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NOTE

MAY I BE EXCUSED? SMITH'S INDIVIDUALIZED GOVERNMENTAL ASSESSMENT EXCEPTION AND THE HHS MANDATE

MARY E. MCMAHON[†]

“No provision in our constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.”¹

INTRODUCTION

“Let’s honor the conscience of those who disagree with abortion, and draft a sensible conscience clause, and make sure that all of our health care policies are grounded not only in sound science, but also in clear ethics, as well as respect for the equality of women.”² President Obama made this statement during his 2009 commencement speech at the University of Notre Dame on May 17, 2009. While his invitation to speak at Notre Dame upset some Catholics due to his pro-choice positions,³ many Catholic leaders were heartened by the President’s words regarding the need to draft a “sensible conscience clause” in healthcare legislation in order to protect the consciences of religious groups

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¹ Letter from Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809), *available at* <http://www.consource.org/document/to-the-society-of-the-methodist-episcopal-church-at-new-london-connecticut-1809-2-4/20130122082649/>.

² President Barack Obama, Notre Dame Speech (May 17, 2009), *available at* <http://www.chicagotribune.com/chi-barack-obama-notre-dame-speech-story.html#page=1>.

³ Cathy Lynn Grossman, *Notre Dame’s Obama Invite Outrages Some Catholics*, USA TODAY (Mar. 24, 2009, 1:27 PM), <http://content.usatoday.com/communities/religion/post/2009/03/64571525/1#.UhxUD7RLR8x>.

and individuals opposed to abortion and contraception.⁴ In fact, when the battle for President Obama's controversial healthcare bill, the Patient Protection and Affordable Care Act ("ACA"), was raging, many Catholic Bishops said they supported the bill for its guarantee of universal healthcare coverage, provided, of course, that it also prohibited federally funded abortions and included conscience provisions.⁵

Now, just over five years after President Obama's speech at Notre Dame, and four years after the ACA was signed into law, many Catholics feel deceived.⁶ In fact, the University of Notre Dame, the very school that warmly welcomed President Obama to speak only a few years ago, has sued the Department of Health and Human Services ("HHS") over the President's signature law, in response to what it perceives to be an affront to its religious liberty.⁷ The University of Notre Dame is not alone: Over 300 plaintiffs representing more than ninety organizations or businesses with various religious backgrounds have brought lawsuits in federal courts around the country against HHS, its former and current Secretaries Kathleen Sebelius and Sylvia Burwell, and other executive agencies.⁸

⁴ Complaint & Demand for Jury Trial, *Univ. of Notre Dame v. Sebelius* (No. 3:12CV253), 2012 WL 1859163, at *71. Notre Dame's complaint states that President Obama's signing of Executive Order 13,535, which provided that no executive agency would authorize the funding of abortion services, "was consistent with a 2009 speech that [he] gave at Notre Dame, in which he indicated that his Administration would honor the conscience of those who disagree with abortion, and draft sensible conscience clauses." *Id.*

⁵ Don Clemmer, *Yet Another Healthcare Round-Up*, U.S. CONF. OF CATHOLIC BISHOPS BLOG (Mar. 18, 2010, 3:26 PM), <http://uscgbmedia.blogspot.com/2010/03/yet-another-health-care-round-up.html>.

⁶ Benjamin Mann, *President Accused of Breaking Notre Dame 'Conscience' Pledge*, CATHOLIC NEWS AGENCY (Nov. 20, 2011, 5:28 PM), <http://www.catholicnewsagency.com/news/president-accused-of-breaking-notre-dame-conscience-pledge/>.

⁷ See generally *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014).

⁸ See *HHS Mandate Information Central*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral/> (last visited Jan. 26, 2015). Plaintiffs contesting the HHS Mandate have had rather good results. As of February 2015, there have been fifty rulings on cases brought by for-profit businesses, which, most importantly, includes a Supreme Court victory by the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *Id.* There have also been fifty-six lawsuits filed by nonprofit organizations, including various dioceses and universities. As of February 2015, thirty-one of these organizations have had their motions for injunctive relief granted, while nine have had theirs denied. *Id.* Several other cases have been dismissed for procedural issues. *Id.*

The Supreme Court has already decided one case on the matter, *Burwell v. Hobby Lobby Stores, Inc.*,⁹ in which it concluded that HHS's regulations requiring all non-exempt businesses and organizations to provide coverage of certain contraceptives ("HHS Mandate") violate the rights of closely-held corporations under the Religious Freedom Restoration Act ("RFRA"), if those closely-held corporations object to the regulations based on the sincerely-held religious beliefs of their shareholders.¹⁰ The *Hobby Lobby* decision has not brought an end to the controversy over the HHS Mandate, however. Many lawsuits, including those by non-profit organizations like the University of Notre Dame, are still pending.¹¹

Though the ACA is notoriously long and complex,¹² the reason for these lawsuits is relatively straightforward. The ACA requires a "group health plan and a health insurance issuer offering group or individual health insurance coverage" to provide coverage, without any cost sharing requirements, for women's "preventive care and screenings."¹³ These "preventive services" are laid out in "comprehensive guidelines" supported by the Health Resources and Services Administration ("HRSA"), an agency of HHS.¹⁴ In other words, HHS mandates that all non-exempt employers provide insurance coverage free of charge for the preventive services contained in the guidelines. The controversy over this requirement stems from the fact that the preventive services mandated by HHS include coverage for contraceptives, abortifacients, and sterilization, along with related patient education and counseling,¹⁵ some or all of which violate the core tenets of a variety of religious denominations.

⁹ 134 S. Ct. 2751 (2014).

¹⁰ *Id.* at 2759.

¹¹ Mark Sherman & Rachel Zoll, *After Hobby Lobby, Nonprofits' Contraceptive Cases up Next for Supreme Court*, DALLAS MORNING NEWS (July 6, 2014, 6:54 PM), <http://www.dallasnews.com/news/washington/20140706-after-hobby-lobby-nonprofits-contraceptive-cases-up-next-for-supreme-court.ece>; see also *HHS Mandate Information Central*, *supra* note 8.

¹² Rick Newman, *The Real Reason Obamacare Scares People*, U.S. NEWS & WORLD REP. (Mar. 23, 2012, 1:52 PM EDT), <http://www.usnews.com/news/blogs/rick-newman/2012/03/23/the-real-reason-obamacare-scares-people>.

¹³ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2713, 124 Stat. 119 (2010).

¹⁴ *Id.*

¹⁵ See *Women's Preventive Services Guidelines*, U.S. DEPARTMENT HEALTH & HUM. SERVICES: HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Jan. 26, 2015).

While it is true that there is a religious exemption to the HHS Mandate, established at the discretion of HRSA, it is narrow,¹⁶ essentially only covering actual church organizations themselves (such as houses of worship) and “their integrated auxiliaries, and conventions or associations of churches,” and “the exclusively religious activities of any religious order.”¹⁷ The exemption does not extend to the vast majority of religiously affiliated organizations such as universities, hospitals, and charities.¹⁸

¹⁶ See 45 C.F.R. § 147.131(a) (2014) (“For purposes of this paragraph (a), a ‘religious employer’ is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.”). Section 6033(a)(3)(A)(i) refers to “churches, their integrated auxiliaries, and conventions or associations of churches,” while section 6033(a)(3)(A)(iii) refers to “the exclusively religious activities of any religious order.” 26 U.S.C. § 6033 (2012). The previous definition of “religious employer,” which was changed when the HHS Mandate was finalized on June 28, 2013, stated:

[A] ‘religious employer’ is an organization that meets all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B) (2011).

¹⁷ See 26 U.S.C. § 6033.

¹⁸ See *id.*; 4 W. Cole Durham & Robert Smith, RELIGIOUS ORGANIZATIONS AND THE LAW § 17:4 (2012). While this is an updated and “simplified” definition of “religious employer,” see DEPT OF HEALTH & HUMAN SERVS. ET AL., COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT [hereinafter FINAL RULES], it merely clarifies that “[a] house of worship is exempted even if it provides charitable social services to, or employs, persons of different religious faiths.” Thus, the new definition does not expand the universe of group health plans that qualify for the exemption beyond that which was originally intended. See *Women’s Preventive Services Coverage and Non-Profit Religious Organizations*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Jan. 28, 2015). Additionally, the numerous lawsuits by religiously affiliated nonprofit organizations contesting the HHS Mandate prove that the “religious employer” exemption rarely extends beyond houses of worship. See Laurie Goodstein, *Catholics File Suits on Contraceptive Coverage*, N.Y. TIMES (May 21, 2012), <http://www.nytimes.com/2012/05/22/us/catholic-groups-file-suits-on-contraceptive-coverage.html?ref=contraception&r=1&> (“In an effort to show a unified front in their campaign against the birth control mandate, 43 Roman Catholic dioceses, schools, social service agencies and other institutions filed lawsuits in 12 federal courts on Monday, challenging the Obama administration’s rule that their employees receive coverage for contraception in their health insurance policies.”); *HHS Mandate Information Central*, *supra* note 8. On June 28, 2013, after much

discussion, the Obama administration introduced an “accommodation” for non-exempt religiously affiliated institutions objecting to the HHS Mandate. See 45 C.F.R. § 147.131; FINAL RULES, *supra*; News Release, U.S. Dep’t of Health & Human Servs., Administration Issues Final Rules on Contraception Coverage and Religious Organizations (June 28, 2013), available at <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>. Under these rules, self-certifying “nonprofit religious organizations that qualify for [the] accommodations are not required to contract, arrange, pay, or refer for contraceptive coverage; however, plan participants and beneficiaries (or student enrollees and their covered dependents) will still benefit from separate payments for contraceptive services without cost sharing or other charge.” See FINAL RULES, *supra*. In other words, the accommodation creates a system in which qualifying institutions, such as some religiously affiliated hospitals, charities, and schools, will not have to pay or be involved in providing contraceptive coverage. Instead, the institutions’ insurance providers or third-party administrators must provide the coverage “without cost sharing, premium, fee, or other charge to plan participants or beneficiaries or to the eligible organization or its plan.” See *id.* Despite this, the majority of religiously affiliated nonprofit institutions that oppose the HHS Mandate have not accepted the “accommodation” as an adequate means of protecting their religiously-based objections. See, e.g., Press Release, The Beckett Fund, Final HHS Rule Fails To Protect Constitutional Rights of Millions of Americans (June 28, 2013), available at <http://www.becketfund.org/becket-welcomes-opportunity-to-study-final-rule-on-hhs-mandate/> (stating that the Final Rules continue to make nonprofit religious employers the “gatekeepers” to abortion); *USCCB Finds Continued Major Problems in HHS Mandate’s ‘Final Rule,’* CATHOLICCULTURE.ORG (July 4, 2013), <http://www.catholicculture.org/news/headlines/index.cfm?storyid=18353>. For more information on the “accommodation” and Final Rules, see FINAL RULES, *supra*; DEP’T OF HEALTH & HUMAN SERVS., GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING (2013), available at <http://www.becketfund.org/wp-content/uploads/2013/06/preventive-services-guidance-6-28-2013.pdf>. The Final Rules were updated once again on August 27, 2014, when HHS issued “Interim Final Rules.” See 45 C.F.R. § 147.131 (2014), available at <https://federalregister.gov/a/2014-20252>. This update is similar to the original “accommodation,” but is simpler in that it allows religious organizations to file a letter with HHS stating the organization’s religious objection to the HHS Mandate. *Id.*; see also Ctr. for Consumer Info. & Ins. Oversight, *Women’s Preventive Services Coverage and Non-Profit Religious Organizations*, CENTERS FOR MEDICARE & MEDICAID SERVICES, available at <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Mar. 2, 2015). After the letter is filed, HHS or the Department of Labor will order the organization’s insurer or a third-party administrator to provide contraceptive services to the organization’s employees at no cost. *Id.* The Interim Final Rules were written largely in reaction to the Supreme Court’s decision to grant an emergency injunction for Wheaton College, a Christian academic institution. *Id.* In *Wheaton College v. Burwell*, the Supreme Court held that “pending final disposition of appellate review,” Wheaton College was not required to comply with the HHS Mandate as long as it informed HHS in writing “that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services.” 134 S. Ct. 2806, 2807, 2814 (2014). As with the Final Rules, the Interim Final Rules have not mollified religious organizations, as they still contend that they should be exempted

Likewise, religiously devout business owners are also subject to the HHS Mandate.¹⁹ This, of course, puts these religious individuals and organizations in a serious bind: They must choose between complying with the law in violation of their deeply held religious convictions, refusing to comply in the face of very hefty penalties,²⁰ or shutting down their organizations completely.

The religious employers who have brought lawsuits in response to the HHS Mandate have made a variety of arguments as to why the HHS Mandate should be struck down, including assertions that it violates RFRA and the Free Exercise Clause of the First Amendment. In *Hobby Lobby*, the Supreme Court

completely from complying with the Mandate. See, e.g., CNS Staff, *Newman Society Releases Statement on New HHS Mandate Accommodation*, CARDINAL NEWMAN SOC'Y (Aug. 28, 2014, 5:09 PM), available at <http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/3500/Newman-Society-Releases-Statement-on-New-HHS-Mandate-Accommodation.aspx> (noting that the new proposal does not provide an exemption for religious objectors, which it states "is the only acceptable condition for the protection of religious freedom").

¹⁹ See 45 C.F.R. § 147.130(a)(1)(iv). As noted, however, after the Supreme Court's decision in *Hobby Lobby*, closely-held for-profit businesses whose shareholders object to the HHS Mandate on sincere religious grounds are not required to comply with its requirements. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In August 2014, in response to the Supreme Court's decision, HHS published proposed rules, which would establish an "accommodation" for closely-held for-profit entities objecting to the Mandate. See 79 FR 51118 (Aug. 27, 2014), available at <https://federalregister.gov/a/2014-20254>; Ctr. for Consumer Info. & Ins. Oversight, *Women's Preventive Services Coverage and Non-Profit Religious Organizations*, *supra* note 18. The "accommodation" would be similar to the one created for non-profit religious organizations. 79 FR 51118; see *supra* note 18. From the perspective of closely-held businesses like *Hobby Lobby*, such an "accommodation" would be a step down from their current status, as such entities are currently completely exempt from the HHS Mandate after the Supreme Court's decision. See, e.g., "Comments on Proposed Rules on Coverage of Certain Preventive Services Under the Affordable Care Act," United States Conference of Catholic Bishops, Office of the General Counsel (Oct. 8, 2014), available at <http://www.usccb.org/about/general-counsel/rulemaking/upload/2014-hhs-comments-on-proposed-rule-on-for-profits-10-8.pdf> (noting that the proposed rules would once again subject closely-held for-profit organizations to the HHS Mandate, while they are currently exempt).

²⁰ See 26 U.S.C. § 4980H; 26 U.S.C. § 4980D; 29 U.S.C.A. § 1132 (West 2014); see also F. James Sensenbrenner, *Affordable Care Act Gives Government Permission To Play the Bully*, FOX NEWS (Aug. 1, 2012), <http://www.foxnews.com/opinion/2012/08/01/affordable-care-act-gives-government-permission-to-play-bully/> ("[The ACA] authorizes our government to tax employers to the tune of \$100 per day, per employee for failing to comply with the HHS mandate. That equals an astounding \$36,500 per employee, per year.").

based its decision solely on RFRA, and did not address the free exercise argument.²¹ This Note analyzes an alternative ground the Court could have relied upon in reaching a similar conclusion. Specifically, this Note only focuses on one particular assertion relating to the free exercise argument. More particularly, this Note concentrates on the claim that the HHS Mandate should not apply to organizations and businesses that object to it as a violation of their religious consciences because the HHS Mandate falls under the “individualized governmental assessment exception” set forth in the Supreme Court’s landmark free exercise case *Employment Division v. Smith*.²²

While *Smith* has been criticized by many proponents of broad religious liberty for its holding that “neutral, generally applicable” laws are presumptively constitutional,²³ even if they place an incidental burden on the free exercise of religious individuals, *Smith* did provide several exceptions to that rule, one being the “individualized governmental assessment exception.”²⁴ Unfortunately for lower courts, the Court did little to define the scope of this exception, resulting in a wide array of interpretations. This Note examines how the lower courts have generally interpreted the exception, and how such interpretations will be applied in the context of the HHS Mandate.

Part I of this Note explores the state of free exercise jurisprudence prior to *Smith*, followed by an examination of the Court’s decision in *Smith* and the background of the “individualized governmental assessment exception.” Part II examines several circuit court decisions representing both the broad and narrow interpretations of the exception. Part III analyzes the interpretations discussed in Part II, particularly in the context of the HHS Mandate, and ultimately argues that the

²¹ See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²² 494 U.S. 872, 884 (1990).

²³ See, e.g., Vincent Martin Bonventre, *The Fall of Free Exercise: From ‘No Law’ to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1414 (2007) (“[T]he nation’s constitutional promise of religious free exercise is no longer guaranteed special protection. No longer is free exercise safeguarded under the Constitution against routine government interests. No longer must state courts subject infringements upon free exercise to the compelling-interest test; in fact, no longer may federal courts do so to infringements by state governments.”).

²⁴ See *Smith*, 494 U.S. at 884.

broad interpretation, which gives individuals more extensive religious freedoms, is more consistent with the aims of the First Amendment's Free Exercise Clause.

I. BACKGROUND

The Supreme Court's decision in *Smith* drastically changed the way the judiciary interpreted the scope of the Free Exercise Clause, substantially weakening the extent of its protections, at least according to many First Amendment scholars.²⁵ This ruling was controversial in that it essentially "cast aside almost three decades of free exercise jurisprudence."²⁶ This Section first describes the state of the Free Exercise Clause prior to *Smith*, before examining *Smith* itself and the changes it made to free exercise jurisprudence. Finally, and most importantly for the purposes of this Note, this Section also explores the birth of the "individualized governmental assessment exception" in *Smith*.

A. *Free Exercise Jurisprudence: Pre-Smith*

The Free Exercise Clause of the First Amendment, as its name suggests, protects the right of individuals to freely exercise their religious beliefs. More specifically, it limits Congress's power to interfere with religious practice, stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁷ While the Supreme Court's pre-*Smith* free exercise jurisprudence was at times inconsistent, and certainly not always strongly protective of broad religious freedoms,²⁸ the law settled down considerably just under thirty years before the Court's decision in *Smith*.²⁹ This stabilization of free exercise jurisprudence, which, at least in

²⁵ See Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001) ("According to the conventional wisdom in the community of First Amendment scholars, in *Employment Division v. Smith* the Supreme Court 'abandoned' its longstanding commitment to protecting the free exercise of religion and 'created a legal framework for persecution' of religious dissenters.") (footnotes omitted).

²⁶ See *id.* at 851.

²⁷ U.S. CONST. amend. I (emphasis added).

²⁸ See Bonventre, *supra* note 23, at 1404.

²⁹ See Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1180 (2005).

theory, favored rather broad protections for religious liberty, was a result of the Court's decision in the 1963 case *Sherbert v. Verner*.³⁰

Sherbert was a case in which a Seventh-day Adventist in South Carolina was denied unemployment benefits because she refused to accept employment that required her to work on Saturdays, her religion's Sabbath.³¹ The South Carolina Unemployment Compensation Act disqualified those applicants who, "without good cause," failed to accept "suitable work" that had been offered to them.³² Her religiously motivated reason for rejecting "suitable work" was deemed to be without "good cause," making her ineligible to receive the benefits.³³ The Supreme Court declared that this denial of benefits required the plaintiff to make an impermissible choice "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."³⁴ The Court held that this infringement of free exercise failed under the "compelling state interest" test, in which "only the gravest abuses, endangering paramount interest[s]" could validate even an incidental burden on religious practice.³⁵ In other words, the Court ruled that free exercise cases are subject to strict scrutiny, and a burden on free exercise is upheld only when the government demonstrates that the law in question is narrowly tailored to achieve a compelling state interest.³⁶

After *Sherbert*, the compelling interest test in free exercise jurisprudence became the norm.³⁷ The Supreme Court affirmed this about a decade later in *Wisconsin v. Yoder*,³⁸ a 1972 case dealing with the application of compulsory state education law to Amish students, whose parents' religious beliefs dictated that their children be free from secular influences beyond the basic

³⁰ *Id.*

³¹ *Id.* at 1181.

³² *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 401 (1963)) (internal quotation marks omitted).

³³ *Id.* (quoting *Sherbert*, 374 U.S. at 401) (internal quotation marks omitted).

³⁴ *Id.* (quoting *Sherbert*, 374 U.S. at 404) (internal quotation mark omitted).

³⁵ See Bonventre, *supra* note 23, at 1410 (alteration in original) (quoting *Sherbert*, 374 U.S. at 406) (internal quotation marks omitted).

³⁶ See Duncan, *supra* note 29.

³⁷ See Bonventre, *supra* note 23, at 1410–11.

³⁸ 406 U.S. 205 (1972).

reading, writing, and math skills taught through eighth grade.³⁹ The Court held that although the state of Wisconsin clearly had an interest in educating its citizens beyond the eighth grade, this interest was not so "absolute" as to "exclu[de] or subordinat[e] . . . other interests."⁴⁰ The Court reiterated that states should give deference to free exercise claims, declaring that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁴¹ It was not until the *Smith* ruling, which came down almost three decades after *Sherbert*, that the Court decided to take a different approach to free exercise jurisprudence.

B. Free Exercise Jurisprudence: The Smith Approach

Employment Division v. Smith,⁴² decided by the Supreme Court in 1990, was a case involving two members of the Native American Church who lost their jobs after ingesting peyote for sacramental purposes as part of a religious ceremony.⁴³ Peyote is a "controlled substance" under Oregon law, and thus, possessing it is considered a crime.⁴⁴ In addition to being fired from their jobs, the plaintiffs were deemed ineligible for unemployment benefits by Oregon's Employment Division "because they had been discharged for work-related 'misconduct.'"⁴⁵ The Oregon Supreme Court sided with the plaintiffs, applying the compelling interest test established in *Sherbert*.⁴⁶

Justice Scalia, writing for a 5-4 majority, overturned the Oregon Supreme Court's decision, seemingly abandoning decades of well-settled free exercise doctrine as well, though *Sherbert* and its progeny were not explicitly discarded.⁴⁷ Instead, the majority concluded that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."⁴⁸

³⁹ *Id.* at 210–11.

⁴⁰ *Id.* at 215.

⁴¹ *Id.*

⁴² 494 U.S. 872 (1990).

⁴³ *See id.* at 874.

⁴⁴ *Id.* (internal quotation marks omitted).

⁴⁵ *Id.*

⁴⁶ *Id.* at 875.

⁴⁷ *See Bonventre, supra* note 23, at 1411.

⁴⁸ *See Smith*, 494 U.S. at 878–79.

As the Court explained, “[T]he 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 (or prescribes) conduct that his religion prescribes (or proscribes).’”⁴⁹ Thus, strict scrutiny and the compelling interest test are only applied in situations in which a law is not a “neutral law of general applicability,” even in cases in which the law incidentally burdens individuals’ free exercise of religion.

Justice Scalia did leave a ray of hope for proponents of a robust free exercise doctrine, however: He explicitly stated that *Smith*’s holding did not overturn Court precedent,⁵⁰ including the Court’s decision in *Sherbert*.⁵¹ In order to support this assertion, Justice Scalia established three exceptions to the new “neutral, generally applicable” rule: the hybrid rights exception, the church autonomy rule, and most importantly for the purposes of this Note, the “individualized governmental assessment exception.”⁵²

C. *The “Individualized Governmental Assessment Exception”*

The “individualized governmental assessment exception” originated from Justice Scalia’s attempt to distinguish *Smith* from *Sherbert*, without having to overrule *Sherbert*.⁵³ He noted that the *Sherbert* test, unlike the *Smith* test, “was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct,” and thus is best understood to “stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”⁵⁴ Here, Justice Scalia was referring to the fact that unlike *Smith*, in which the law at issue was an “across-the-board criminal prohibition on a particular form of conduct,”⁵⁵ the law in *Sherbert* was based on the state’s judgment concerning what constituted “good cause” for turning down

⁴⁹ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

⁵⁰ *Id.* at 878–79.

⁵¹ *Id.* at 884.

⁵² See generally *Smith*, 494 U.S. 872.

⁵³ See *Duncan*, *supra* note 29, at 1184–85.

⁵⁴ See *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

⁵⁵ *Id.*

available work.⁵⁶ In such a situation, the state could not create exemptions for individuals motivated by secular reasons while denying similar exemptions for religious reasons, unless of course the state had a compelling interest in doing so, because the state would essentially be making a subjective value judgment favoring secular motivations over religious ones.⁵⁷

Hence, the *Sherbert* compelling interest test lives on in free exercise jurisprudence, though in a "transfigured state."⁵⁸ It applies in those circumstances in which the government makes individualized assessments regarding a law's applicability to a certain individual or group, which is why some scholars believe the exception is simply a branch of *Smith*'s general applicability requirement.⁵⁹ Whether or not the "individualized governmental assessment exception" is simply a branch of general applicability, the fact remains that the Court in *Smith* did little to shed light on the scope of this rule. Thus, lower courts have interpreted it both narrowly and broadly, with some strictly limiting its application to unemployment compensation cases like *Sherbert*,⁶⁰ and others applying it in cases in which the law at issue allows for no government discretion, but includes built-in categorical secular exemptions.

The Supreme Court did address the "individualized governmental assessment exception" in one other case following *Smith*. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁶¹ a case involving a Florida animal cruelty statute penalizing anyone who killed any animal "unnecessarily," the Court held that although the law appeared to be neutral and generally applicable on its face, in actuality it represented "a

⁵⁶ See generally *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵⁷ See *Smith*, 494 U.S. at 884.

⁵⁸ See *Duncan*, *supra* note 29, at 1185.

⁵⁹ See *Duncan*, *supra* note 25, at 861.

⁶⁰ Though most courts have expanded the "individualized governmental assessment exception" beyond unemployment compensation cases, there are some that have refused to do so. See, e.g., *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 18 (1st Cir. 2004) ("The *Smith* majority expressly limited . . . *Sherbert* to the unemployment compensation field."). Courts that have limited the exception to the unemployment compensation field have largely done so in response to Justice Scalia's statement in *Smith*, in which he wrote that the Court "ha[s] never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." See *Smith*, 494 U.S. at 883.

⁶¹ 508 U.S. 520 (1993).

system of ‘individualized governmental assessment of the reasons for the relevant conduct,’” in that it allowed the government to determine whether or not killing an animal was “necessary” in a particular instance.⁶² The plaintiffs practiced Santeria—a religion requiring animal sacrifice—and the regulatory scheme in question was used in such a way as to solely prohibit this sort of animal killing, but not others.⁶³ The City of Hialeah failed to provide a compelling interest for this discriminatory regulatory scheme, and thus, the Court struck it down.⁶⁴ Once again, however, the Supreme Court declined to define the limits of the exception.

II. INTERPRETATION IN THE LOWER COURTS

The open-endedness of the “individualized governmental assessment exception,” as well as the seemingly boundless number of circumstances to which it could potentially apply, have made for disparate results in the lower courts. These lower court decisions can generally be broken down into two categories: (1) those that interpret the exception rather narrowly, limiting its application to select circumstances, generally in which the government exercises some sort of discretion; and (2) those that interpret it broadly, applying it in cases dealing with a variety of circumstances in which the government has granted either individualized or categorical exemptions, or both.

A. *The Narrow Approach*

The United States Court of Appeals for the Tenth Circuit is among those courts that have viewed the “individualized governmental assessment exception” as being relatively limited in scope. In *Swanson ex rel. Swanson v. Guthrie Independent School District No. I-L*,⁶⁵ a home-schooled student and her parents brought suit against the local school district, alleging that its refusal to allow her to attend classes part-time violated her free exercise rights.⁶⁶ The only recognized exceptions to the full-time attendance requirement in this school district were “strict categories of students, all of whom ha[d] one characteristic

⁶² See *id.* at 537 (quoting *Smith*, 494 U.S. at 884).

⁶³ See *id.* at 526.

⁶⁴ See generally 508 U.S. 520.

⁶⁵ 135 F.3d 694 (10th Cir. 1998).

⁶⁶ *Id.* at 696.

in common—the state of Oklahoma recognize[d] them as students for purposes of calculating the amount of financial aid to provide to the school district.”⁶⁷ Thus, all other home-schooled students who failed to meet that requirement were deemed ineligible for the exception.⁶⁸ When faced with the plaintiffs’ individualized assessment exception argument, the court first expressed its uncertainty as to whether the *Sherbert* test even continued to apply outside the unemployment context.⁶⁹ The court then went on to conclude that even if the *Sherbert* test was still valid outside of that context, “[t]he school board’s policy . . . [did] not establish a system of *individualized* exceptions that give rise to the application of a subjective test.”⁷⁰ Here, the court construed the individualized governmental assessment test narrowly, suggesting that it is inapplicable in situations in which the exemptions in question are “strict categories” of people defined in the law itself, rather than individualized exemptions determined on an ad hoc basis at the discretion of the state.

The Tenth Circuit reaffirmed this interpretation of *Smith*’s “individualized governmental assessment exception” in *Grace United Methodist Church v. City of Cheyenne*,⁷¹ in which it held that a zoning board’s determination that a church could not establish a daycare facility in a residential zone, despite the fact that the zoning ordinance did allow for some “objective exceptions” to the residential zoning requirements, was not a violation of free exercise.⁷² Once again, the court relied on the fact that there were categorical exemptions to the zoning requirements, and thus, the zoning law did not amount to a system of ad hoc subjective decisions.⁷³ The court emphasized that although there were several exemptions to the zoning law, there was no exemption for daycare facilities, whether run by

⁶⁷ *Id.* at 701.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*; see also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (explaining that the “individualized governmental assessment exception” is limited to cases in which the decision to exempt an individual or organization from a particular law is discretionary and made on a case-by-case basis, and does not apply to cases in which the law contains objective categorical exemptions).

⁷¹ 451 F.3d 643 (10th Cir. 2006).

⁷² See *id.* at 654.

⁷³ See *id.* at 655.

secular or religious organizations, and thus, the government did not make a value judgment disfavoring religion.⁷⁴ Essentially, the court held that until the board, at its discretion, decided to allow a secular daycare facility to fall under a zoning exemption, the denial of a religious organization's proposal to build a daycare facility was acceptable.

The court pointed out that this holding is consistent with several other circuit court decisions in the land use context, noting that the Sixth, Seventh, Eighth, and Eleventh Circuits have all held that "although zoning laws may permit some individualized assessment for variances, they are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances."⁷⁵ Thus, some courts have held that the fact that a governmental entity uses discretion in granting an exemption is not conclusive in terms of whether the "individualized governmental assessment exception" applies.⁷⁶ Even when discretion is used, the "individualized governmental assessment exception" is triggered only when the regulatory system is applied in a discriminatory manner.⁷⁷ Therefore, under this interpretation, since no secular daycare facility had ever been granted an exemption from the zoning law, Grace United Methodist Church's complaint had no merit.

Various district courts have also taken the narrow approach when interpreting the "individualized governmental assessment exception." For example, in *Rader v. Johnston*,⁷⁸ a case involving a devoutly religious student's challenge to a state university's rule requiring all full-time freshmen to live on campus,⁷⁹ the United States District Court for the District of Nebraska

⁷⁴ See *id.* at 654 ("Although the City of Cheyenne's zoning ordinance allows for limited objective exceptions in the LR-1 zone (such as churches, schools, and other similar uses) the regulation bars any organization or individual from operating a daycare center in this residential zone, for either secular or religious reasons.").

⁷⁵ See *id.* at 651 (citing *First Assembly of God of Naples, Fla., Inc. v. Collier Cnty.*, 20 F.3d 419, 423–24 (11th Cir. 1994), *modified*, 27 F.3d 526 (11th Cir. 1994) (*per curiam*)).

⁷⁶ *Id.* ("Consistent with the majority of our sister circuits, . . . we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption." (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004))).

⁷⁷ *Id.* at 653–54.

⁷⁸ 924 F. Supp. 1540 (D. Neb. 1996).

⁷⁹ See *id.* at 1543.

distinguished the school's discretionary exemption from the categorical exemptions enumerated in the rule itself.⁸⁰ The court held that it was the discretionary exemption—which enabled the university to grant exceptions for “significant and truly exceptional circumstances which would make living on-campus impossible”⁸¹—and not the three expressly enumerated exemptions⁸² that placed the plaintiff's claim within *Smith's* “individualized governmental assessment exception.”⁸³ Since the discretionary exemption was applied in a manner that discriminated against religiously motivated individuals, the compelling interest test applied.⁸⁴

Similarly, in *Brock v. Boozman*,⁸⁵ the United States District Court for the Eastern District of Arkansas rejected the plaintiff's assertion that the challenged law fell under the “individualized governmental assessment exception” because it contained a specified exemption for medical purposes.⁸⁶ The court noted that the central concern of “individualized governmental assessment exception” cases is “the prospect of the government making a value judgment in favor of secular motivations but not religious motivations.”⁸⁷ According to the court, a medical exemption “is not a value judgment.”⁸⁸ Instead, a specified medical exemption

⁸⁰ See *id.* at 1551–52; see also Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1082 (2000).

⁸¹ See *Rader*, 924 F. Supp. at 1546 (internal quotation mark omitted).

⁸² The three enumerated exemptions to the university's housing policy were: (1) students who were age nineteen or older on the first day of class of the fall semester; (2) married students; (3) students living with their parents or legal guardian and commuting from within the local community. See *id.*

⁸³ See *id.* at 1551–52. The court observed that the discretionary exemption, which contained language suggesting it would only be granted in dire circumstances, was in practice granted for a variety of not-so-dire secular reasons, while it was denied for religious reasons. See Kaplan, *supra* note 80, at 1082–83.

⁸⁴ See *Rader*, 924 F. Supp. at 1555–56.

⁸⁵ No. 4:01CV00760 SWW, 2002 WL 1972086 (E.D. Ark. Aug. 12, 2002).

⁸⁶ See *id.* at *7–8. In this case, a mother objected to a law that required her children to receive Hepatitis B immunizations in order for them to attend public school. *Id.* at *1. She claimed that this law violated her religious beliefs because Hepatitis B is most often spread through sexual contact or injection of illegal drugs, and she did not want to teach her children that it is acceptable to be promiscuous or to use drugs. *Id.* at *2. The law contained an exemption for medical reasons, but not for personal religious reasons. *Id.*

⁸⁷ *Id.* at *7 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365–66 (3d Cir. 1999)).

⁸⁸ *Id.* (citing *Fraternal Order*, 170 F.3d at 365).

is simply “what the law requires of the State.”⁸⁹ In other words, an objective exemption, such as a medical exemption, specifically enumerated in the challenged provision, is not considered a value judgment, and thus does not trigger the “individualized governmental assessment exception.”

To summarize, the narrow approach to *Smith*’s “individualized governmental assessment exception” essentially depends on how analogous the challenged regulation is to the regulation at issue in *Sherbert*.⁹⁰ Therefore, the first step under this approach concentrates “on whether a law contains a mechanism similar to the ‘good cause’ criterion that is open to unfettered discretionary interpretation” in *Sherbert*.⁹¹ If such a mechanism does not exist, the “individualized governmental assessment exception” is inapplicable. If it does exist, however, the second step “requires courts to determine whether it is enforced in a discriminatory manner.”⁹² If no discrimination is uncovered, the exception does not apply, and the state is not required to justify the enforcement of its regulation with a compelling interest.⁹³

B. The Broad Approach

The broad approach to the “individualized governmental assessment exception” views the exception as being somewhat intertwined with *Smith*’s general applicability requirement. In fact, some commentators have even argued that the exception is “nothing more than a subset of the general applicability requirement.”⁹⁴ As mentioned, *Smith* asserts that incidentally burdening religion is inconsequential so long as the law in question is “neutral” and “generally applicable.”⁹⁵ As with the “individualized governmental assessment exception,” the Supreme Court has not explicitly defined a test or standard

⁸⁹ See *id.*

⁹⁰ See *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 31 A.3d 1227, 1248 (Md. 2011) (reasoning that in order to establish whether the “individualized governmental assessment exception” applies, it must be determined “whether a . . . ruling is cut from the same cloth as the individualized exemptions with which the Supreme Court in *Sherbert* and its progeny dealt.”).

⁹¹ See *id.* (quoting Kaplan, *supra* note 80, at 1081).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See Duncan, *supra* note 25, at 861.

⁹⁵ *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

explaining how to evaluate general applicability challenges, but it has provided some general guidelines.⁹⁶ Essentially, a law is not generally applicable and is “underinclusive” when it neglects to restrict “nonreligious conduct that endangers” state interests “in a similar or greater degree” than the religiously based exemption being proposed by the plaintiff.⁹⁷ This rationale appears to have been adopted by several courts using the broad approach to the “individualized governmental assessment exception.” Under the broad approach, as is illustrated in several cases below, even across-the-board categorical exemptions can trigger heightened scrutiny. Also, unlike the narrow approach, which requires proof that a system of discretionary ad hoc exemptions is applied discriminatorily, the broad approach generally views the mere existence of such a system as “*per se* not neutral and not generally applicable,”⁹⁸ automatically necessitating the application of the compelling interest test.⁹⁹

The Third Circuit has produced some of the most prominent “individualized governmental assessment exception” decisions using the broad approach.¹⁰⁰ In one such case, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the court held that the Newark Police Department could not require two Sunni Muslim officers to shave their beards.¹⁰¹ There were two exemptions to the no-beard policy: those who could not shave their beards for medical reasons and those who required a departure from the rule as part of their duties as undercover

⁹⁶ See Duncan, *supra* note 29, at 1188.

⁹⁷ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993); see also Duncan, *supra* note 29, at 1189 (“[A] law burdening religious conduct is underinclusive, with respect to any particular government interest that justifies the law’s burdensome restrictions, if the law fails to pursue that interest uniformly against other conduct that causes similar harm to that government interest.”).

⁹⁸ See Duncan, *supra* note 29, at 1189.

⁹⁹ See *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (“[A] law must satisfy strict scrutiny if it *permits* individualized, discretionary exemptions because such a regime creates the *opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.” (emphasis added) (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–65 (3d Cir. 1999))).

¹⁰⁰ Two of these decisions—*Fraternal Order* and *Blackhawk*—were written by then-Judge Alito, indicating that if an “individualized governmental assessment exception” case comes before the Supreme Court, at least one Justice will likely favor applying the broad approach.

¹⁰¹ See *Fraternal Order*, 170 F.3d at 367.

officers.¹⁰² The court admitted that the rule allowing beards for medical reasons was not exactly an “individualized exemption” as discussed in *Smith* and *Lukumi*, but was rather a “categorical exemption.”¹⁰³ However, the court reasoned that although “the Supreme Court did speak in terms of ‘individualized exemptions’ in *Smith* and *Lukumi*, it is clear from those decisions that the Court’s concern was the prospect of the government’s deciding that secular motivations are more important than religious motivations.”¹⁰⁴ The court went on to explain that this concern was actually “further implicated” in cases involving secular “categorical exemption[s]” than in those involving mere “mechanism[s] for individualized exemptions.”¹⁰⁵

In other words, categorical exemptions are, to an extent, actually more harmful than individualized exemptions because there is no question that the rulemakers have already judged a particular secular exemption as being more important than a particular religious exemption. Furthermore, under a categorical exemption, there is no opportunity for a religious dissenter to apply for an individualized exemption because the only exemptions permitted are already enumerated.

The court in *Fraternal Order* did make clear, however, that the mere existence of a categorical exemption does not necessarily indicate that a religious exemption must also be granted. In its analysis, the court distinguished between the two exemptions to the no-beard policy permitted by the police department.¹⁰⁶ The court explained that the undercover officer exemption did not obligate the police department to provide a religious exemption because “the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing.”¹⁰⁷ The purpose of the no-beard policy was to promote the department’s “general interest in

¹⁰² See *id.* at 360.

¹⁰³ See *id.* at 365.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993)). In discussing the difficulty with categorical exemptions, the court quoted Justice Kennedy’s opinion in *Lukumi*: “All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Id.* (quoting *Lukumi*, 508 U.S. at 542).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 366.

uniformity.”¹⁰⁸ The undercover officer exemption did not undermine this purpose because it had an important purpose of its own in achieving the police department’s goals.¹⁰⁹ The medical exemption, on the other hand, had no such redeeming purpose; it undermined the police department’s policy of uniformity without providing any benefits.¹¹⁰ A religious exemption to the policy would have undermined the policy to the same extent as the medical exemption.¹¹¹ Consequently, the police department’s decision to allow only the medical exemption was a value judgment favoring a harmful secular exemption over an equally harmful religious exemption.¹¹²

This broad interpretation, which seems to conflate the general applicability standard with the “individualized governmental assessment exception,” was used once again by the Third Circuit in *Blackhawk v. Pennsylvania*.¹¹³ That case dealt with a Native American’s right to possess two black bears for religious purposes. Pennsylvania required owners of “exotic wildlife” to apply for a specific permit and pay a permit fee in order to keep such animals.¹¹⁴ The law contained both categorical and individualized exemptions: It allowed zoos and nationally recognized circuses to be categorically exempt from the law, and permitted the director of the Game Commission to “waive a permit fee ‘where hardship or extraordinary circumstance warrant[ed],’ so long as the waiver is ‘consistent with sound game or wildlife management activities or the intent of [the Game and Wildlife Code].’”¹¹⁵ Clearly, the plaintiff did

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.* (“The Department’s decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department’s interest in fostering a uniform appearance through its ‘no-beard’ policy.”).

¹¹¹ See *id.* at 367 (“We are at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not.”).

¹¹² See *id.* at 366 (“[T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not.”).

¹¹³ 381 F.3d 202 (3d Cir. 2004).

¹¹⁴ See *id.* at 205.

¹¹⁵ See *id.* (alteration in original).

not fall under the categorical exemption, as his animals were not part of a zoo or circus. He was also denied an exemption under the discretionary waiver.¹¹⁶

Holding that the plaintiffs' free exercise rights were unconstitutionally infringed upon, the court first addressed the "individualized governmental assessment exception." The court analogized the waiver in *Blackhawk* to the discretionary exemption in *Sherbert*, holding that they were almost identical in that the "hardship" and "extraordinary circumstances" requirements, as well as the requirement that the waiver be "consistent with 'sound game or wildlife management activities or the intent of [the Game and Wildlife Code],'" were "sufficiently open-ended to bring the regulation within the individualized exemption rule,"¹¹⁷ just like the "good cause" requirement in *Sherbert*. Since the court applied the broad approach, the mere existence of such a system of individualized exemptions was enough to take the case outside of the scope of *Smith's* "neutral, generally applicable" standard, triggering *Sherbert's* compelling interest test.¹¹⁸

As in *Fraternal Order*, the court also established that the categorical exemptions—for zoos and circuses in this case—prompted strict scrutiny analysis.¹¹⁹ The state of Pennsylvania listed two primary interests served by its fee requirement: raising money and discouraging the keeping of wild animals in captivity.¹²⁰ Since exemptions for zoos and circuses "work against these interests to at least the same degree as the type of exemption that *Blackhawk* [sought],"¹²¹ the court ruled that the policy was not generally applicable, and thus strict scrutiny

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 209–10 (alteration in original) (internal quotation marks omitted).

¹¹⁸ See *id.* at 210 ("[T]he waiver mechanism set out in 34 Pa. Cons.Stat. Ann. § 2901(d) creates a regime of individualized, discretionary exemptions that triggers strict scrutiny."); see also *id.* at 209 ("[A] law must satisfy strict scrutiny if it *permits* individualized, discretionary exemptions because such a regime creates the *opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." (emphasis added)) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–65 (3d Cir. 1999)).

¹¹⁹ See *id.* at 211.

¹²⁰ See *id.*

¹²¹ See *id.*

would be applied.¹²² Once again, the court took the purpose of the “individualized governmental assessment exception”—preventing the government from making value judgments favoring secular exemptions over religious exemptions—and applied it to the categorical exemption situation.

Other circuit courts, as well as various district courts,¹²³ have also applied the broad approach to the “individualized governmental assessment exception.” For example, in *Ward v. Polite*,¹²⁴ the Sixth Circuit reversed the trial court’s grant of summary judgment to the defendant, partially based on its “individualized governmental assessment exception” analysis.¹²⁵ In that case, a graduate counseling student was expelled from her university for requesting to refer a homosexual client seeking relationship advice to another counseling student because her religious beliefs prohibited her from affirming homosexual relationships.¹²⁶ The school refused to allow the referral, and claimed that the plaintiff had violated the American Counseling Association code of ethics.¹²⁷ According to the court, the difficulty with this determination was the existence of considerable evidence suggesting that the ethics code “permit[ed] values-based referrals.”¹²⁸ Not only did such referrals appear to be permitted, the code actually enumerated at least two circumstances in which such referrals were *expressly* permitted: circumstances in which the client requested end-of-life counseling, and circumstances in which the client could not afford to pay for the services.¹²⁹ These two exemptions both ran afoul of the same anti-discrimination policy as the plaintiff’s requested exemption. In the first exemption, the counselor discriminated against those potentially wishing to end their life, while in the second situation, the counselor technically discriminated based on “socioeconomic status,” which was expressly prohibited in the

¹²² See *id.* at 210–11.

¹²³ See, e.g., *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012) (dealing with a law requiring pharmacists to stock and deliver a variety of drugs, though in practice the law was primarily enforced to require pharmacists to stock and dispense Plan B).

¹²⁴ 667 F.3d 727 (6th Cir. 2012).

¹²⁵ See generally *id.*

¹²⁶ See *id.* at 729–30.

¹²⁷ See *id.* at 731–32.

¹²⁸ See *id.* at 739.

¹²⁹ See *id.*

code, though clearly allowed when the client could not afford the services.¹³⁰ The court viewed the presence of these two exemptions as an indication that the ethics code adopted by the university was actually “an exception-ridden policy” that had taken on the “appearance and reality of a system of individualized exemptions.”¹³¹ Thus, if the district court, on remand, finds that this is indeed the case, it will have to apply strict scrutiny.

In sum, the broad approach differs from the narrow approach in two main respects. First, in terms of systems of individualized or discretionary case-by-case exemptions, the narrow approach requires both a showing that the system in question is analogous to the “good cause” criterion in *Sherbert* and a showing that the system is applied in a discriminatory manner. The broad approach, on the other hand, simply requires a showing that a system of individualized discretionary exemptions exists. Second, the narrow approach does not extend to cases involving enumerated or “categorical exemptions,” such as those in *Grace United*, *Swanson*, or *Fraternal Order*, for example. The broad approach, on the other hand, does extend to such cases, requiring the application of strict scrutiny for categorical exemptions made for secular purposes that undermine the challenged policy to an equal or greater extent than the proposed religious exemption. Once again, the rationale behind this rule is that “categorical exemptions” pose an equal, or possibly even greater, threat than “individualized exemptions” in allowing the government to decide that secular motivations are more important and thus worthier of an exemption than religious motivations.

III. APPLICATION TO THE HHS MANDATE

While the ACA established universal healthcare, it is not free from exemptions. In fact, there are a variety of exemptions to an array of the law’s many provisions. This Note only focuses

¹³⁰ See *id.* (internal quotation marks omitted).

¹³¹ See *id.* at 740 (“At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990))).

on those exemptions affecting the implementation of the HHS Mandate.

One exemption to the HHS Mandate that we have already seen is for those that fit under the HHS Mandate's definition of a "religious employer." This, of course, is a categorical exemption because it categorically exempts qualified religious institutions.¹³² There are two other relevant categorical exemptions that must be scrutinized: the exemptions for "grandfathered health plans"¹³³ and for small businesses.¹³⁴ There is also a discretionary exemption that must be examined: the ability of the Secretary of HHS to "waive part or all" of the tax penalty imposed on those institutions neglecting to comply with group health plan requirements in some way.¹³⁵ A court's approach—narrow or broad—to the "individualized governmental assessment exception" could very well change the outcome of a case challenging the HHS Mandate. Predictably, a court's use of the broad approach will greatly increase the chances that the HHS Mandate will be found to violate the Free Exercise Clause, while those chances severely diminish under the narrow approach.

A. *The "Individualized Exemption"*

1. The Tax Waiver

As mentioned, the tax waiver is a discretionary or "individualized exemption" to the HHS Mandate. In order to weigh the likelihood that a religious objector to the law would succeed on a free exercise claim, it must be determined whether this exemption falls under the scope of the "individualized governmental assessment exception," triggering strict scrutiny, or whether it falls under the scope of *Smith*, triggering a much more deferential standard. As discussed earlier, one of the serious quandaries non-exempt religious employers face is the crippling tax penalty that results from a decision to refuse to comply with the HHS Mandate. The ACA imposes "a tax on any

¹³² See 45 C.F.R. § 147.131(a) (2014).

¹³³ See *Health Coverage Rights and Protections: Grandfathered Health Insurance Plans*, HEALTHCARE.GOV, <https://www.healthcare.gov/health-care-law-protections/grandfathered-plans/> (last visited Jan. 31, 2015).

¹³⁴ 26 U.S.C. § 4980H (2012); 42 U.S.C. § 300gg-13 (2012); 42 U.S.C. § 18024 (2012).

¹³⁵ See 26 U.S.C. § 4980D(c)(4).

failure of a group health plan to meet [group health plan requirements].”¹³⁶ As a review, group health plans, with limited exceptions, are required to cover preventive services enumerated by HHS.¹³⁷ Those refusing to comply will be taxed “\$100 for each day in the noncompliance period with respect to each individual to whom such failure relates.”¹³⁸ This tax can be waived, however, at the discretion of the Secretary of HHS. According to the statute, “[i]n the case of a failure which is due to *reasonable* cause and not to willful neglect, the Secretary may waive part or all of the tax . . . to the extent that the payment of such tax would be excessive relative to the failure involved.”¹³⁹ This rule gives the Secretary the discretion to determine in which cases, if any, the failure to pay the tax is “reasonable,” and how much of the tax, if any, should be waived.¹⁴⁰ There is no question that this waiver creates a system of individualized exemptions; the question is, does this mean the “individualized governmental assessment exception” applies?

Under the narrow approach, the answer to this question depends on the circumstances. Once again, the narrow approach requires both the existence of a system of individualized exemptions analogous to that in *Sherbert*, as well as proof that this system is applied in a discriminatory manner.¹⁴¹ The tax waiver is most definitely analogous to the “good cause” criterion in *Sherbert*, because it is completely discretionary. It allows the HHS Secretary to determine what constitutes a “reasonable cause” for failing to pay the tax, just as the board in *Sherbert* determined what constituted “good cause” for refusing employment. As for whether the waiver is applied in a discriminatory manner, it is too early to tell. Until religious objectors to the HHS Mandate can prove that the Secretary has waived the tax on a case-by-case basis for secular reasons in a manner that undermines the enforcement of the HHS Mandate to an equal or greater extent than a waiver for religious reasons would, the waiver is not discriminatory. Consequently, as of

¹³⁶ See *id.* § 4980D(a).

¹³⁷ See *supra* INTRODUCTION.

¹³⁸ 26 U.S.C. § 4980D(b)(1).

¹³⁹ *Id.* § 4980D(c)(4) (emphasis added).

¹⁴⁰ See *id.*

¹⁴¹ See *supra* Part II.A.

now, a court using the narrow approach would not conclude that *Smith's* individualized assessment exception applies in regards to the tax waiver.

A court applying the broad approach would likely reach a different conclusion. Under this approach, the "individualized governmental assessment exception" is applied, and strict scrutiny is triggered, simply because the tax waiver creates a system of individualized exemptions.¹⁴² This is the case because, as noted in *Blackhawk*, "a law must satisfy strict scrutiny if it *permits* individualized, discretionary exemptions because such a regime creates the *opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct."¹⁴³ In other words, a law is subject to strict scrutiny just for "permit[ing] individualized, discretionary exemptions," and for creating the "opportunity" for discrimination. Thus, there is no need for a system of individualized exemptions, such as the tax waiver, to *actually* discriminate; the potential for discrimination is sufficient to prompt the application of *Sherbert's* compelling interest test.

B. The "Categorical Exemptions"

1. The "Religious Employer Exemption"

The first of the categorical exemptions, the "religious employer" exemption, appears discretionary at first:¹⁴⁴ The HHS Mandate grants HRSA discretion to "establish an exemption from [its] guidelines with respect to a group health plan

¹⁴² See *supra* Part II.B.

¹⁴³ See *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (emphasis added) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–65 (3d Cir. 1999)).

¹⁴⁴ In fact, the "religious employer" exemption was originally both a discretionary and categorical exemption. As discussed, the definition of "religious employer," as originally written, included the requirements that the organization have the "inculcation of religious values as its purpose" and "primarily employ[] persons who share its religious tenets." See FINAL RULES, *supra* note 18. Clearly, these two criteria were discretionary in nature because HRSA would have to determine which organizations met these requirements. Though the new definition of "religious employer," which no longer contains these criteria, does not do much to change the scope of the exemption, it has the effect of making the exemption appear entirely categorical, rather than discretionary.

established or maintained by a religious employer . . . with respect to any requirement to cover contraceptive services under such guidelines.”¹⁴⁵ However, the criteria used to define “religious employer” are categorical, rather than discretionary.¹⁴⁶ As discussed, a “religious employer” is defined as “an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.”¹⁴⁷ As noted, this narrow definition of “religious employer” essentially limits the exemption to houses of worship, leaving a multitude of religiously motivated objectors subject to the HHS Mandate.¹⁴⁸

How would a court using the narrow approach to the “individualized governmental assessment exception” view this exemption? Would the exemption bring the HHS Mandate under the scope of the exception? For this particular exemption, the answer would most certainly be no. In regards to the fact that HRSA was given discretion to establish the definition of a “religious employer,” a court using a narrow approach in analyzing the individualized assessment exception would have no objection. Under the view of the narrow approach, HRSA merely created an enumerated or “categorical exemption” to the HHS Mandate. As in *Grace United*, in which the zoning law had several “objective exemptions” for buildings such as churches and schools, or in *Swanson*, in which the school only allowed a specific category of students to attend classes part-time,¹⁴⁹ the law here creates a categorical exemption for all “religious employers,” as defined in the provision.¹⁵⁰ The formation of an exemption for “religious employers” is not, in and of itself, discretionary; it is not part of a system of subjective, ad hoc exemptions.

The analysis is the same for the actual definition of “religious employer.” This definition, which, once again, limits the exemption to “nonprofit entit[ies]” referred to in “6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986,”¹⁵¹ gives HRSA no discretion to determine which organizations

¹⁴⁵ 45 C.F.R. § 147.131(a) (2014) (internal quotations omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See generally *supra* note 18.

¹⁴⁹ See *supra* Part II.A.

¹⁵⁰ 45 C.F.R. § 147.131(a).

¹⁵¹ See *supra* text accompanying note 147.

qualify and which do not. Therefore, because the definition does not create a system of subjective, ad hoc exemptions, a court following the narrow approach would conclude that the "individualized governmental assessment exception" is inapplicable.

Furthermore, the fact that this exemption only applies to "religious employers" poses another problem for those contending that the "individualized governmental assessment exception" should apply. As noted previously, the Supreme Court's purpose for creating the "individualized governmental assessment exception" was its concern that the government would be able to judge "secular motivations" as "more important than religious motivations."¹⁵² The "religious employer exemption" clearly does not raise this concern, as it cannot be applied to secular institutions. It seems probable that under the narrow approach, even if a court believed the "religious employer exemption" somehow created a system of individualized exemptions analogous to that in *Sherbert*, the plaintiff would fail to convince the court on the discrimination front. This is because the narrow approach's discrimination requirement is primarily concerned with evidence that the government, at its discretion, is favoring secular motivations over religious ones, not that it is discriminating between religious motivations.¹⁵³ That is not to say that such discrimination between religious motivations could not pose a problem as well,¹⁵⁴ but it would simply not be within the scope of *Smith's* "individualized governmental assessment exception."

The broad approach to the "individualized governmental assessment exception" could potentially lead to different results, though a challenge to the "religious employer exemption" would certainly not be a "slam dunk" even in front of a court using that approach. First, the fact that HRSA was given discretion to institute a categorical exemption for "religious employers" is relevant under the broad approach. As discussed earlier, the broad approach is not limited to individualized exemptions, but rather applies to categorical exemptions as well.¹⁵⁵ The concern

¹⁵² See *supra* Part II.A-B.

¹⁵³ See *supra* Part II.A.

¹⁵⁴ Such discrimination between religious groups might pose an Establishment Clause question, but this issue is beyond the scope of this Note.

¹⁵⁵ See *supra* Part II.B.

of a court using such an approach would be whether the categorical exemption for “religious employers,” as defined by the HHS Mandate, undermines the purpose of the law to an equal or greater extent than a hypothetical exemption for religiously affiliated institutions and religious business owners not currently covered under the exemption.¹⁵⁶ According to HHS, the purpose of mandated contraceptive coverage is to address women’s “unique health care needs” and burdens, eliminate the disparity between men and women that exists in the workforce due to unintended pregnancies, and remove the greater out-of-pocket costs that women, as compared to men, are forced to incur for contraceptive coverage.¹⁵⁷ Plainly, any exemption to the HHS Mandate would undermine this purpose. However, like in *Fraternal Order* or *Blackhawk*, the court must also examine whether the exemption furthers another governmental interest.¹⁵⁸ Here, it can be argued that the exemption furthers the governmental interest of preserving the rights of houses of worship to be free to practice their religious beliefs without government interference. If this is indeed an interest of the state, however, the same could be said for the exemption sought by religious institutions and religious business owners not covered by the exemption.

Though the “religious employer exemption” undermines the purpose of the HHS Mandate, and only debatably furthers a different governmental purpose, this does not necessarily indicate that a court using the broad approach would construe the exemption as triggering strict scrutiny. While it is true that the categorical exemption for “religious employers” acts against the purpose identified by HHS, the *extent* to which the exemption acts against the law is also significant.¹⁵⁹ HHS argues that its “religious employer exemption” undermines the HHS Mandate to a lesser extent than a broader exemption would, because in only exempting nonprofit religious institutions that fit under the definition set forth in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, it is limiting the exemption to a smaller group consisting primarily of houses of worship.¹⁶⁰ Furthermore,

¹⁵⁶ See *supra* Part II.B.

¹⁵⁷ See FINAL RULES, *supra* note 18.

¹⁵⁸ See *supra* Part II.B.

¹⁵⁹ See *supra* Part II.B.

¹⁶⁰ 45 C.F.R. § 147.131(a) (2014); FINAL RULES, *supra* note 18.

it is more likely that such institutions would employ members of its own faith who would be less likely to seek contraceptive coverage in the first place. The same cannot necessarily be said for religious institutions or businesses owned by religiously devout individuals, which are much more likely to employ and serve individuals of other faiths. HHS's contention that its narrow "religious employer exemption" undermines the HHS Mandate to a lesser extent than an exemption that would include other religious objectors definitely has some merit, though the assumption that those who share the religious tenets of an exempted "religious employer" will not use contraceptives may not always be correct. However, it is logical to expect that contraceptive use would at least be lower in such circumstances. Hence, even under the broad approach to the individualized assessment exception, religious objectors to the HHS Mandate would face a challenge in convincing the court to apply strict scrutiny in regards to the existence of the categorical "religious employer exemption."

2. Grandfathered Health Plans

The second of the "categorical exemptions" that must be analyzed is the "grandfathered health plan exemption." This exemption, as the name suggests, applies to so-called "[g]randfathered health plan coverage," or coverage "provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010."¹⁶¹ As long as the qualifying plans "maintains [its] status"¹⁶² under the rules provided, it may generally keep the coverage that it had on the date the ACA was passed, though there are some provisions of the ACA that apply to all health plans, including "grandfathered plans."¹⁶³ Coverage for preventive services is not included in those provisions that apply to grandfathered health

¹⁶¹ See 45 C.F.R. § 147.140(a)(1)(i). For more information on the "grandfathered health plans," see generally *id.* See also *Health Coverage Rights and Protections: Grandfathered Health Insurance Plans*, *supra* note 133.

¹⁶² 45 C.F.R. § 147.140(a)(1)(i).

¹⁶³ See THE KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS 190 (2012) [hereinafter EMPLOYER HEALTH BENEFITS], available at <http://ehbs.kff.org/pdf/2012/8345.pdf>.

plans, and thus, companies qualifying as “grandfathered” are not required to cover the preventive services enumerated by HRSA.¹⁶⁴

It is easy to predict how the narrow approach to the “individualized governmental assessment exception” would interpret the “grandfathered exemption.” Under such an approach, the “individualized governmental assessment exception” is limited to cases involving a system of subjective, ad hoc exemptions.¹⁶⁵ The “grandfathered exemption” does not amount to such a system. All health plans that qualify as “grandfathered” are exempt from the HHS Mandate. Thus, the government exercises no discretion in determining an organization’s exempt status, and from the perspective of the narrow approach, plays no part in favoring secular motivations over religious ones, as both secular and religious institutions can qualify for “grandfathered health plans” if they meet the requirements.

A court applying the broad approach to the “individualized governmental assessment exception” would likely not be so dismissive of the “grandfathered exemption.” Just to review, this approach also applies to “categorical exemptions” as long as these exemptions meet certain criteria.¹⁶⁶ The enumerated exemption must apply to secular motivations that undermine the challenged policy to an equal or greater extent than the denied religious motivations.¹⁶⁷ Once again, the rationale behind this rule is that “categorical exemptions” pose an equal, or possibly even greater threat, than “individualized exemptions” in allowing the government to decide that secular motivations are more important than religious motivations.¹⁶⁸ With “categorical exemptions,” the government merely makes a value judgment favoring secular motivations in a different manner and at a different stage of the game than in the case of individualized, discretionary exemptions, but it still makes a value judgment all the same.

¹⁶⁴ See *Health Coverage Rights and Protections: Grandfathered Health Insurance Plans*, *supra* note 133.

¹⁶⁵ See *supra* Part II.A.

¹⁶⁶ See *supra* Part II.B.

¹⁶⁷ See *supra* Part II.B.

¹⁶⁸ See *supra* Part II.B.

When analyzing the “grandfathered exemption” in light of cases such as *Fraternal Order* and *Blackhawk*, it is rather apparent that under a broad approach to the “individualized governmental assessment exception,” the exception, or at least its functional equivalent—the failure of the general applicability requirement—would apply. First of all, the “grandfathered exemption” acts against the purpose of the HHS Mandate, at least to the same degree, if not to a greater degree, than the proposed religious conscience exemptions. While it is true that the “grandfathered exemption” serves the governmental purpose of allowing individuals and businesses to keep the current plan they like, as well as providing “stability and flexibility to insurers and businesses that offer insurance coverage as the nation transitions to a more competitive marketplace,”¹⁶⁹ this does not outweigh the degree to which the exemption undermines the HHS Mandate. In 2011, fifty-eight percent of covered workers were enrolled in a “grandfathered health plan.”¹⁷⁰ In 2012, this number decreased to forty-eight percent,¹⁷¹ in 2013 it decreased to thirty-six percent, and in 2014 it decreased to twenty-six percent.¹⁷² As indicated by the pattern in the last few years, it is likely that the number of workers enrolled in such plans will continue to decrease as various businesses neglect to, or decide not to, continue to meet the requirements to retain “grandfathered health plans.” Even so, a sizable percentage of the workforce will likely remain covered under these plans for the next few years. Even if just ten percent of the workforce remains under “grandfathered health plans,” that would mean that over fourteen million Americans would be covered by such plans.¹⁷³ It is difficult to argue that allowing religiously

¹⁶⁹ See Stephanie Cutter, *The Grandfather Regulation—What They’re Saying*, WHITE HOUSE BLOG (June 15, 2010, 5:20 PM), <http://www.whitehouse.gov/blog/2010/06/15/grandfather-regulation-what-theyre-saying>.

¹⁷⁰ See EMPLOYER HEALTH BENEFITS, *supra* note 162.

¹⁷¹ See *id.*

¹⁷² 2014 *Employer Health Benefits Survey*, HENRY J. KAISER FAM. FOUND. (Sept. 10, 2014), <http://kff.org/report-section/ehbs-2014-summary-of-findings/>.

¹⁷³ As of January 2015, the employed U.S. workforce consisted of approximately 148,201,000 people. See Press Release, Bureau of Lab. Stat., Employment Situation Summary Table A. Household Data, Seasonally Adjusted—January 2015 (Feb. 6, 2015), available at <http://www.bls.gov/news.release/empsit.a.htm>.

motivated exemptions will undermine the HHS Mandate to a greater extent than a secular exemption that impacts millions of Americans.

Furthermore, if the government is truly very concerned with making sure women's preventive services are available to the greatest extent possible, it could have required "grandfathered health plans" to cover them as well. There are various provisions of the ACA, such as that requiring the extension of dependent health coverage to age twenty-six, from which even "grandfathered plans" are not exempt.¹⁷⁴ Refusing to exempt "grandfathered health plans" from the requirements of the HHS Mandate probably would not undermine the purposes of such health plans—allowing individuals and businesses to keep their preferred plans, and providing stability and flexibility—any more than requiring them to comply with provisions such as the dependent health coverage provision mentioned above would. Consequently, it would be difficult for the government to convincingly contend that a "categorical exemption" for "grandfathered plans" is any less harmful to the purposes of the HHS Mandate than an exemption for religious motivations would be. Indeed, this appears to be a perfect example of a scenario in which the government has made a value judgment favoring a secular motivation over a religious one, despite their equally harmful impacts on the challenged law's policy goals.

3. Small Businesses

The final "categorical exemption" from the HHS Mandate that must be examined is the small business exemption. Under this exemption, employers employing less than fifty full-time employees are exempt from providing health coverage, including coverage for preventive services.¹⁷⁵

As with the "grandfathered health plan exemption," it is easy to predict how the narrow approach to the "individualized governmental assessment exception" would interpret the small business exemption. Once again, under such an approach, the "individualized governmental assessment exception" is limited to cases involving a system of subjective, ad hoc exemptions.¹⁷⁶ The

¹⁷⁴ See EMPLOYER HEALTH BENEFITS, *supra* note 163.

¹⁷⁵ 42 U.S.C. § 18024 (2012); 42 U.S.C. § 300gg-13 (2012); 42 U.S.C. § 4980H (2012).

¹⁷⁶ See *supra* Part II.A.

small business exemption is not such a system because all qualifying small businesses are exempt from providing health coverage. Consequently, the government does not exercise discretion in determining a business's exempt status, and from the perspective of the narrow approach, fails to favor secular motivations over religious ones, as both secular and religious institutions can qualify as small businesses exempt from providing preventive services if they meet the requirements.

The analysis is very different under the broad approach, however. Under that approach, the "individualized governmental assessment exception" very likely applies because the small business exemption infringes upon the purpose of the HHS Mandate to the same degree, or likely even to a greater degree, than a potential religious conscience exemption would. While exempting small businesses furthers the government's goal of ensuring that small businesses are not overly burdened by the requirements of the ACA, it is difficult to argue that this purpose outweighs the extent to which the exemption will undermine the HHS Mandate. Approximately ninety-six percent of all U.S. businesses, or 5.8 million out of 6.0 million total businesses, have fewer than fifty employees, and thus are exempt from the requirements of the ACA and the HHS Mandate.¹⁷⁷ These businesses employ almost thirty-four million Americans.¹⁷⁸ While it is true that small employers choosing to provide health coverage for their employees must comply with the requirements of the ACA,¹⁷⁹ including the provision mandating coverage of preventive services, less than thirty-six percent of private businesses with fewer than fifty employees offered health insurance as of 2011.¹⁸⁰ Therefore, even excluding small businesses that choose to provide health insurance, there are millions of Americans working for small businesses that will continue to receive no employer-provided coverage. Thus, considering the number of women who will not receive free

¹⁷⁷ David Francis & Eric Pianin, *7 Ways Businesses Can Dodge Obamacare*, FISCAL TIMES (July 1, 2013), <http://www.thefiscaltimes.com/Articles/2013/07/01/7-Ways-Businesses-Can-Dodge-Obamacare.aspx#page1>.

¹⁷⁸ *Id.*

¹⁷⁹ *ObamaCare Small Business Facts*, OBAMACARE FACTS, <http://obamacarefacts.com/obamacare-smallbusiness.php> (last visited Jan. 31, 2015).

¹⁸⁰ *Percent of Private Sector Establishments That Offer Health Insurance to Employees, by Firm Size*, KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/firms-offering-coverage-by-size/> (last visited Jan. 31, 2015).

contraceptive coverage due to the small business exemption, it is virtually impossible to contend that a religious conscience exemption would undermine the purpose of the HHS Mandate to a greater extent. Hence, a court using the broad approach to the “individualized governmental assessment exception” would view the “small business exemption” as an inappropriate value judgment in favor of a secular motivation over a religious one, particularly in view of the fact that the secular exemption most likely undermines the purpose of the HHS Mandate to a greater degree than the proposed religious one.

CONCLUSION

While the Supreme Court chose to rely on RFRA to reach its decision in *Hobby Lobby*, this Note demonstrates that a free exercise analysis could have quite possibly led the Court to a very similar result. Such an analysis could have also had the additional benefits of more thoroughly defining the scope of the rather elusive “individualized governmental assessment exception” and bringing free exercise jurisprudence closer to its more vigorous pre-*Smith* state, assuming the Court would have chosen to adopt the broad approach to the exception. Considering that Justice Alito, who authored both *Blackhawk* and *Fraternal Order*, wrote the *Hobby Lobby* decision, it seems probable that the Court would have adopted such an approach if it had decided to take that route. If the Supreme Court decides to hear additional HHS Mandate cases, it is likely that it will once again base its decision on RFRA. However, plaintiffs would be remiss to ignore the potential strength of the “individualized governmental assessment exception” argument. If the Court decides to address that argument, its effect could ultimately be much greater than any decision based on RFRA because RFRA can be amended by Congress, as some Democratic congressmen have already suggested, while no such threat exists in regards to the Free Exercise Clause.