistaken fact or a mistaken application of the law to the facts.[74] Once the agency makes a decision on the request for reconsideration, "the decision is final."[75]

Although a federal employee must endure this tedious process prior to filing suit against an agency in federal court, there are several points during the process when a suit may be filed, including:

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Overview of Federal Sector EEO Complaint Process*, *supra* note 60.

[73] *Id.*

[74] *Id.*

[75] *Id.*

> After 180 days have passed from the day you filed your complaint, if the agency has not issued a decision and no appeal has been filed; Within 90 days from the day you receive the agency's decision on your complaint, so long as no appeal has been filed; After the 180 days from the day you filed your appeal if the EEOC has not issued a decision; or Within 90 days from the day you receive the EEOC's decision on your appeal.[76]

However, once a suit is filed, the EEOC will close the complaint process regardless of how far along the employee might have found themselves.[77]

b. The exclusive remedy—*Brown v. GSA*

The Supreme Court's 1976 decision, *Brown v. GSA*, provides a framework that many federal appellate courts rely upon when faced with a federal employment discrimination claim.[78] However, as this Comment later addresses, the framework has been inappropriately and detrimentally applied in religious discrimination cases. To recognize the problematic application of *Brown*, it is important to understand the background of the case.

The plaintiff, Clarence Brown, was an African American employee of the General Services Administration (GSA) (an agency of the federal government) since 1957.[79] In December 1970, Brown, who had not been promoted since 1966, was referred, along with two white colleagues, for promotion.[80] All three of the employees were rated as "highly qualified" by their supervisors, but the promotion was given to one of the white candidates.[81] Subsequently, Brown filed a complaint alleging that racial

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[76] *Id.*

[77] *See id.*

[78] Kristin Sommers Czubkowski, *Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims*, 80 U. CHI. L. REV. 1841, 1850 (2013) (discussing the intersection between Title VII and state tort claims stemming from overlapping facts); *see* Brown v. GSA, 425 U.S. 820 (1976).

[79] *Brown*, 425 U.S. at 822.

[80] *Id.*

[81] *Id.*

discrimination biased the promotion decision with the GSA Equal Employment Opportunity Office (EEOC).[82] However, he withdrew the complaint when he heard that another promotion would soon be available.[83] Sure enough, another position became available in June 1971, for which Brown applied, but once again a white candidate received the promotion.[84] Brown filed another complaint with the GSA EEOC but was denied relief because the investigation and review showed "no evidence that race had played a part in the promotion."[85] After a hearing and further review, the GSA rendered its final decision that "considerations of race had not entered the promotional process."[86] The director of the agency told Brown that he could appeal the final decision with the Board of Appeals and Review of the Civil Service Commission or file suit in federal district court within thirty days of the GSA's final decision.[87]

Forty-two days later, Brown filed his claim in federal district court alleging jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the EEOA of 1972, "'with particular reference to' § 717"; under 28 U.S.C. § 1331 (federal-question jurisdiction); under 28 U.S.C. §§ 2201, 2202 (the Declaratory Judgment Act); and under 42 U.S.C. § 1981 (the Civil Rights Act of 1866, as amended).[88] However, the GSA filed a motion to dismiss the complaint for lack of subject-matter jurisdiction because Brown had not filed his complaint within the thirty day window as required by § 717(c) of the Civil Rights Act of 1964.[89] The district court granted the GSA's motion and dismissed the action accordingly.[90] Subsequently, the Second Circuit Court of Appeals affirmed the district court's judgment of dismissal.[91] The Second

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Brown v. GSA, 425 U.S. 820, 822 (1976).

[86] *Id.* at 822–23.

[87] *Id.* at 823.

[88] *Id.* at 823–24.

[89] *Id.* at 824.

[90] *Id.*

[91] Brown v. GSA, 425 U.S. 820, 824 (1976).

Circuit held that "§ 717 provides the exclusive judicial remedy for federal employment discrimination, and that the complaint had not been timely filed under that statute" and, additionally, "if § 717 did not pre-empt other remedies, then [Brown's] complaint was still properly dismissed because of his failure to exhaust available administrative remedies."[92] The Supreme Court granted certiorari "to consider the important issues of federal law presented by th[e] case."[93]

The "primary question" addressed by the Supreme Court was "not difficult to state: Is § 717 of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, the exclusive individual remedy available to a federal employee complaining of job-related racial discrimination?"[94] Regardless of the simplicity in stating the question, the Court had a difficult time resolving it because "Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law."[95]

Prior to *Brown*, the Supreme Court held that "Title VII was *not* the exclusive remedy for private employees in *Alexander v. Gardner-Denver Co.* and *Johnson v. Railway Express Agency, Inc.*"[96] However, "unlike in *Brown* which exclusively focused on the EEOA," in *Alexander* and *Johnson*, the Court addressed the legislative history of the Civil Rights Act of 1964, including Congress's intent "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[97] In *Brown*, the Court disregarded the legislative history of the Civil Rights Act of 1964 and instead focused solely on the history of the EEOA, which extended Title VII protection to federal employees.[98] Because

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[92] *Id.*

[93] *Id.*

[94] *Id.* at 824–25 (citations omitted).

[95] *Id.* at 825.

[96] Czubkowski, *supra* note 78, at 1851.

[97] *Id.* (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44–48 (1974)).

[98] *Id.* at 1852.

Congress failed to address the issue of § 717's exclusivity, the Court felt that it needed to "infer congressional intent in less obvious ways."[99]

The Court explained how Congress's intent behind the EEOA was to "create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[100] To support this finding, the Court inferred Congress's belief that prior to the EEOA of 1972, federal employees did not have effective administrative or judicial relief available to them because of sovereign immunity concerns.[101] The Court cited statements from House and Senate members, such as Senator Cranston who asserted that the EEOA would "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . " and Senator Williams who stated that § 717 "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court."[102]

The Court concluded that "[t]he legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy."[103] In addition, the Court elucidated:

> Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.[104]

From the legislative history, the Court arrived at the presumption that "the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment

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[99] Brown v. GSA, 425 U.S. 820, 825 (1976).

[100] *Id.* at 828–29.

[101] *See id.* at 825–26.

[102] *Id.* at 828 (citing 118 CONG. REC. 4929 (1972)).

[103] *Id.*

[104] *Id.*

discrimination."[105] In essence, the Court pulled the "exclusive, pre-emptive" language out of thin air. Ultimately, based on the Court's conclusion about the legislative intent behind § 717, the Court held that "§ 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment."[106]

Conversely, the dissent began by discussing how the Civil Rights Act of 1964, including Title VII, was enacted as a "comprehensive remedial statute which did not expressly state whether it was exclusive of, or supplementary to, whatever other remedies might exist."[107] The dissent reasoned that "[s]ince both the 1964 statute and the 1972 amendment were enacted in comparable settings, and since both pieces of legislation implement precisely the same important national interests, it is reasonable to infer that Congress intended to resolve the question of exclusivity in the same way at both times."[108] Furthermore, the dissent argued that "[s]ince . . . victims of racial discrimination in the private sector have a choice of remedies and are not limited to Title VII, federal employees should enjoy parallel rights."[109]

In addition, the dissent highlighted the fact that "the General Subcommittee on Labor of the House Committee on Education and Labor *rejected* an amendment which would have explicitly provided that § 717 would be the exclusive remedy for federal employees."[110] The final Committee report included the following statement from the disappointed minority:

> Failure to Make Title VII an Exclusive Federal Remedy. Despite the enactment of [T]itle VII of the Civil Rights Act, charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of

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[105] Brown v. GSA, 425 U.S. 820, 828–29 (1976).

[106] *Id.* at 835.

[107] *Id.* (Stevens, J., dissenting).

[108] *Id.* at 836 (Stevens, J., dissenting).

[109] *Id.*

[110] *Id.* at 838 (Stevens, J., dissenting) (emphasis added).

> 1866. In view of the comprehensive prohibitions against discrimination contained in [T]itle VII, and the intent of the Committee bill to consolidate procedures and remedies under one agency, it would be consistent to make [T]itle VII the exclusive remedy. No public interest is served in continuing to permit a multiplicity of statutes or forums to deal with discrimination in employment. *However, our attempt to amend the Committee bill to make [T]itle VII an exclusive remedy* (except for pattern or practice suits) *was rejected*. In our view, the failure to make this an exclusive remedy merely encourages an individual who has lost his case in one forum under one statute to relitigate his case in still another forum under another federal statute.[111]

Logically, if Congress intended § 717 to be the exclusive and pre-emptive remedy in federal employment discrimination cases, it would not have rejected the opportunity to make it such. Lastly, the dissent asseverated that "interpolat[ing] such an important provision into a complex, carefully drafted statute is a heavy [burden]" and that, because that burden was not met, the statute should be read as Congress wrote it.[112]

B. *The Road to RFRA*

On November 16, 1993, at 9:15 a.m., President William Jefferson Clinton delivered remarks on the South Lawn at the White House praising Congress for passing the Religious Freedom Restoration Act of 1993 with near unanimity.[113] President Clinton stated that the Act "better protects all Americans of all faiths in the exercise of their religion in a way that . . . is far

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[111] Brown v. GSA, 425 U.S. 820, 838 n.5 (1976) (emphasis added) (quoting H.R. REP. NO. 92-238, at 66 (1971)).

[112] *Id.* at 839.

[113] *Remarks of Signing the Religious Freedom Restoration Act of 1993*, 29 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 46, 2377–78 (1993). Congress passed RFRA by a vote of 97–3. *Id.*

more consistent with the intent of the Founders of this Nation . . . ."[114] He explained:

> [RFRA] basically says . . . that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion. This judgment is shared by the people of the United States as well as by the Congress. We believe strongly that we can never . . . be too vigilant in this work.[115]

Shortly thereafter, President Clinton signed RFRA into law.[116]

RFRA states in pertinent part:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.[117]

RFRA was enacted to overturn the Supreme Court's decision in *Employment Division v. Smith* "by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability."[118]

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[114] *Id.* at 2377.

[115] *Id.* at 2378.

[116] *Id.*

[117] 42 U.S.C. § 2000bb-1.

[118] H.R. REP. NO. 103-88, at 1 (1993); *see also* S. REP. NO. 103-111, at 2 (1993).

1. *Employment Division v. Smith*—the Court's Repudiation of the Compelling Interest Test

In *Employment Division v. Smith*, Alfred Smith and Galen Black were terminated from their jobs at a private drug rehabilitation organization after they ingested peyote[119] for sacramental purposes at a Native American Church ceremony.[120] Both Smith and Black were members of the church.[121] When Smith and Black applied to the Employment Division for unemployment compensation after being terminated, they were denied and deemed "ineligible for benefits" because they had been terminated due to "work-related 'misconduct.'"[122]

The case, which had "a rather serpentine route through the Oregon and federal courts," finally landed on the Supreme Court's docket in 1990.[123] Both Oregon's attorney general and Smith and Black's attorney thought that the case would be "a standard compelling interest case" to determine whether Oregon had a compelling interest "in uniformly enforcing its drug laws that would trump the men's claim to free exercise."[124] Under the compelling interest test set forth in *Sherbert v. Verner*, if Oregon had a compelling interest, then it could deny Smith and Black unemployment benefits.[125] Conversely, if Oregon did not have a compelling interest, Smith and Black were entitled to the benefits.[126] Smith and Black essentially argued that "the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote."[127]

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[119] JEROLD WALTMAN, CONGRESS, THE SUPREME COURT, AND RELIGIOUS LIBERTY 17 (1st ed. 2013) ("a mildly hallucinogenic drug that was illegal in Oregon").

[120] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

[121] *Id.*

[122] *Id.*

[123] WALTMAN, *supra* note 119, at 17.

[124] *Id.*

[125] *Id.*; *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[126] WALTMAN, *supra* note 119, at 17.

[127] Emp. Div. v. Smith, 494 U.S. 872, 897 (1990).

The Supreme Court ruled 6–3 in favor of Oregon.[128] However, when Justice Scalia's majority opinion was published, many, including the attorneys who argued the case, were surprised by its content.[129] Justice Scalia "rested the key portion of the opinion on an issue that had not even been briefed: the validity of the compelling interest test."[130]

In his plight to reject the compelling government interest test, Justice Scalia discussed first that "it was important to draw a line between laws aimed directly at a religious practice and general purpose statutes that merely happen to impinge on someone's free exercise."[131] Justice Scalia said the former had been voided consistently by the Court, while the latter had been received more favorably.[132] Next, Justice Scalia declared:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.[133]

He asserted that Smith and Black's case did not present "such a hybrid situation."[134] Finally, Justice Scalia repudiated the use of the compelling interest test.[135] He explained that "[a]lthough . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to [generally applicable criminal prohibitions], we have never applied the test to invalidate one."[136]

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[128] WALTMAN, *supra* note 119, at 18.

[129] *Id.*

[130] *Id.*

[131] *Id.*; *accord Smith*, 494 U.S. at 879 ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . .'" (citations omitted)).

[132] WALTMAN, *supra* note 119, at 18.

[133] Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

[134] *Id.* at 882.

[135] *Id.* at 884–85.

[136] *Id.*

Justice Scalia concluded that "the sounder approach . . . is to hold the [compelling interest] test inapplicable to such challenges"[137] because "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[138] Justice Scalia reasoned that the application of the compelling interest test to generally applicable laws that infringe upon an individual's religious beliefs "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including "compulsory vaccination laws."[139] Alternatively, Justice Scalia asserted that the free exercise of religion could be protected by the political process.[140] He explained:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[141]

Congress heard Justice Scalia's message loud and clear.

2. Overturing *Smith*—RFRA is born

As the result of *Smith*, "religious practices forbidden by laws of general applicability [were subjected] to the lowest level of scrutiny employed by the courts"—the rational relationship test.[142] The rational relationship test "only requires that a law must be rationally related to a legitimate state interest."[143]

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[137] *Id.* at 885.

[138] *Id.* at 888.

[139] Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990).

[140] *Id.* at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

[141] *Id.*

[142] H.R. REP. NO. 103-88, at 5 (1993). The rational relationship test is also commonly referred to as "rational basis" or "minimal scrutiny."

[143] *Id.*

Almost immediately after *Smith*, numerous religious and civil rights leaders met with members of Congress to explore what could be done to restore the protection to the free exercise of religion that was provided by the compelling interest test.[144] By June 1990, a group known as the Coalition for the Free Exercise of Religion (CFER) decided that legislation based on Section Five of the Fourteenth Amendment to the United States Constitution would be the best way to combat the Court's repudiation of the compelling interest test.[145] The CFER produced an outline of what would become the Religious Freedom Restoration Act.[146] Shortly thereafter, the CFER asked their congressional allies, Representative Stephen Solarz of New York and Senators Edward Kennedy of Massachusetts and Orrin Hatch of Utah, to propose the soon-to-be RFRA to Congress.[147]

On September 27, 1990, the Chairman of the House Subcommittee on Civil and Constitutional Rights, Representative Don Edwards, delivered the opening statement at the initial hearing on RFRA.[148] He stated, "The bill responds to *Employment Division v. Smith*, a recent Supreme Court ruling that weakened the long-held standard of review for religious freedom cases. H.R. 5377 restores the prior legal standard."[149] That prior legal standard was the compelling interest test. "Under this long-established test, a law can interfere with religious freedom *only* if it is the least restrictive means possible to protect a compelling state interest."[150] Chairman Edwards then asserted, "The Religious Freedom Restoration Act re-establishes the 'compelling state interest' standard."[151]

Throughout the hearing, representatives from various states made statements in support of the newly proposed legislation. One such

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[144] WALTMAN, *supra* note 119, at 21.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 21–22.

[148] *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 101st Cong. 1 (1990).

[149] *Id.* at 2.

[150] *Id.*

[151] *Id.*

representative was William E. Dannemeyer of California.[152] Representative Dannemeyer stated that he would "normally . . . be more than suspect about a bill pertaining to the free exercise of religion and endorsed by the 'Religion Last' crowd," but RFRA was not a "normal piece of legislation and the Supreme Court decision that brings [Congress] together . . . was not your normal piece of reasoned jurisprudence."[153] He went on to state that *Smith* was an "ill-conceived" "embarrassment" and that it would "undoubtedly go down in legal history as a case study in intellectual rigidity."[154]

Shortly thereafter, Chairman Edwards welcomed Representative Solarz who then received the opportunity to make his statement at the hearing.[155] Representative Solarz opened by discussing how the proposed legislation "facilitated the establishment of an extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole . . . ."[156] He confidently stated: "It is perhaps not too hyperbolic to suggest that in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie than the legislation now before you."[157]

Initially, it appeared that with the diverse coalition of substantial magnitude backing the proposed legislation, coupled with the legislation's simplicity, RFRA would pass seamlessly.[158] However, while RFRA did pass almost unanimously in the end, it took three years to accomplish that feat.[159] "There were two major and two minor matters at fault: abortion and prisoner rights being the former and religious institutions' participation in public social programs and the tax-exempt status of religious property the latter."[160]

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[152] *Id.* at 8.

[153] *Id.*

[154] *Hearing on H.R. 5377*, *supra* note 148, at 8.

[155] *Id.* at 13.

[156] *Id.*

[157] *Id.*

[158] WALTMAN, *supra* note 119, at 22.

[159] *Id.*

[160] *Id.*

Ultimately, these concerns were alleviated throughout the legislative process and, although RFRA was added to and amended since its original proposal in 1990, its basic purpose remained: "to reinstate the protection given to religious freedom prior to *Smith*."[161]

III. PROBLEM

To date, the Supreme Court has not provided any guidance on the relationship between RFRA and Title VII in the context addressed in this Comment.[162] Thus, lower courts have primarily been left to their own devices[163] when plaintiffs bring both a RFRA and a Title VII claim parallel to each other. Many courts have relied on *Brown* and held that Title VII preempts RFRA.[164] However, other courts and administrative bodies, including the EEOC, have not fully bought into the *Brown* rationale as applied to RFRA and have acknowledged RFRA's role in federal employment religious discrimination cases.[165] Most recently, while writing for the majority

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[161] Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 533 (1993).

[162] While the Supreme Court has addressed the intersection of RFRA and Title VII in the context of using RFRA as a shield, it has not addressed using RFRA as a sword. In other words, it has analyzed the situations in which employers can use RFRA as a defense to Title VII requirements. For example, an *employer* may bring a RFRA defense to a Title VII claim of discrimination based on sex when the employee was fired for revealing their homosexuality.

[163] Such as the confusing application of the meager legislative history.

[164] *See* Francis v. Mineta, 505 F.3d 266, 272 (3d Cir. 2007) ("It is equally clear that Title VII provides the exclusive remedy for job-related claims of federal religious discrimination, despite [plaintiff's] attempt to rely upon the provisions of RFRA."); *see also* Holly v. Jewell, 196 F. Supp. 3d 1079, 1090 (N.D. Cal. 2016) ("[T]he court finds that Title VII remains the exclusive remedy for religious discrimination in federal employment."); Harrell v. Donahue, 638 F.3d 975, 984 (8th Cir. 2011) ("Title VII provides the exclusive remedy for [employee] claims of religious discrimination.").

[165] *See* Tagore v. United States, 735 F.3d 324 (5th Cir. 2013) (treating plaintiff's RFRA claim as distinct from her Title VII claim); Lister v. Def. Logistics Agency, No. 2:05-CV-495, 2006 U.S. Dist. LEXIS 5007, at *3 (S.D. Ohio Jan. 20, 2006) (dismissing plaintiff's Title VII claim but allowing plaintiff's RFRA claim) ("Title VII does not preclude Plaintiff from pursuing claims under the Fifth Amendment to the United States Constitution and RFRA. Although the claims arise from the same factual circumstance as the Title VII claim, the claims are distinct from Plaintiff's claim for employment discrimination and therefore are not precluded by Title VII."

in *Bostock v. Clayton County*, Justice Gorsuch stated in dicta that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases . . . . But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too."[166] Although it appears he made this assertion in the context of allowing RFRA to be used as a defensive shield against Title VII, Justice Gorsuch's comment opened the door to questions regarding the relationship between RFRA and Title VII as a whole.[167] In addition, the differences between Title VII and RFRA highlight the importance of allowing a federal employee to bring a RFRA claim alongside their Title VII claim in certain circumstances.

A. *The Intersection Between Title VII and RFRA*

Based upon the plain meaning of the text, one could reasonably infer that RFRA should extend to *all* acts of the federal government, including acts of the government as an employer. In fact, the Act states: "This Act applies to all federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after . . . Nov[ember] 16, 1993."[168] If this were applied absent a regard for the legislative history, "RFRA would replace [Title VII's] undue hardship test with the much tougher compelling-interest test . . . ."[169] However, looking at RFRA's legislative history, it is not entirely clear how Congress intended RFRA to interact with Title VII. The only guidance[170] provided by Congress consists of one sentence from the House and one nearly identical sentence from the Senate.[171] The House Report states: "Nothing in this bill shall be construed as affecting Title VII of

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(footnote omitted)); *see also* EEOC COMPLIANCE MANUAL, *supra* note 34 ("The applicability and scope of other defenses based on Title VII's interaction with . . . [RFRA] is an evolving area of the law.").

[166] Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

[167] *See* discussion *supra* note 162.

[168] 42 U.S.C. § 2000bb-3.

[169] Rosenzweig, *supra* note 37, at 2526.

[170] It is a stretch to classify two vague sentences as legislative guidance, especially in this situation.

[171] H.R. REP. NO. 103-88, at 8 (1993); S. REP. NO. 103-111, at 13 (1993).

the Civil Rights Act of 1964."[172] Similarly, the Senate Report states: "Nothing in this act shall be construed as affecting religious accommodation under [T]itle VII of the Civil Rights Act of 1964."[173] Even with the Senate's use of more specific language, it is difficult (if not impossible) to understand what Congress meant by these two vague sentences. What does "*affecting* religious accommodation" mean?

One *may* infer that the sentences mean that RFRA's strict scrutiny standard should not replace Title VII's requirement of religious accommodations or that RFRA does not ever apply in Title VII employment discrimination cases. However, another, seemingly more appropriate, interpretation of the sentences is that RFRA does not negate Title VII's reasonable accommodation standard. In other words, Congress did not intend that RFRA "affect[] religious accommodation" under Title VII, meaning that even if an employer's discriminatory action can survive a RFRA claim, they still must work with the employee to provide a reasonable accommodation to the employee whose religious beliefs are being discriminated against.[174] This interpretation allows for the greatest level of protection of an employee's religious beliefs.

Ultimately, one may ignore the legislative history altogether and simply rely on the clearly stated plain meaning of RFRA's text, allowing RFRA to apply "in all cases where free exercise of religion is substantially burdened."[175]

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[172] H.R. REP. NO. 103-88, at 8.

[173] S. REP. NO. 103-111, at 13.

[174] *Id.* This interpretation is more appropriate than the others, especially considering Congress's intent to create a broad cause of action for individuals who suffer religious discrimination at the hands of the government.

[175] 42 U.S.C. § 2000bb. According to Justice Scalia, an outspoken opponent of relying on legislative history, "[i]t is the *law* that governs, not the intent of the lawgiver." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997). Moreover, Justice Scalia explained that the content within the legislative history should never be considered one-and-the-same as the text of the statute itself. *See id.* at 28–29. He stated:

> Resort to legislative history has become so common that lawyerly wags have popularized a humorous quip inverting the oft-recited (and oft-

Not surprisingly, however, multiple courts have ignored the plain text of the statute and decided that Title VII preempts RFRA based largely on the vague and confusing two-sentence legislative history with little-to-no attempt to interpret what Congress meant.[176]

B. *The Major Differences Between RFRA and Title VII*

One of the most notable differences between Title VII and RFRA is the level of scrutiny applied to a religious discrimination claim. Under Title VII, an employee has the burden of establishing a *prima facie* case of religious discrimination.[177] Once the employee has satisfied that burden, the burden shifts to the employer to either provide a reasonable accommodation or demonstrate that accommodation poses an undue hardship.[178] Under this standard, the *validity* of the law or regulation itself as applied to the employee is never questioned. Further, when an employer alleges an "undue hardship," the employer's burden is not particularly heavy.[179] Thus, Title VII's

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> ignored) rule as to when [the] use [of legislative history] is appropriate: 'One should consult the text of the statute,' the joke goes, 'only when the legislative history is ambiguous.' Alas, that is no longer funny. Reality has overtaken parody.

Id. at 31. He further stated that "the more courts have relied upon legislative history, the less worthy of reliance it has become." *Id.* at 34.

[176] *See* Harrell v. Donahue, 638 F.3d 975, 983 (8th Cir. 2011); Francis v. Ridge, No. 2003/0039, 2005 U.S. Dist. LEXIS 40015, at *7–8 (D.V.I. Dec. 27, 2005) ("The Court acknowledges that the RFRA makes no mention of whether Title VII should preempt that statute, however, a court is allowed to look at legislative history even if the plain meaning of a statute is clear, when 'the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.' . . . . The Senate Report on the RFRA makes it apparently clear that it was Congress'[s] intent that the exhaustion requirement in Title VII's administrative remedies was not to be affected. Therefore, this Court holds that Title VII preempts Plaintiffs RFRA claim." (citations omitted) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989))); Molotsky v. Henderson, No. 98-5519, 1999 U.S. Dist. LEXIS 2985, at *2 (E.D. Pa. Mar. 8, 1999).

[177] *See supra* Section II.A.1.

[178] *See supra* Section II.A.1.

[179] *See supra* Section II.A.1.

reasonable accommodation requirement is often easily circumventable, and the employee is left with no other line of recourse.[180]

Under RFRA, however, the government employer is held to a "heightened standard of review."[181] Once the employee has established that the government has substantially burdened their religious exercise, the burden is on the government to demonstrate that the law or regulation imposing the substantial burden is in furtherance of a compelling government interest *and* that it is the least restrictive means available to further that interest.[182] While RFRA does not define "substantial burden,"

> [T]he phrase appears to have originated from free exercise case law, which holds that such burdens exist when an individual is required to choose between following his or her religious beliefs and receiving a governmental benefit or when an individual must act contrary to his or her religious beliefs to avoid facing legal penalties.[183]

Under this standard, there is a rebuttable presumption that the government action is invalid as applied to the claimant since the government action is valid *only if* the government can satisfy its burden.[184] Ultimately, "RFRA's standard is . . . more rigorous than Title VII's religious accommodation standard, for which the touchstone is reasonableness."[185] Thus, under RFRA, the employee's religious beliefs receive greater protection. This disparity in protection for the employee's religious beliefs between Title VII and RFRA is

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[180] EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86 (N.D. Ga. 1981).

[181] WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] APRIL J. ANDERSON & VICTORIA L. KILLION, CONG. RSCH. SERV. LSB10573, COVID-19 VACCINATION REQUIREMENTS: POTENTIAL CONSTRAINTS ON EMPLOYER MANDATES UNDER FEDERAL LAW, at 5 (2021) ("RFRA also provides more robust protections from application of facially neutral laws and policies than the First Amendment's Free Exercise Clause, which the Supreme Court has construed as not normally providing a basis for noncompliance with generally applicable laws and policies.").

problematic; particularly because RFRA was passed with the intent that it would be all-encompassing.[186]

Other significant differences between RFRA and Title VII include the type of relief available to the individual who claims that they have suffered from religious discrimination, as well as who may be named as a defendant in the action. Under RFRA, "persons may sue and 'obtain appropriate relief against a government . . . .'"[187] "[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity."[188] According to the Supreme Court, "appropriate relief against a government" includes an aggrieved individual's right to "sue [g]overnment officials in their personal capacities" and "when appropriate, to obtain money damages against federal officials in their individual capacities."[189] However, under Title VII, the injured party can only obtain monetary relief (in the form of compensatory or punitive damages) "in cases involving *intentional* discrimination . . . ."[190] Thus, unlike under RFRA, Title VII does not permit monetary relief in cases involving disparate impact claims.[191] Furthermore, under Title VII, the options for who may be named as the defendant are more limited than under RFRA. In a civil action under Title VII, "the head of the department, agency, or unit, as appropriate, shall be the defendant."[192] There is no option to sue an official in their personal capacity. Therefore, it is evident that RFRA

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[186] 42 U.S.C. § 2000bb ("The threefold purpose of [RFRA] is . . . to restore the compelling interest test . . . and to guarantee its application *in all cases* where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government." (emphasis added)).

[187] Tanzin v. Tanvir, 141 S. Ct. 486, 488 (2020) (quoting 42 U.S.C. § 2000bb-1(c)).

[188] 42 U.S.C. § 2000bb-2.

[189] *Tanzin*, 141 S. Ct. at 488, 490, 493.

[190] U.S. EQUAL EMP. OPPORTUNITY COMM'N, REMEDIES FOR EMPLOYMENT DISCRIMINATION (emphasis added).

[191] "As its name suggests, disparate impact discrimination typically occurs when a seemin gly neutral workplace practice unduly impacts a protected group — usually unintentionally." *What Is Disparate Treatment Discrimination — and How Is It Proven?,* THOMSON REUTERS (May 10, 2022), https://legal.thomsonreuters.com/en/insights/articles/the-basics-of-disparate-treatment-discrimination-under-title-vii.

[192] 42 U.S.C. § 2000e-16(c) (also referred to as § 717).

provides a claimant greater freedom and flexibility to formulate their suit according to their individual preferences.

Considering the notable differences between Title VII and RFRA, along with RFRA's explicit plain meaning, and the fact that *Brown* was decided long before RFRA was even a work-in-progress, strictly applying *Brown* in cases of federal employment religious discrimination is inappropriate. Applying *Brown* in this context forces the federal employee to forgo the level of protection against religious discrimination that they would receive as a non-federal employee because non-federal employees are permitted to bring claims independent of Title VII.[193] Individuals should not be forced to abdicate their religious beliefs and practices solely because they chose to work for the federal government.

This problem is particularly noticeable in situations where the federal government has published a facially neutral mandate requiring all federal employees to abide by a certain policy—for example, mandates requiring that all federal employees receive the COVID-19 vaccine to maintain their status as a federal employee.[194]

C. *A Pandemic Threat to Religious Liberties—Will Religious Liberties Survive COVID-19?*

On January 20, 2020, the Centers for Disease Control and Prevention (CDC) confirmed "the first laboratory-confirmed case of the Novel Coronavirus in the U.S. from samples taken on January 18 in Washington state."[195] Just a couple of months later, on March 11, 2020, the World Health Organization "declare[d] COVID-19 a pandemic."[196] There is hardly a

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[193] Johnson v. Ry. Express Agency, 421 U.S. 454, 459–60 (1975) ("Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief."); *see* Brown v. GSA, 425 U.S. 820, 833–34 (1976).

[194] Exec. Order No. 14043, 86 Fed. Reg. 50989 (Sept. 14, 2021).

[195] David J. Sencer CDC Museum, *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html# (Aug. 16, 2022).

[196] *Id.*

person on the planet who has not been affected by or made aware of this global pandemic that has taken the world by storm since its genesis. While the pandemic has tragically caused death, illness, and economic tribulation, it has also given rise to threats to and violations of religious liberties.[197]

Threats to religious liberties in the name of health and safety started with restrictions on places of worship and quickly progressed to vaccine mandates that violate sincerely held religious beliefs.[198] On September 9, 2021, President Biden issued an Executive Order containing a vaccine mandate requiring "COVID-19 vaccination for all [f]ederal employees."[199] The mandate did not contain an "option of being regularly tested to opt out."[200] Further, the mandate stated that "[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its [f]ederal employees, with exceptions only as required

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[197] *Id.* (providing that on February 21, 2021, the U.S. COVID-19 death toll surpassed 500,000); LAUREN BAUER ET AL., TEN FACTS ABOUT COVID-19 AND THE U.S. ECONOMY 1 (2020), https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/ ("The coronavirus 2019 disease (COVID-19) pandemic has created both a public health crisis and an economic crisis in the United States."); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (holding certain restrictions on church gatherings unconstitutional) ("But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty.").

[198] *See Cuomo*, 141 S. Ct. at 66, 68 ("The restrictions at issue . . . effectively barr[ed] many from attending" "religious services in areas classified as 'red' or 'orange' zones."); *see also* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (granting injunction against California's restrictions of religious gatherings in light of the Court's holding in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020)); Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) ("First, California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."); Exec. Order No. 14043, 86 Fed. Reg. 50989 (Sept. 14, 2021) (mandating the vaccine for all federal employees "to promote the health and safety of the Federal workforce.").

[199] Exec. Order No. 14043, *supra* note 194.

[200] Kevin Liptak & Kaitlan Collins, *Biden Announces New Vaccine Mandates That Could Cover 100 Million Americans*, CNN POLITICS (Sept. 9, 2021, 9:01 PM), https://www.cnn.com/2021/09/09/politics/joe-biden-covid-speech/index.html.

by law."[201] Speaking in defense of the mandate in an effort to convince unvaccinated citizens to get vaccinated, President Biden stated, "We've been patient, but our patience is wearing thin, and your refusal [to get vaccinated] has cost all of us."[202] White House Press Secretary Jen Psaki asserted that "[t]he expectation is if you want to work in the federal government . . . you need to be vaccinated."[203] The White House touted that "the federal government should act as a model for other businesses in their own vaccine mandates . . . ."[204]

Although the mandate allows for "exceptions only as required by law," these exceptions are stringent and very limited.[205] The limited exceptions "apply to workers claiming medical or religious reasons for not getting vaccinated."[206] According to the Safer Federal Workforce Task Force, "[d]etermining whether an exception is legally required will include consideration of factors such as the basis for the claim; the nature of the employee's job responsibilities; and the reasonably foreseeable effects on the agency's operations, including protecting other agency employees and the public from COVID-19."[207]

As of November 2021, "tens of thousands" of federal employees had requested religious exemptions to the vaccine mandate.[208] With the influx of religious exemption requests, the federal government has been forced "to

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[201] Exec. Order No. 14043, *supra* note 194.

[202] Liptak & Collins, *supra* note 200.

[203] *Id.*

[204] *Id.*

[205] Exec. Order No. 14043, *supra* note 194.

[206] Liptak & Collins, *supra* note 200.

[207] *Vaccination*, SAFER FEDERAL WORKFORCE, https://www.saferfederalworkforce.gov/faq/vaccinations/ (last visited Oct. 10, 2022).

[208] Lisa Rein et al., *Nearing Monday Coronavirus Vaccine Deadline, Thousands of Federal Workers Seek Religious Exemptions to Avoid Shots*, THE WASHINGTON POST (Nov. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/federal-workers-vaccines-exemptions/2021/11/07/761eb9d8-3da3-11ec-8ee9-4f14a26749d1_story.html ("The number of religious objectors ranges from a little more than 60 people at the Education Department to many thousands among the 38,000-strong workforce at the Bureau of Prisons, according to federal employee union officials.").

fairly and legally weigh the surging requests and determine who receives an exemption."[209] Federal attorneys, the EEOC, unions, and even external lawyers have scrambled to assist employees with the exemption process, finding deliberations to be "particularly acute as the government tries to balance the right to religious freedom against the goal of creating safe workplaces for 2.1 million civilian employees."[210] Ultimately, if an employee does not comply with the vaccine mandate or if their exemption request is denied, they face adverse employment action such as termination.[211]

IV. PROPOSAL

Considering the differences between RFRA and Title VII, particularly in the context of religious exemption requests for the federal employee vaccine mandate, it is clear that if *Brown* is strictly applied, aggrieved federal employees will be limited to claims under Title VII and will thus receive less protection than a non-federal employee would receive under RFRA. To remedy this significant problem, this Comment ultimately proposes allowing a federal employee who alleges religious discrimination directly resulting from government action to bring a RFRA claim parallel to, or in place of, their Title VII claim in federal district court.

A. *Federal Mandate Exemption Requests Under Title VII*

Under Title VII, if an employee requests an exemption from the federal employee vaccine mandate, the employer must attempt to reasonably accommodate that employee unless an accommodation poses an undue hardship.[212] When evaluating what constitutes a reasonable accommodation, "an employer should thoroughly consider all possib[ilities] . . . , including

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[209] *Id.*

[210] *Id.*

[211] *Vaccination*, *supra* note 207 ("Employees covered by Executive Order 14043 who fail to comply with a requirement to be fully vaccinated or provide proof of vaccination and have neither received an exception or extension nor have an exception or extension request under consideration, are in violation of a lawful order. Employees who violate lawful orders are subject to discipline, up to and including termination or removal.").

[212] *See* discussion *supra* Section II.A.1.

telework and reassignment."[213] Although "[i]n many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances without imposing an undue hardship,"[214] according to the federal government's Safer Federal Workforce Task Force, "[i]n some cases, the nature of the employee's job may be such that an agency determines that no safety protocol other than vaccination is adequate."[215] When an agency makes this determination, the religious accommodation request may be denied.[216]

Essentially, if an employer demonstrates that they are unable to provide a reasonable accommodation to the employee without incurring an undue hardship, they are not required to accommodate the employee under Title VII and may deny any exemption request.[217] According to the EEOC, when evaluating whether an accommodation would impose an undue hardship, "[c]osts to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business—including, in this instance, the risk of the spread of COVID-19 to other employees or to the public."[218] Thus, the burden under Title VII is light. An employer may simply claim that they are concerned with the risk that COVID-19 will spread in the workplace and with that, an employee must either abdicate their religious beliefs or bid farewell to their livelihood.[219]

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[213] U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (July 12, 2022).

[214] *Id.*

[215] *Vaccination*, *supra* note 207.

[216] *Id.*

[217] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 213.

[218] *Id.* The EEOC also explained that "[c]ertain common and relevant considerations during the COVID-19 pandemic include, for example, whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation, i.e., the cumulative cost or burden on the employer." *Id.*

[219] Interestingly, even a fully vaccinated employee can spread COVID-19. *See Variants of the Virus*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2

B. *Federal Mandate Exemption Requests Under RFRA*

Under RFRA, on the other hand, the burden for denying a religious exemption request is much higher than under Title VII. As discussed in Section II.B., RFRA prohibits the federal government from substantially burdening a person's exercise of religion unless the government can show that the burden furthers a compelling government interest and the burden on religious exercise is the least restrictive means available to further the government's interest.[220] According to the Congressional Research Service, when "the federal government or a covered entity *as an employer* adopts its own policy requiring its employees to be vaccinated, employees with religious objections could bring a RFRA claim against their government employer . . . ."[221] Because of the strict scrutiny standard applied in a RFRA analysis, an employee is more likely to be successful under RFRA than Title VII.[222]

Assuming an employee can demonstrate that the vaccine mandate causes them a substantial burden, the government would then have the burden under RFRA to prove the vaccine mandate furthers a compelling government interest.[223] In the case of a global pandemic, it is likely that the government would be able to successfully establish this interest because the vaccine mandate is, according to the government, the "best way" to promote the

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019-ncov/variants/index.html?CDC_AA_refVal=https%3A%252 (Aug. 11, 2021) ("Anyone with Omicron infection, regardless of vaccination status or whether or not they have symptoms, can spread the virus to others."); *see also COVID-19 Vaccines Work*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html (June 28, 2022) ("However, since vaccines are not 100% effective at preventing infection, some people who are up to date with the recommended vaccines will still get COVID-19.").

[220] 42 U.S.C. § 2000bb.

[221] ANDERSON & KILLION, *supra* note 185, at 6.

[222] *See id.* at 5 ("RFRA's standard is thus more rigorous than Title VII's religious accommodation standard, for which the touchstone is reasonableness.").

[223] *See* 42 U.S.C. § 2000bb.

health and safety of the federal workforce.[224] However, unlike Title VII, the employee's journey does not end with the government's establishment of a compelling interest (or an undue hardship under Title VII) due to the severity of COVID-19. Rather, under RFRA, the government must go a step further and establish that requiring the employee to be injected with a vaccine against their wishes is the least restrictive means available to further the government's interest of stopping the spread of COVID-19.[225] While courts have not yet adjudicated this issue, it is likely that the government would have a difficult time proving that the workforce-wide vaccine mandate is the least restrictive way to stop the spread of COVID-19 when alternatives like teleworking, social distancing, rapid testing, and masking are available and commonly-used methods for stopping the spread.[226] If the government cannot prove that a mandatory vaccine as applied to the aggrieved employee is the least restrictive means of furthering the government's interest, the mandate is invalid as applied to the federal employee and the employee will be exempted from receiving the vaccine as a condition of their employment.[227]

C. *RFRA as a Parallel Cause of Action—The Solution Explained*

Because the paths of RFRA and Title VII have rarely crossed in the context addressed in this Comment, there are various avenues by which the problem this intersection causes may be addressed. The first, and probably most straight-forward, solution would be for Congress to clarify the interplay between RFRA and Title VII. Although it does not appear that, based on the text of RFRA, Congress could be any clearer regarding its application,

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[224] Exec. Order No. 14043, *supra* note 194; ANDERSON & KILLION, *supra* note 185, at 6 ("[C]ases involving other compulsory vaccination programs suggest strong governmental interests behind immunization efforts against infectious diseases.").

[225] 42 U.S.C. § 2000bb-1.

[226] *How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (as updated Jan. 20, 2022) (last visited Jan. 22, 2022) ("COVID-19 self-tests are one of many risk-reduction measures, along with vaccination, masking, and physical distancing, that protect you and others by reducing the chances of spreading COVID-19.").

[227] *See* 42 U.S.C. § 2000bb.

Congress could expressly extend RFRA to the government *as an employer*, which would eliminate the concerns and problems found in *Brown* as applied to religious discrimination.[228]

Another solution, which requires no action from Congress, is that in a particular set of circumstances—such as a vaccine mandate for all federal employees—where a federal law, regulation, or mandate itself is the *cause* of the religious discrimination, a federal employee should be allowed to bring a RFRA claim against the federal government as a whole or the government official in their individual capacity instead of a Title VII claim against the government agency. This solution comports with the text and purpose of RFRA while also leaving the Court's rationale in *Brown* undisturbed.[229] In this narrow set of circumstances where the discrimination does not stem from standard workplace policies, such as grooming requirements, décor restrictions, scheduling, etc., the federal employee would have the option to bypass the stringent and tedious Title VII claim-filing process and instead bring the claim in federal court.[230] This allows the aggrieved federal employee the opportunity to fully exercise their rights as provided under RFRA. Notably, if the federal employee was a non-federal employee and the government passed a law, regulation, or mandate that discriminated against the employee's religious beliefs, the non-federal employee would be able to bring a RFRA claim in federal court parallel to or in place of a Title VII claim.[231] For these reasons, courts should allow federal employees who suffer

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[228] ANDERSON & KILLION, *supra* note 185, at 6.

[229] In *Brown*, the Court primarily relied upon its avant-garde interpretation of § 717 to make its decision. Brown v. GSA, 425 U.S. 820, 825, 828 (1976). However, the Court also reasoned that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833.

[230] It is important to note the distinction between standard workplace policies and broader policies implemented by the government *as an employer*. Standard policies are those that would be expected in the everyday workplace—federal and non-federal. The EEOC provides numerous examples of these types of policies. *See* EEOC COMPLIANCE MANUAL, *supra* note 34. However, regulations, mandates, and laws, passed by the government as an employer open the door to a RFRA cause of action because Title VII does not allow an aggrieved employee to sue the government as a whole, while RFRA does.

[231] Johnson v. Ry. Express Agency, 421 U.S. 454, 459 (1975); *see Brown*, 425 U.S. at 833–34.

religious discrimination as the result of a government policy, mandate, law, regulation, etc., to bypass Title VII and bring a RFRA claim directly to federal court.

In addition, if a federal employee's religious belief can be reasonably accommodated then there is no need to move forward with a Title VII or RFRA claim. However, if a reasonable accommodation cannot be found or if one is denied altogether and the employer claims an undue hardship defense saying accommodation would require a violation of the government policy, law, mandate, etc., the employee should be permitted to bypass Title VII and bring a RFRA claim in federal court.[232] Furthermore, if an employer claims an undue hardship defense by stating that accommodation would impose a security concern (in the case of COVID-19, the security concern may be the risk of the spread of the virus), then the employee should be permitted to bring a RFRA claim instead of enduring the Title VII claim process.

Logically, these solutions are necessary because if a federal employer can claim an undue hardship defense for violation of federal law when the government passes a law, regulation, or mandate, then the employee will essentially never be granted an accommodation. The federal employer could discriminate against the employee's religious beliefs and simply hide behind the government under the guise of obedience and compliance. Similarly, because of the relatively easy-to-meet undue hardship standard under Title VII, an employer can lean heavily on the fear surrounding a speculative security or health concern. For example, in the case of the vaccine mandates discussed previously, the employer can claim an undue hardship and consequently deny religious accommodation requests in the broad name of stopping the spread of COVID-19. Federal employees' religious liberties deserve better than this.

In light of the differences between the protections and options provided by RFRA and Title VII, this solution provides the greatest level of protection for an aggrieved employee's religious beliefs while also maintaining respect for the intricate filing process of Title VII in appropriate circumstances.

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[232] *See* Rosenzweig, *supra* note 37, at 2528.

IV. CONCLUSION

The problem analyzed in this Comment is highly relevant, particularly in the context of COVID-19. With the recent implementation of vaccination mandates, a plethora of religious discrimination claims will likely follow over the next few years. The solution proposed by this Comment allows greater protection for religious liberties in a time when they are being dangerously threatened. By providing employees and attorneys with arguments that can be used to combat the idea that Title VII is the only possible avenue for recourse in a federal employment religious discrimination situation, this Comment seeks to be useful to those who find themselves on the frontlines of the intensifying battle at hand. "Remember civil and religious liberty always go together: if the foundation of the one be sapped, the other will fall of course."[233]

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[233] ALEXANDER HAMILTON, A FULL VINDICATION OF THE MEASURES OF CONGRESS (1774), *reprinted in* THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON 1, 29 (Richard B. Vernier ed., 2008).