Private Right of Inaction: The Decades-Long Struggle To Enforce the Church Amendments

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INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] has reinvigorated debates over the role of conscience in healthcare. Conscience plays a pivotal role in healthcare, as the Hippocratic Oath that physicians take upon graduating medical school instructs them to "do no harm."[2] Abortion and other controversial medical practices have transformed this instruction to "do no harm" into a policy task fit for a legislator.[3] What one views as "harm" in the context of abortion is largely dependent on that person's subjective beliefs regarding abortion.

One element of the debate on the role of conscience in healthcare is the extent to which the law should protect the conscience rights of "conscientious providers" (healthcare workers with moral convictions to provide abortion care).[4] Another element of the debate is the extent to which the law should protect "conscientious objectors" (healthcare workers with moral convictions against providing abortion care).[5]

The Church Amendments—federal conscience protection laws enacted in response to *Roe v. Wade*[6]—were the first set of conscience laws on the books

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1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
2. *See* Rachel Hajar, *The Physician's Oath: Historical Perspectives*, 18 HEART VIEWS 154 (2017).
3. *Id.* ("The oath has generated a lot of controversies, with some claiming that the oath . . . does not address the realities of modern medicine such as abortion, physician-assisted killing . . . , and end-of-life issues. It is felt that the oath offers no guidance to ethical dilemmas in today's medical practice.").
4. *See* Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. 1030, 1035 (2023).
5. *See id.* at 1032, 1048.
6. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

and inspired a wave of federal and state conscience legislation.[7] But as one legal scholar notes, despite the "intense academic and public interest" in conscience laws, there is a troubling "gap in the literature on health care conscience laws."[8] In the aftermath of *Dobbs*, trying to make sense of these conscience laws has become a priority for legal scholars and healthcare workers alike—and for good reason.

In states with stringent abortion bans, legal challenges have arisen over whether the Emergency Medical Treatment and Labor Act ("EMTALA")[9] preempts state abortion bans by requiring medical personnel to provide abortions more broadly than permitted by narrow exceptions in state law.[10] Courts are currently split on this question.[11] The resulting ambiguity leaves medical professionals in the precarious position of judging when a patient's situation becomes an "emergency," and consequently when an otherwise

7. *E.g.*, Fox, *supra* note 4, at 1048–49; Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 47–52 (2008).

8. Nadia N. Sawicki, *The Conscience Defense to Malpractice*, 108 CALIF. L. REV. 1255, 1268 (2020).

9. EMTALA, 42 U.S.C. § 1395.

10. *See, e.g.*, Scott Aronin, *The Labor Divide: EMTALA's Preemptive Effect on State Abortion Restrictions*, 19 STAN. J. C.R. & C.L. 189, 190–91 (2023); Letter from Xavier Becerra, Sec'y of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/G9U4-FUWK] (suggesting abortions are permitted if the "life and health of the pregnant person" are at risk, as opposed to just life-saving procedures, and leaving "determination of an emergency medical condition" purely at the discretion of the examining medical personnel).

11. *See* WEN W. SHEN, CONG. RSCH. SERV., LSB10851, EMTALA EMERGENCY ABORTION CARE LITIGATION: OVERVIEW AND INITIAL OBSERVATIONS (PART II OF II) 1–4 (2022); Texas v. Becerra, 623 F. Supp. 3d 696, 727 (N.D. Tex. 2022) (holding that "EMTALA does not preempt Texas's abortion law"); United States v. Idaho, 623 F. Supp. 3d 1096, 1117 (D. Idaho 2022) (holding that EMTALA preempts Idaho's abortion law "to the extent it conflicts with EMTALA"), *rev'd*, 83 F.4th 1130 (9th Cir. 2023), *en banc reh'g granted*, 82 F.4th 1296 (9th Cir. 2023).

illegal abortion becomes legal.[12] In these states,[13] an increased reliance on EMTALA's "emergency" safe harbor creates challenges not only for conscientious providers seeking to legally provide abortions, but also for conscientious objectors that rely on such "emergency" classifications.

Consider, for example, a nurse that has a religious objection to participating in elective abortions but is willing to assist in emergency abortions necessary to save the mother's life. If physicians decide to classify a broader range of abortions as an "emergency," the nurse may no longer be comfortable relying on that designation to determine what abortion cases they are comfortable assisting with. This also impacts conscientious objectors in states with fewer abortion restrictions because hospitals are likely to transfer legally ambiguous cases to states with fewer restrictions.[14] Coupled with the already overwhelming influx of out-of-state patients seeking abortions,[15]

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12. Mary Ziegler, *Disobedience, Medicine, and the Rule of Law*, 136 HARV. L. REV. 319, 319 (2023) ("Noncompliance with EMTALA could cost a provider over $119,000 per violation . . . [but] violating a state abortion law might cost a physician their license and liberty (prison sentences under state laws run up to life in prison)."); Harris Meyer, *Patients and Doctors Trapped in a Gray Zone When Abortion Laws and Emergency Care Mandate Conflict*, KHN (Aug. 8, 2022), https://khn.org/news/article/emtala-abortion-care-gray-zone-trigger-laws/ [https://perma.cc/P33A-D5UW]; Alicia Macklin et al., *Between EMTALA and State Abortion Restrictions: The Post-Dobbs Dilemma*, AM. HEALTH L. ASS'N: HEALTH L. CONNECTIONS (Jan. 1, 2023), https://www.americanhealthlaw.org/content-library/connections-magazine/article/b7a49aa7-ec78-48dd-b254-be04e2db46f7/between-emtala-and-state-abortion-restrictions-the [https://perma.cc/7ZBH-RSZB].

13. As of January 2024, over half of the states have restrictive abortion bans. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Jan. 24, 2024), https://states.guttmacher.org/policies/?gad_source=1&gclid=Cj0KCQiAgqGrBhDtARIsAM5s0_nC1a2fWa4ZTVGhVu-qOjg0jR4kniCJXb8k4HUNZWHySrroquvHuG8aAuVAEALw_wcB [https://perma.cc/N68G-XFB5].

14. *See* Bridget Balch, *What Doctors Should Know About Emergency Abortions in States with Bans*, AAMC (Sept. 26, 2023), https://www.aamc.org/news/what-doctors-should-know-about-emergency-abortions-states-bans [https://perma.cc/4SPS-DL9E].

15. *See* Sarah Fentem, *Illinois Abortions Increased Nearly 30% in Two Months After Supreme Court's Ruling*, ST. LOUIS PUB. RADIO (Nov. 10, 2022, 5:15 AM), https://news.stlpublicradio.org/health-science-environment/2022-11-10/illinois-abortions-increased-nearly-30-in-two-months-after-supreme-courts-ruling [https://perma.cc/S6RD-R7P2]; Lorraine Longhi, *Las Vegas Sees Increase in Out-of-State Abortion Patients*, L.V. REV.-J. (July 6, 2022, 9:16 AM), https://www.reviewjournal.com/news/politics-and-government/las-vegas-sees-increase-in-out-of-state-abortion-patients-2603090/?utm_campaign=KHN%3A%20First%20Edition&utm_medium=email&_hsmi=218738910&_hsenc=p2ANqtz-8T7DsGGItehbH_FAmD5I108FRjVBENHmD3L5LzbDEN3fzIjnlCD2zQryf_sAbgZuRO0x4s9dboJ0h2fY6AmNI2QSQZ2w&utm_content=218738910&utm_source=hs_email [https://perma.cc/GJ3J-6S6K]; Lisa M. Krieger, *Rush to California: Out-of-State Patients Surge to Abortion 'Sanctuary State,'* THE MERCURY NEWS (July 5, 2022, 9:53 AM),

conscientious objectors in these states are more frequently thrust into the spotlight. As hospitals continue to become a battleground for conscience rights, increased skepticism[16] towards conscientious objectors could spur more attempts to enforce conscience protection laws like the Church Amendments.

In 2010, the Second Circuit seemingly foreclosed judicial enforcement of the Church Amendments. In *Cenzon-DeCarlo v. Mount Sinai Hospital*,[17] a Catholic operating room nurse faced a situation similar to the example mentioned above. The nurse alleged that the hospital assigned her to what was labeled a common post-miscarriage procedure,[18] which she was comfortable assisting in.[19] While prepping the operating room, she discovered that the procedure was actually a twenty-two-week abortion.[20] She objected to participating in this type of procedure because of her religious beliefs.[21] She disagreed with the hospital's characterization of this procedure as an emergency because she believed the patient was stable, that other treatments were viable, and that the surgery did not need to be completed within six hours.[22]

The nurse further alleged that upon alerting her supervisor to the issue, her supervisor yelled at her, prohibited her from attempting to find a replacement, and threatened to file career-ending patient abandonment charges against her

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https://www.mercurynews.com/2022/07/03/rush-to-california-out-of-state-patients-surge-to-abortion-sanctuary-state/ [https://perma.cc/PLG2-JEA3].

16. *See, e.g.*, Fox, *supra* note 4, at 1040 ("Many Americans are convinced that the culture wars have reduced conscience to little more than a card that one side plays when it loses . . . . On this view, conscience is just a cover, a convenient tool to exploit. These conscience skeptics see a similar social agenda reflected in refusals to provide reproductive medicine."); Eileen K. Fry-Bowers, *A Matter of Conscience: Examining the Law and Policy of Conscientious Objection in Health Care*, 21 POL'Y, POLITICS, & NURSING PRAC. 120, 121 (2020) ("Although [health care providers] should not be required to abandon their religious, moral, or ethical principles . . . legitimate concern exists that religious, ethical, or moral disagreement is merely pretext for discrimination.").

17. Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695 (2d Cir. 2010).

18. Memorandum in Support of Motion for Preliminary Injunction at 4–5, Cenzon-DeCarlo v. Mount Sinai Hosp., 2010 WL 169485 (E.D.N.Y. 2010) (No. CV-03120-RJD-JO) [hereinafter Cenzon-DeCarlo Memo], https://adfmedialegalfiles.blob.core.windows.net/files/Cenzon-DeCarloPIbrief.pdf [https://perma.cc/C35C-WV6B].

19. *Id.* at 3.

20. *Id.* at 4–5.

21. *Id.* at 3, 5. The surgical procedure—called dilation and evacuation—involves dilating the cervix, draining the amniotic fluid, and removing fetal and placental tissue in pieces using forceps. MATTHEW B. BARRY, CONG. RSCH. SERV., R45161, ABORTION AT OR OVER 20 WEEKS' GESTATION: FREQUENTLY ASKED QUESTIONS 5–6 (2018).

22. Cenzon-DeCarlo Memo, *supra* note 18, at 8.

if she did not participate in the case.[23] The nurse claimed that she ultimately participated in the procedure out of fear of losing her livelihood.[24] The nurse claimed that during the procedure she was forced to watch the removal of "the bloody arms and legs of the child from its mother's body" and then carry the dismembered body parts to another room.[25] She described this experience as causing "extreme emotional, psychological, and spiritual suffering."[26]

The nurse sued the hospital under Section (c) of the Church Amendments, but the Second Circuit held that the Church Amendments do not confer a private right of action.[27] Despite the fact that Section (c) was the only provision of the Church Amendments at issue in *Cenzon-DeCarlo*, many subsequent lower court decisions have hastily relied on that holding to conclude that none of the provisions of the Church Amendments confer a private right of action,[28] leaving significant gaps in the protection of conscience rights of healthcare workers.[29]

This Comment argues that *Cenzon-DeCarlo* does not foreclose judicial enforcement of Section (d). Part I provides an overview of the Church Amendments and the insufficiency of the enforcement mechanisms currently available—including administrative remedies under the Department of Health and Human Services, Title VII employment discrimination, state laws, and recently-proposed conscience protection statutes. Part II describes the complicated state of implied private right of action jurisprudence, then outlines Church Amendment precedent and how those cases improperly concluded that Section (d) does not confer a private right of action. Part III argues that Section (d) should confer a private right of action. Part IV concludes.

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23. *Id.* at 6.

24. *Id.* at 6–7.

25. *Id.* at 7. While this is sometimes viewed as a controversial description of second-trimester abortions, in part due to debates surrounding gestational viability, this description is included to emphasize the nurse's personal perceptions that led to her distress. *See* BARRY, *supra* note 21, at 13 (discussing disagreements about gestational viability).

26. Cenzon-DeCarlo Memo, *supra* note 18, at 8.

27. Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698–99 (2d Cir. 2010) ("What we do hold today is that Section 300 does not confer upon [the plaintiff] a private right of action to enforce its terms.").

28. *See infra* Section II.B.

29. *See infra* Section I.B.

I. THE CHURCH AMENDMENTS AND THEIR ENFORCEMENT

The Church Amendments—named after their sponsor, Senator Frank Church—are a series of conscience protection provisions codified at 42 U.S.C. § 300a-7.[30] Section A provides a brief overview of each provision contained in the Church Amendments. To contextualize the need for a federal judicial remedy, Section B lays out the currently available enforcement mechanisms and their shortcomings.

A. The Church Amendments

The Church Amendments contain five conscience provisions enacted at various times throughout the 1970s.[31] First, Section (b) establishes that entities receiving certain federal grants are not required to perform abortions or sterilizations if doing so would be contrary to their religious beliefs or moral convictions.[32] Second, Section (c)(1) prohibits entities that receive certain federal grants from discriminating against health care workers for performing lawful abortions, and for refusing to perform abortions if contrary to the individual's religious beliefs or moral convictions.[33] Third, Section (c)(2) mirrors Section (c)(1) but regarding biomedical or behavioral research.[34] Fourth, Section (d) protects individual conscience rights in federally funded health service programs.[35] Fifth, Section (e) prohibits medical training programs that receive certain federal grants from discriminating against applicants based on their reluctance or willingness to participate in abortions.[36]

While this Comment focuses primarily on Section (d), it is worth mentioning ways in which the other provisions of the Church Amendments could prove useful. For instance, amidst the developing uncertainties surrounding abortion in the post-*Roe* era, one unresolved legal question involves physicians licensed in multiple states. Some states that ban abortions have threatened to suspend the licenses of physicians that perform legal

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30. Kevin H. Theriot & Ken Connelly, *Free To Do No Harm: Conscience Protections for Healthcare Professionals*, 49 ARIZ. ST. L.J. 549, 576 (2017); 119 CONG. REC. 9595 (1973).

31. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23171 (May 21, 2019) (codified at 45 C.F.R. § 88) [hereinafter 2019 Final Rule].

32. 42 U.S.C. § 300a-7(b); 2019 Final Rule, *supra* note 31, at 23171.

33. § 300a-7(c)(1); 2019 Final Rule, *supra* note 31, at 23171.

34. § 300a-7(c)(2); 2019 Final Rule, *supra* note 31, at 23171.

35. § 300a-7(d). For a detailed discussion of Section (d), see *supra* Part III.

36. § 300a-7(e); 2019 Final Rule, *supra* note 31, at 23171.

abortions in other states.[37] The Church Amendments could provide solace for these physicians through the nondiscrimination provision in Section (c)(1) that protects healthcare workers who choose to perform abortions.[38]

As the United States experiences increasing levels of polarization surrounding abortion in the post-*Roe* era,[39] the Church Amendments serve as a reminder of the importance of tolerating diversity of thought. Enacted in response to *Roe v. Wade*,[40] the Church Amendments sought to promote respect for diverse views regarding abortion at a time when abortion was at the forefront of controversy.[41] Today, the impact of this polarization has unfortunately manifested as skepticism towards conscientious objectors in the healthcare field,[42] and, as discussed in the next Section, has ultimately led to greater instability in the current enforcement mechanisms of the Church Amendments.[43]

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37. Joshua Sharfstein, *Abortion Access After the* Dobbs *Decision*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Jan. 4, 2023), https://publichealth.jhu.edu/2023/abortion-access-after-dobbs [https://perma.cc/5KCA-PYMS].

38. § 300a-7(c)(1). The availability of this protection relies heavily on the frequently fluctuating administrative regulations regarding this provision contained in 45 C.F.R. § 88. *See infra* Section I.B.1. Under the Trump Administration regulations, the nondiscrimination provision applies to States. 2019 Final Rule, *supra* note 31, at 23263 (including "a State" in the definition of "entity"). However, the Biden Administration's new proposed regulation omits all definitions, leaving it uncertain whether Section(c)(1) applies to States. *See* Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820, 823 (Jan. 5, 2023) (to be codified at 45 C.F.R. § 88) [hereinafter 2023 Proposed Rule]; *see also infra* notes 77–81 and accompanying text.

39. *See* Carrie Blazina, *Key Facts About the Abortion Debate in America*, PEW RSCH. CTR. (July 15, 2022), https://www.pewresearch.org/fact-tank/2022/07/15/key-facts-about-the-abortion-debate-in-america/ [https://perma.cc/2REG-EY5S] ("[T]he 46 percentage point partisan gap today is considerably larger than it was in the recent past, according to the survey conducted after the court's ruling [in *Dobbs*].").

40. 410 U.S. 113 (1973); *see* 119 CONG. REC. 9595 (1973) (statement of Sen. Church).

41. *See, e.g.*, 119 CONG. REC. 9604 (1973) (statement of Sen. Javits) ("We are going to respect whatever the religious or moral convictions are on either side of the case, and our purpose is to respect them. That is the reason for the nondiscrimination portion.").

42. *See, e.g.*, *supra* note 16 and accompanying text; Isa Ryan et al., *Why the Post-*Roe *Era Requires Protecting Conscientious Provision as We Protect Conscientious Refusal in Health Care*, 24 AMA J. ETHICS 906, 909 (2022) ("[A]buse of conscientious refusal must be eliminated in those states where abortion is legal, to which even more patients from outside jurisdictions will come seeking abortion care."); 2019 Final Rule, *supra* note 31, at 23176.

43. *See infra* Section I.B.

B. Current Enforcement Mechanisms and Their Shortcomings

Since courts have refused to find a private right of action under the Church Amendments, the most direct line of enforcement is through the regulations created by the Department of Health and Human Services ("HHS"). However, as illustrated in this Section, this administrative remedy has been particularly susceptible to the political polarization surrounding abortion, leading to uncertainties about the enforcement of the Church Amendments. This Section also discusses other potential avenues of enforcement, including Title VII employment discrimination, state laws, and recently proposed conscience protection statutes.

1. Administrative Remedies Under the United States Department of Health and Human Services

In 2008, the Bush Administration notoriously promulgated a "midnight rule" that established a complaint procedure and assigned the HHS Office for Civil Rights ("OCR") authority to handle complaints under various conscience protection statutes, including the Church Amendments.[44] The Rule ("2008 Final Rule") raised concerns about "the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions."[45] These hostile environments "discourage individuals from entering health care professions," which is "especially troublesome when considering current and anticipated shortages of health care professionals."[46] The Rule also raises the policy concern that faith-based hospitals are "among the largest providers of health care in [the] nation," and that promoting tolerance in the healthcare field for their views will help expand patient access to healthcare services.[47] The Rule purported that the creation of this enforcement mechanism was necessary to address these concerns.[48]

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44. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (formerly codified at 45 C.F.R. § 88) [hereinafter 2008 Final Rule]; *see* Jane W. Walker, Comment, *The Bush Administration's Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUS. L. REV. 939, 944 (2009).

45. 2008 Final Rule, *supra* note 44, at 78073.

46. *Id.*

47. *Id.*

48. *Id.* at 78074.

Since the first iteration of this regulation in 2008, OCR has maintained authority over enforcing the Church Amendments.[49] However, every subsequent shift in presidential administrations has led to the promulgation of a new rule with substantial changes to the prior framework, creating constant uncertainty within the healthcare industry.[50]

In 2011, the Obama Administration issued another Rule ("2011 Final Rule").[51] Initially, OCR proposed rescinding the 2008 Final Rule in its entirety and sought public comments addressing this proposal.[52] OCR received over 300,000 comments, including concerns about the lack of enforcement without this regulatory scheme.[53] After considering these comments, OCR agreed the 2011 Final Rule "needs to have a defined process for health care providers to seek enforcement of these protections."[54] The 2011 Final Rule still rescinded most of the 2008 Final Rule,[55] retaining only the purpose and the delegation of authority to OCR to handle complaints.[56] The 2011 Final Rule removed definitions that broadened the scope of conscience protections,[57] and the certification of compliance requirement for healthcare providers.[58] The 2011 Final Rule also noted that the policy statements made in the 2008 Final Rule "are neither the position of the Department, nor guidance that should be relied upon for the purposes of interpreting the Federal health care provider conscience protection statutes."[59]

In 2019, the Trump Administration promulgated another Rule ("2019 Final Rule") reinstating several portions of the 2008 Final Rule and expanding on the consequences for violating the 2019 Final Rule's requirements.[60] The new provisions included defining significantly more terms than the 2008 Final Rule, imposing certification and record-keeping

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49. *See* 2023 Proposed Rule, *supra* note 38, at 823.

50. *See id.* (proposing a new rule under the Biden Administration and describing the history and changes in prior rules promulgated in 2008, 2011, and 2019 under the Bush, Obama, and Trump Administrations, respectively).

51. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (formerly codified at 45 C.F.R. § 88) [hereinafter 2011 Final Rule].

52. *Id.* at 9971; 2019 Final Rule, *supra* note 31, at 23174.

53. 2011 Final Rule, *supra* note 51, at 9971.

54. *Id.* at 9969.

55. *Id.* at 9971.

56. *See id.* at 9976.

57. *Id.* at 9970. Examples include removing a broad definition of "assist in the performance" and "individual," both of which were specific to interpreting the Church Amendments. *See* 42 U.S.C. § 300a-7.

58. 2011 Final Rule, *supra* note 51, at 9975.

59. *Id.*

60. 2019 Final Rule, *supra* note 31, at 23175, 23179.

requirements, adopting a voluntary notice provision, and, most significantly, establishing robust enforcement provisions "comparable to provisions found in OCR's other civil rights regulations."[61] The 2019 Final Rule stated that the "significant increase in complaints filed with OCR" and the increase in litigation on "conscience and coercion" in healthcare "underscores the need for [OCR] to have the proper enforcement tools available to appropriately enforce all Federal conscience and anti-discrimination laws."[62]

However, shortly after publishing the 2019 Final Rule, the Rule was challenged in multiple district courts and ultimately held unconstitutional by district courts in New York, California, and Washington.[63] These decisions vacated the 2019 Final Rule in its entirety and enjoined OCR from enforcing the 2019 Final Rule nationwide.[64] In 2021, because of these district court decisions, the Department of Justice ("DOJ") dropped a lawsuit against a hospital despite OCR finding that the hospital was violating the Church Amendments.[65]

According to DOJ's complaint, several nurses and other healthcare personnel employed by the University of Vermont Medical Center ("UVMMC") placed their names on the hospital's conscientious objectors list in accordance with the hospital's policies.[66] DOJ alleged that UVMMC "scheduled conscience objectors to assist with elective abortions knowing that other staff, who did not object because of religious beliefs or moral convictions, were available to assist with the procedures."[67] The complaint further alleged that the hospital "repeatedly assigned conscience objectors to participate in elective abortions without giving advance notice of the nature

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61. *Id.* at 23179; *see* 2023 Proposed Rule, *supra* note 38, at 823. Other OCR civil rights regulations include Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Title II of the Americans with Disabilities Act. *See Laws and Regulations Enforced by OCR*, HHS.GOV (Nov. 22, 2021), https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html [https://perma.cc/K3PW-SWYG].

62. 2019 Final Rule, *supra* note 31, at 23175, 23175 n.11.

63. 2023 Proposed Rule, *supra* note 38, at 823–24.

64. *Id.* at 823*; see also* New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475 (S.D.N.Y. 2019); Washington v. Azar, 426 F. Supp. 3d 704 (E.D. Wash. 2019); City & Cnty. of San Francisco v. Azar, 411 F. Supp. 3d 1001 (N.D. Cal. 2019).

65. Letter from Robinsue Frohboese, Acting Dir. & Principal Deputy, Dep't of Health & Hum. Servs. Off. for C.R., to David Quinn Gacioch, Couns. for Univ. of Vermont Med. Ctr. (July 30, 2021) [hereinafter Withdrawal Letter], https://www.hhs.gov/conscience/conscience-protections/uvmmc-letter/index.html [https://perma.cc/BKQ2-Z6AA].

66. Complaint at 4, United States v. Univ. of Vt. Med. Ctr., No. 20-cv-213 (D. Vt. Dec. 16, 2020) [hereinafter UVMMC Complaint], https://www.justice.gov/opa/press-release/file/1345321/download [https://perma.cc/T5UR-MG7P].

67. *Id.* at 5.

of the procedure."[68] DOJ also claimed that the hospital readily accommodated non-religious or non-moral objections, such as "nurses who requested not to assist in caring for an intoxicated driver who killed five people," but refused to accommodate nurses with conscience objections to abortion.[69] DOJ suggested that the hospital "effectuated its discrimination through certain employees, nursing leadership, and managers, who expressed overt disregard or hostility to religious beliefs and moral convictions against participating in abortion."[70]

In August 2019, OCR notified UVMMC of its violation and allowed the hospital thirty days to change its policies.[71] UVMMC responded that their policies complied with federal law and refused to make further changes.[72] DOJ filed suit against UVMMC in December 2020 seeking declaratory judgment and an order that UVMMC change its policies to comply with the Church Amendments.[73] The suit was based on the 2019 Final Rule's suggestion that the Church Amendments created an "unqualified right" for conscientious objectors to refuse to participate in procedures on religious or moral grounds.[74] This premise was "called into serious question" by the district court decisions holding the 2019 Final Rule unconstitutional, resulting in DOJ and OCR dropping the suit.[75] After DOJ dropped the suit, the healthcare professionals at UVMMC were left with no legal remedies.[76]

Most recently, in January 2023, the Biden Administration proposed a new version of the rule ("2023 Proposed Rule").[77] The 2023 Proposed Rule takes into account the holdings of the various district court cases,[78] as well as

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68. *Id.*

69. *Id.* at 6.

70. *Id.*

71. Letter from Roger T. Severino, Deputy Dir., Conscience & Religious Freedom Div., to Couns. for Univ. of Vermont Med. Ctr. 6 (Aug. 28, 2019), https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf [https://perma.cc/3HR2-P77B].

72. *UVM Medical Center Rebukes Baseless Federal Enforcement Actions Threatening Access to Patient Reproductive Rights*, UVM MED. CTR. NEWSROOM (Dec. 16, 2020), https://www.uvmhealth.org/medcenter/news/uvm-medical-center-rebukes-baseless-federal-enforcement-actions-threatening-access-patient [https://perma.cc/K2HG-QXRV].

73. UVMMC Complaint, *supra* note 66, at 14.

74. Withdrawal Letter, *supra* note 65.

75. *Id.*; *see supra* notes 63–64 and accompanying text.

76. Letter from Eighty-Four Members of Congress to Merrick Garland, U.S. Att'y Gen., Dep't of Just., and Xavier Becerra, Sec'y of Health & Hum. Servs., Dep't of Health & Hum. Servs. 2 (Aug. 11, 2021), https://www.lankford.senate.gov/imo/media/doc/210811%20-%20UVMMC%20Letter.pdf [https://perma.cc/H25Y-DQEY].

77. 2023 Proposed Rule, *supra* note 38, at 824.

78. *See* sources cited *supra* note 64.

numerous public comments from the 2019 Final Rule.[79] The 2023 Proposed Rule primarily highlights comments regarding policy concerns, such as access to patient care and discrimination against women and the LGBTQ community.[80] The 2023 Proposed Rule rescinds most of the 2019 Final Rule and reinstates much of the 2011 Final Rule, but retains certain portions of the 2019 Final Rule, including the complaint-handling procedures and voluntary notice provision.[81]

These rule changes seem to reflect some level of political influence on the administrative enforcement of the Church Amendments and other federal conscience statutes. These frequent changes create confusion about how the Church Amendments will be enforced and what types of remedies will be available for Church Amendment violations.[82]

Additionally, many doubt the efficacy of OCR in the healthcare context, describing OCR as underfunded and understaffed.[83] HHS's funding requests for Fiscal Year ("FY") 2023 confirm these concerns:

> To advance the Administration's priorities, OCR's budget includes an $8 million increase to invest in additional staff and resources to allow OCR to address the backlog of complaint inventory. Since FY 2016, civil rights case receipts have increased by 252 percent . . . . The additional staff will allow the opportunity for a full investigative process; the resources to initiate compliance reviews in the Administration's priority areas; and the ability to properly staff the regional offices to respond to the complaints in a timely and impactful way.[84]

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79. 2023 Proposed Rule, *supra* note 38, at 824–25, 824–25 nn.3–12.

80. *Id.*

81. *Id.* at 825.

82. *See* UVMMC Complaint, *supra* note 66, at 14 (seeking remedies that were available under the 2019 Final Rule but were called into question in the district court decisions enjoining enforcement of the rule).

83. *See, e.g.*, Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 35, 47 (2005) ("OCR is severely under-funded and its limited resources make it an ineffective governmental enforcement agency, not only for enforcing Title VI and other federal health laws but also for regulating our huge health care system."); Marianne Engelman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation To Address Race Discrimination and Inequalities in Health Care Delivery*, 6 TEX. F. ON C.L. & C.R. 1, 28 (2001) (describing OCR as "an agency that is underfunded, inadequately staffed, and largely ineffectual").

84. U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR 2023 BUDGET IN BRIEF 154 (2022), https://www.hhs.gov/sites/default/files/fy-2023-budget-in-brief.pdf [https://perma.cc/2N5E-46FB]; *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR

While this seems promising, funding requests for previous fiscal years also indicate increases in OCR funding in furtherance of similar staffing and efficiency goals,[85] casting doubt on whether these changes will actually impact OCR's efficacy in civil rights enforcement in healthcare. Similar efficacy concerns exist regarding the Equal Employment Opportunity Commission ("EEOC"),[86] and, as discussed in the next Section, enforcement of the Church Amendments through Title VII is limited under the current employment discrimination framework.

2. Administrative Remedies Under the Equal Employment Opportunity Commission

Some public comments to the 2008 Final Rule raised concerns that HHS enforcement of federal conscience statutes would overlap with EEOC enforcement of religious discrimination under Title VII of the Civil Rights Act of 1964.[87] HHS responded that the conscience protections under various federal statutes are "broader in scope than the protections afforded under Title VII,"[88] in part because the Church Amendments intentionally omit Title VII's "reasonable accommodation and undue hardship" language.[89] HHS also noted that federal regulations exist that provide procedures for when there is overlapping jurisdiction between agencies responsible for federal nondiscrimination laws.[90]

Title VII requires employers to make reasonable accommodations to religious conscience objections.[91] While this might provide an adequate

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2024 BUDGET IN BRIEF 154–55 (2023), https://www.hhs.gov/sites/default/files/fy-2024-budget-in-brief.pdf [https://perma.cc/7SRW-GGRC] (showing a steady increase in workload every year).

85. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., FISCAL YEAR 2022 BUDGET IN BRIEF 138 (2021), https://www.hhs.gov/sites/default/files/fy-2022-budget-in-brief.pdf [https://perma.cc/SP4V-VGKG].

86. *See, e.g.*, Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 2 (1996).

87. 2008 Final Rule, *supra* note 44, at 78083; Title VII, 42 U.S.C. § 2000e *et seq*.

88. 2008 Final Rule, *supra* note 44, at 78083.

89. The 2008 Final Rule notes that Title VII was enacted nine years prior to the Church Amendments, so the subsequent enactment of the Church Amendments and the omission of the undue hardship language in Title VII suggest that Congress intended for the Church Amendments to be "distinct from, and extend beyond, [conscience protections] under Title VII." *Id.* at 78083–85.

90. *Id.* at 78086–87; *see* 29 C.F.R. § 1691.5 (2024).

91. Reasonable Accommodation Without Undue Hardship as Required by Section 701(j) of Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1605.2(c).

solution in some scenarios,[92] the employer is not required to provide a reasonable accommodation if the accommodation poses an undue hardship on the employer.[93] For decades, employers were able to demonstrate an undue hardship by merely showing that the accommodation imposed "more than a *de minimis* cost" on the employer.[94] However, in 2023, the Supreme Court decided *Groff v. DeJoy*, which held that "showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII."[95] Instead, "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."[96] The Court further explained that "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business," and instructed lower courts applying this test to "take[] into account all relevant factors . . . including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of an employer."[97]

So, what does *Groff* mean for enforcing conscience rights through Title VII? It's not entirely clear.[98] The Court had "no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today," particularly the agency's guidance contained in 29 C.F.R. § 1605.2(d).[99]

EEOC's Compliance Manual on Religious Discrimination suggests that a reasonable accommodation might include allowing a nurse to trade shifts with another able and willing nurse.[100] However, a hospital is not required to

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92. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION § 12-IV(C) (2021) (describing common methods of accommodation, including scheduling changes, voluntary substitutes and shift swaps, change of job tasks and lateral transfer, and modifying workplace practices, policies, and procedures).

93. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(e)(1) (2024); *see* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 92, § 12-IV(C)(2) ("[I]f allowing a swap or other accommodation would not provide the coverage the employer needs for its business operations or otherwise pose an undue hardship, the accommodation does not have to be granted.").

94. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977); Leading Case, *Title VII—Religious Accommodations*—Groff v. DeJoy, 137 HARV. L. REV. 470, 470 (2023).

95. Groff v. DeJoy, 600 U.S. 447, 468 (2023).

96. *Id.*

97. *Id.* at 470–71 (internal quotation marks omitted).

98. Leading Case, *supra* note 94, at 470 ("In declining to speak on the Title VII-ADA undue hardship relationship, the Court sidestepped a debate many expected it would enter in *Groff*, leaving the details for future litigants and lower courts to resolve.").

99. *Groff*, 600 U.S. at 471; 29 C.F.R. § 1605.2(d) (2024).

100. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 92, § 12-IV(A)(3) (Example 35); *see also* 2019 Final Rule, *supra* note 31, at 23191.

allow shift trading when the hospital alleges that "there were not enough staff members able and willing to trade with" the employee "due to staffing cuts," which the hospital believed posed a risk to patient safety.[101]

Additionally, prior to *Groff*, an accommodation could cause an undue hardship based on the impact it would have on other employees.[102] For example, the Fourth Circuit held that "[i]f an employer reasonably believes that an accommodation would . . . impose 'more than a de minimis impact on coworkers,' then it is not required to offer the accommodation under Title VII."[103] In that case, the accommodation would "adversely affect the shift and job preference of some employees."[104] In *Groff*, the Court clarified that an accommodation's impact on coworkers is only relevant if it goes on to affect the conduct of the employer's business.[105]

Given the Court's favorable attitude towards EEOC's interpretations and the ongoing nationwide shortage of nurses,[106] hospitals will likely still have no trouble denying nurses certain accommodations even under the new undue hardship standard. Some public comments to the 2008 Final Rule raised specific concerns that healthcare entities must be able to address these staffing issues and suggested that the Rule should adopt the balancing test in Title VII.[107] HHS responded that Congress, by choosing to omit any balancing of interests, intended to impose higher standards on healthcare employers to provide religious accommodations than is imposed on employers in general.[108] It remains true even after *Groff* that federal conscience laws provide greater protections to healthcare employees than does Title VII.

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101. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 92, § 12-IV(A)(3) (Example 35); *see also* Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 223 (3d Cir. 2000).

102. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 317 (4th Cir. 2008).

103. *Id.*

104. *Id.* at 318 (internal quotations omitted).

105. Groff v. DeJoy, 600 U.S. 447, 472 (2023) (clarifying also that religious animus from other employees is not considered an undue hardship).

106. *See, e.g.*, *The U.S. Nursing Shortage: A State-by-State Breakdown*, NURSEJOURNAL (Nov. 10, 2023), https://nursejournal.org/articles/the-us-nursing-shortage-state-by-state-breakdown/ [https://perma.cc/8EAY-CJZ7]; Nina Chamlou, *How U.S. Hospitals Pay Nurses and Why It's an Issue*, NURSEJOURNAL (Sept. 26, 2022), https://nursejournal.org/articles/how-hospitals-pay-nurses/ [https://perma.cc/VRD4-8VWR] ("In for-profit models, hospitals err on the side of understaffing nurses rather than risking spending any more money than necessary—even at the expense of nurses' well-being and patient safety."); Julia Haines, *The State of the Nation's Nursing Shortage*, U.S. NEWS (Nov. 1, 2022, 4:16 PM), https://www.usnews.com/news/health-news/articles/2022-11-01/the-state-of-the-nations-nursing-shortage [https://perma.cc/S5QW-FBRF].

107. 2008 Final Rule, *supra* note 44, at 78084; *see supra* text accompanying notes 88–91 (describing the undue hardship balancing test in Title VII).

108. 2008 Final Rule, *supra* note 44, at 78085.

Additionally, Title VII does not protect the full scope of healthcare workers that the Church Amendments were intended to protect.[109] Specifically, Title VII does not cover independent contractors,[110] leaving gaps in protection for hospital physicians and travel nurses that are independent contractors.[111] In 2021, over 20% of emergency physicians were independent contractors.[112] In 2019, there were around 43,000 travel nurses,[113] and that number grew to around 67,000 in 2021.[114] Due to the COVID-19 pandemic, the number of travel nurse positions increased by nearly 500% from 2020 to 2022.[115] The Church Amendments fill a gap in conscience protections for these healthcare workers not covered under Title VII.[116]

3. State Laws

In *Cenzon-DeCarlo*, after refusing to imply a private right of action under the Church Amendments, the Second Circuit noted that "other avenues to potential relief remain open" to the nurse, including "state discrimination claims."[117] The nurse subsequently filed suit in New York state court.[118]

The suit raised claims under the New York Constitution for equal protection and free exercise, numerous claims under New York employment discrimination law, a claim of intentional infliction of emotional distress

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109. *See supra* notes 88–89 and accompanying text.

110. *Coverage*, EEOC, https://www.eeoc.gov/employers/coverage-0 [https://perma.cc/ZNK5-7PUK] ("People who are not employed by the employer, such as independent contractors, are not covered by the anti-discrimination laws. Figuring out whether or not a person is an employee of an organization (as opposed to a contractor, for example) is complicated.").

111. *See* Marjorie A. Shields, Annotation, *Liability, Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.), of Hospital on Basis of Refusal or Revocation of Hospital Staff Privileges to Physician or Nurse*, 174 A.L.R. Fed. 611 § 2 (2001).

112. Len Strazewski, *Practice Owner or Employee? Physicians' Specialty May Tell the Tale*, AM. MED. ASS'N (Aug. 9, 2021), https://www.ama-assn.org/medical-residents/transition-resident-attending/practice-owner-or-employee-physicians-specialty-may [https://perma.cc/RX8Y-TN64].

113. April Hansen & Carol Tuttas, *Professional Choice 2020-2021: Travel Nursing Turns the Tide*, 20 NURSE LEADER 145, 145 (2022).

114. Cristal Mackay, *Digging into the Data: Travel Nurse Demographics*, AYA HEALTHCARE (May 20, 2022), https://www.ayahealthcare.com/blog/digging-into-the-data-travel-nurse-demographics/ [https://perma.cc/L4JA-6YY8].

115. Hansen & Tuttas, *supra* note 113, at 146 fig.1.

116. *See* 2008 Final Rule, *supra* note 44, at 78083.

117. Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 699 (2d Cir. 2010).

118. Cenzon-DeCarlo v. Mount Sinai Hosp., 962 N.Y.S.2d 845, 847 (Sup. Ct. 2010); Cenzon-DeCarlo v. Mount Sinai Hosp. 957 N.Y.S.2d 256, 257 (App. Div. 2012).

("IIED"), and a claim under New York's conscience protection statute.[119] The court dismissed the constitutional claims and granted summary judgment in favor of the hospital for the employment discrimination claims and the IIED claim.[120] The court, in addressing New York's conscience protection statute, concluded that the statute does not confer a private right of action.[121]

While state laws have the potential to provide stronger conscience protections for healthcare workers, state conscience protection statutes vary widely, both in protections granted and enforcement mechanisms available.[122] Currently, Colorado, New Hampshire, and Vermont are the only states that do not have an abortion refusal statute for individual healthcare workers.[123] However, of the states that have an abortion refusal statute, only a handful explicitly confer a private right of action.[124] Thus, state laws are generally not an effective means of uniformly enforcing conscience protections.[125]

4. Broad Conscience Protection Acts

Some members of Congress have expressed concerns about ongoing conscience violations in healthcare and the insufficiency of OCR in enforcing conscience protections.[126] Numerous bills have been introduced in the House

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119. *Id.*

120. *Id.* at 849–50.

121. *Id.* at 850; *see also* 2019 Final Rule, *supra* note 31, at 23178. New York's conscience protection statute makes violation of the provision a misdemeanor. N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2023).

122. *See* SARAH M. ESTELLE, CTR. FOR RELIGION, CULTURE & DEMOCRACY, RELIGIOUS LIBERTY IN THE STATES 2023: A DOMESTIC MEASURE OF STATUTORY SAFEGUARDS FOR THE FREE EXERCISE OF RELIGION 25–74 (2023), https://religiouslibertyinthestates.s3.us-east-2.amazonaws.com/Religious_Liberty_in_the_States_Report-2023.pdf [https://perma.cc/BXF9-GU4Q] (listing conscience provisions by state).

123. *Health-Care Provision: Abortion Refusal*, RELIGIOUS LIBERTY IN THE STATES, https://religiouslibertyinthestates.com/safeguard/health-care-provision-abortion-refusal/ [https://perma.cc/MGA7-JUML]. Twenty-six states do not have sterilization refusal statutes for individual healthcare workers. *Health-Care Provision: Sterilization Refusal*, RELIGIOUS LIBERTY IN THE STATES, https://religiouslibertyinthestates.com/safeguard/health-care-provision-sterilization-refusal/ [https://perma.cc/Y9FV-KDWB].

124. *See* Theriot & Connelly, *supra* note 30, at 587–600.

125. *Id.* at 574.

126. *Lankford, Colleagues Protect Health Care Workers from Discrimination*, SENATOR JAMES LANKFORD (Feb. 23, 2021), https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-protect-health-care-workers-from-discrimination-/ [https://perma.cc/HK9A-5RJR]; Conscience Protection Act of 2021, S. 401, 117th Cong. § 2(4) (2021) ("Courts have declined to find that these laws provide a 'private right of action' thereby leaving victims of discrimination unable to defend their conscience rights in court, while at the same time administrative enforcement by the Office for Civil Rights of the Department of Health

and Senate to create a private right of action for existing conscience protection statutes, but none have been passed.[127] The 2016, 2019, and 2021 proposed bills all explicitly provided a private right of action for individual parties whose conscience rights were violated and specified that exhaustion of administrative remedies was not required.[128] The bills emphasized existing conscience protection statutes but did not propose new protections.[129] The most recent attempt in 2021 included a discussion of recent HHS actions to highlight the uncertainty of administrative remedies under HHS.[130]

Given the increasing polarization of abortion[131] and the "hyperpartisan polarization" of the congressional process in the last few decades,[132] legislative action seems to be a fruitless solution.[133] As one legal scholar noted, "[i]n a highly polarized atmosphere . . . the Court's word on the meaning of statutes is now final almost as often as its word on constitutional interpretation."[134] Consequently, court interpretation of statutes has become increasingly important.

II. CHURCH AMENDMENT JURISPRUDENCE

As discussed above, administrative remedies are not a reliable means of enforcing the Church Amendments, yet OCR enforcement remains the primary avenue of relief for individual healthcare workers whose conscience rights are violated. Moreover, legislative action on the subject appears nearly impossible, highlighting the need for a private remedy and for thorough statutory interpretation from courts. Section A discusses the broader history

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and Human Services has been inconsistent, at times allowing cases to languish for years without resolution.").

127. *See* Conscience Protection Act of 2016, H.R. 4828, 114th Cong. (2016); Conscience Protection Act of 2019, H.R. 2014, 116th Cong. (2019); S. 401.

128. *See* sources cited *supra* note 127.

129. H.R. 2014.

130. S. 401 § 2(4)–(7). The bill expressed a fear that the Biden administration would stop enforcing conscience protection violations against California. *Id.* The Biden administration did in fact discontinue the enforcements that the Trump administration pursued. *See* Letter from Robinsue Frohboese, Acting Dir. & Principal Deputy, Off. for C.R., Dep't of Health & Hum. Servs., to Rob Bonta, Att'y Gen., State of Cal. (Aug. 13, 2021), https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html [https://perma.cc/7Z7D-NUK7].

131. *See* Blazina, *supra* note 39.

132. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 87 (6th ed. 2020).

133. *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 237–38 (2013).

134. *Id.* at 209.

and trends of implied private right of action jurisprudence in federal courts, shifting from broad implication of private rights of action to a presumption against implied private rights of action. Section B discusses the key cases that analyze whether the Church Amendments confer an implied private right of action, and the problems with these interpretations that leave the door open for judicial enforcement of the Church Amendments.

A. The Presumption Against Implied Private Rights of Action

For centuries, courts viewed statutorily created rights as inseparable from private rights of action and private remedies.[135] However, in the mid-1970s, the Supreme Court began to "sharply differentiate[] between rights, rights of action, and remedies."[136] Some scholars speculate that this shift was spurred by the "magnitude and breadth of federal legislation" since the 1930s that gave rise to separation of powers concerns.[137] The Church Amendments were enacted in the midst of this shift away from implying private rights of action, making analysis of an implied private right of action under the Church Amendments particularly challenging.[138] In the years leading up to the Church Amendments, "the Court had never identified a cause of action as a separate and essential entity connecting a right and a remedy."[139] In 1975—

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135. Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001); *see, e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 624 (1838) (stating that a case with "a clear and undeniable right" but "no remedy" is "a monstrous absurdity in a well organized government"); Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

136. Zeigler, *supra* note 135, at 83–84.

137. Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 861 (1996); *see* Bradford C. Mank, *Using § 1983 To Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 321 (2001) ("Because judicial implication of private rights of action raises serious separation of powers issues, courts have increasingly refused to imply private suits unless there is substantial evidence that Congress intended to allow private remedies for statutory violations."); WEN W. SHEN, CONG. RSCH. SERV., LSB10320, COURTS SPLIT ON WHETHER PRIVATE INDIVIDUALS CAN SUE TO CHALLENGE STATES' MEDICAID DEFUNDING DECISIONS: CONSIDERATIONS FOR CONGRESS (PART I OF II) 2 (2019).

138. *See* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 816 (2002) (discussing the particular challenges of analyzing implied private rights of action in statutes enacted between 1964 and 1975).

139. Zeigler, *supra* note 135, at 86; *see* Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors To Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 124–25 (2017) (describing the expansive view of private rights of action in the 1960s Civil Rights era); J.I. Case Co. v. Borak, 377 U.S. 426, 433

two years after the Church Amendments were enacted—the Court decided *Cort v. Ash*,[140] solidifying the distinction between rights, rights of action, and remedies.[141]

Cort provided[142] four factors for courts to consider in implying a private right of action: (1) "[I]s the plaintiff 'one of the class for whose especial benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff?"[143] (2) "[I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?"[144] (3) "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff?"[145] (4) "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"[146]

Despite articulating a specific framework for analyzing implied private rights of action, the Supreme Court did not consistently apply this framework.[147] The *Cort* factors were ultimately supplanted by "pure textualism—an inquiry that, at least in articulation, seeks solely to discern Congress' intent to create an implied right."[148] Given the challenge of

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(1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.").

140. Cort v. Ash, 422 U.S. 66 (1975).

141. Zeigler, *supra* note 135, at 85–86.

142. Most scholars viewed *Cort* as a synthesis of different factors courts have used in the past to analyze private rights of action. *Id.* at 86; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1422–23 (2001).

143. *Cort*, 422 U.S. at 78 (quoting Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).

144. *Id.* (citing Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers (*Amtrak*), 414 U.S. 453, 458, 460 (1974)).

145. *Id.* (first citing *Amtrak*, 414 U.S. at 458; next citing Secs. Inv. Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975); and then citing Calhoon v. Harvey, 379 U.S. 134 (1964)).

146. *Id.* (first citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); next citing J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); then citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394–95 (1971); and finally citing *id.* at 400 (Harlan, J., concurring)).

147. Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGIS. 251, 257–65 (2013) (describing inconsistencies in the weight the Supreme Court assigns each *Cort* factor, and confusion specifically within the first two *Cort* factors).

148. *Id.* at 268–69; *see also* Zeigler, *supra* note 135, at 88; Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("It could not be plainer that we effectively overruled the *Cort v. Ash* analysis . . . converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence."); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted . . . .").

determining legislative intent,[149] inconsistencies abounded among lower federal courts, with some applying a full *Cort* analysis (sometimes even while acknowledging that *Cort* was effectively overruled), and some not mentioning *Cort* at all.[150] This jumbled state of implied private right of action jurisprudence has prompted a variety of responses, with many proposing new tests trying to make sense of precedent,[151] and others pushing for the abolition of this "tortured" implied-rights jurisprudential line altogether due to its lack of normative utility.[152] This lack of normative utility is apparent in the next Section, which discusses the inconsistent approaches taken by the few courts that have addressed a private right of action under the Church Amendments.

B. The Problem with Current Church Amendment Jurisprudence

The most authoritative private right of action case for the Church Amendments is *Cenzon-DeCarlo*—the only federal appellate case thus far to substantively analyze whether the Church Amendments imply a private right of action.[153] Some subsequent decisions simply rely on the holding in *Cenzon-DeCarlo* to conclude that the Church Amendments do not confer a private right of action.[154] However, a brief examination of the relevant Church Amendment cases demonstrates that this reliance on *Cenzon-DeCarlo* is misplaced.

1. *Cenzon-DeCarlo v. Mount Sinai Hospital*

As discussed in the Introduction, *Cenzon-DeCarlo* involved a nurse who claimed she was forced to assist in a late-term abortion against her religious

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149. *See, e.g.*, Jesse M. Cross, *Disaggregating Legislative Intent*, 90 FORDHAM L. REV. 2221, 2228 (2022) (discussing the challenges of discerning a singular intent from a Congress composed of so many people).

150. Marcantel, *supra* note 147, at 266.

151. *See, e.g.*, Newcombe, *supra* note 139, at 126–47 (proposing a sixteen-factor test); Zeigler, *supra* note 135, at 126.

152. *See* Marcantel, *supra* note 147, at 254, 294.

153. *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695 (2d Cir. 2010).

154. *See, e.g.*, Jackson Women's Health Org. v. Currier, 760 F.3d 448, 461 n.7 (5th Cir. 2014) (Garza, J., dissenting) ("The Second Circuit has held that [Section (c) of the Church Amendments] does not imply a private right of action."); Vt. All. for Ethical Healthcare v. Hoser, 274 F. Supp. 3d 227, 240 (D. Vt. 2017) (holding that Section (d) does not confer a private right of action, supported only by a citation to *Cenzon-DeCarlo*); *cf.* Marcantel, *supra* note 147, at 288–89 (describing a persistent problem where lower federal courts provide "no supporting rationale" in concluding that various statutes do not contain private rights of action).

objections.[155] The court stated that they were specifically deciding "whether 42 U.S.C. § 300a-7(c) implies a private right of action."[156] However, the court referred to the provision as "Section 300" throughout the decision, and noted that this was "sometimes referred to as the 'Church Amendment.'"[157]

The court in *Cenzon-DeCarlo* found that there was "colorable evidence" of Congressional intent to create an individual right, but "*no* evidence that Congress intended to create a right *of action*."[158] The court reasoned that the title of the Public Law and the legislative history support the creation of an individual right, but neither explicitly reference a private right of action.[159]

The court then turned to the first *Cort* factor and found, based on the language, that "Section 300 in the case before us presents a ban on conduct" rather than an "unmistakable focus on the benefited class."[160] This language "does not signal Congressional intent to create a private remedy."[161] The court ultimately held that "Section 300 does not confer upon [the plaintiff] a private right of action to enforce its terms."[162]

Lower courts have improperly relied on this imprecise use of "Section 300" in holding that Section (d) does not confer a private right of action,[163] particularly in failing to acknowledge the difference between the language of Section (d) and the other Sections of the Church Amendments.[164]

2. *Hellwege v. Tampa Family Health Centers*

In *Hellwege v. Tampa Family Health Centers*, a nurse who was a member of the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") and held religious beliefs against "prescribing hormonal contraceptives in certain circumstances"[165] applied for a nurse-midwife position at a Florida clinic.[166] The clinic responded to her application with an

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155. *See supra* notes 17–27 and accompanying text.
156. *Cenzon-DeCarlo*, 626 F.3d at 696.
157. *Id.*
158. *Id.* at 698.
159. *Id.* at 697–98.
160. *Id.* at 698 (citations omitted).
161. *Id.*
162. *Id.* at 699.
163. *See* Vt. All. for Ethical Healthcare, Inc. v. Hoser, 274 F. Supp. 3d 227, 240 (D. Vt. 2017) (holding that Section (d) does not confer a private right of action, supported only by a citation to *Cenzon-DeCarlo*).
164. *See infra* Section III.A. *Compare* 42 U.S.C. § 300a-7(d) ("No individual shall be required"), *with* 42 U.S.C. § 300a-7(c) ("No entity . . . may discriminate").
165. Hellwege v. Tampa Fam. Health Ctrs., 103 F. Supp. 3d 1303, 1305 (M.D. Fla. 2015).
166. *Id.* at 1306.

email that stated: "Due to the fact that we are a Title X organization and you are a member of AAPLOG, we would be unable to move forward in the interviewing process."[167]

The nurse filed suit in federal court under Sections (c) and (d) of the Church Amendments.[168] The district court addressed "whether Sections (c)(1), (c)(2), or (d) of the Church Amendments contain language that confers on individuals . . . a private right of action."[169]

The court started by analyzing whether either Section creates a private right.[170] The court said it "agrees with *Cenzon-DeCarlo*'s analysis" that Section (c) creates "an individual right in physicians and other health care employees to be free from employment discrimination under the circumstances delineated in the statute."[171] For Section (d), the court found that "[t]he language of [Section (d)], as well as its title of 'Individual Rights' strongly suggests that Congress intended to create an individual right."[172] Ultimately, the court was "satisfied that the Church Amendments recognize important individual rights."[173] The court noted, however, that "there is no presumption of enforceability merely because a statute speaks in terms of rights."[174]

The court then turned to "the more difficult question of whether there is any evidence of Congressional intent to create a private remedy for the enforcement of the Church Amendments."[175] Despite analyzing Sections (c) and (d) independently for the creation of an individual right, the court did not perform a separate analysis for whether these Sections create a private right of action.[176] The court ultimately determined that "Congress did not intend to confer a private right of action in the Church Amendments."[177] In so holding, the court focused primarily on legislative scheme and available enforcement mechanisms.[178]

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167. *Id.* A "Title X organization" is an organization that receives federal funds listed in Section (c) of the Church Amendments. *Id.* at 1306 n.1.

168. *Id.* at 1307. The nurse also brought claims under Florida statutes and Title VII employment discrimination. *Id.* at 1306.

169. *Id.* at 1308.

170. *Id.* at 1309.

171. *Id.*

172. *Id.* at 1310.

173. *Id.*

174. *Id.* at 1311.

175. *Id.*

176. *See id.* at 1310–13.

177. *Id.* at 1312.

178. *See id.* at 1311–12.

The court compared the Church Amendments to Title IX of the Education Amendments of 1972,[179] in which the Supreme Court has found an implied private right of action.[180] The district court noted that while Title IX had "numerous indicia of Congressional intent to support a private right of action," including "the scope and purpose of Title IX and its place within the civil rights enforcement scheme," the Church Amendments had "no similar considerations."[181]

The court also compared the Church Amendments to the Family Educational Rights and Privacy Act of 1974 ("FERPA"),[182] in which the Supreme Court has refused to imply a private right of action.[183] The district court noted that in the Supreme Court's analysis of FERPA, "the Court highlighted that the mechanism Congress chose for the enforcement of FERPA involved administrative review procedures under the Secretary of Education."[184] Specifically, FERPA "expressly authorized the Secretary of Education to deal with violation of the Act and required the Secretary to establish or designate a review board for investigating and adjudicating such violations."[185] The district court then found that a "similar provision exists" in the Church Amendments through HHS regulations set forth in 45 C.F.R. § 88.[186] However, the court failed to note that while Congress *expressly* created an administrative enforcement mechanism in FERPA, Congress merely *implied* one in the Church Amendments.[187] This is further supported by the fact that this administrative remedy was not established until 2008—thirty-five years after the Church Amendments were enacted.[188]

Finally, the court noted that its conclusion was consistent with other federal courts that addressed this issue.[189] However, none of the cases cited

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179. *Id.* at 1310; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

180. Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.").

181. *Hellwege*, 103 F. Supp. 3d at 1312.

182. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

183. Gonzaga Univ. v. Doe, 536 U.S. 273, 289 (2002).

184. *Hellwege*, 103 F. Supp. 3d at 1311.

185. *Id.* (quoting *Gonzaga*, 536 U.S. at 289).

186. *Id.*; *see* 45 C.F.R. § 88.1 (2023).

187. *See infra* Section III.C; 2023 Proposed Rule, *supra* note 38, at 826 ("No statutory provision, however, requires promulgation of regulations for their interpretation or implementation.").

188. *See supra* Section I.B.1.

189. *Hellwege*, 103 F. Supp. 3d at 1312.

by the court specifically analyze a private right of action under Section (d).[190] Instead, they imprecisely consider the Church Amendments as a whole.[191]

3. *Vermont Alliance for Ethical Healthcare, Inc. v. Hoser*

In *Vermont Alliance for Ethical Healthcare, Inc. v. Hoser*, physicians and other healthcare providers sought to enjoin the State of Vermont from enforcing Vermont's assisted suicide law, which Plaintiffs alleged was interpreted broadly to require "all healthcare professionals to counsel for assisted suicide."[192] Plaintiffs had religious and moral objections to performing physician-assisted suicide and brought suit under Section (d) and 42 U.S.C. § 1983.[193]

The court's analysis of a private right of action under Section (d) was limited to a citation to *Cenzon-DeCarlo* accompanied by two sentences: "The provision does not explicitly create a private right of action. Nor is there an appropriate basis for finding that Congress intended to create a cause of action by implication."[194] In comparing another statute in question to the Church Amendments, the court stated that "[a]s in the case of the Church Amendments, the court lacks any basis for finding an express or implied cause of action."[195] The court went on to state that the Church Amendments "create[] no individual rights."[196] This statement is inconsistent with the Second Circuit's suggestion that the Church Amendments contain an

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190. *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698 (2d Cir. 2010); Nead v. Bd. of Trs. of E. Ill. Univ., No. 05-2137, 2006 WL 1582454, at *5 (C.D. Ill. June 6, 2006) (finding that the legislative history of the Church Amendments does not support a private right of action); Moncivaiz v. DeKalb Cnty., No. 03 C 50226, 2004 WL 539994, at *3 (N.D. Ill. Mar. 12, 2004) (finding that plaintiff did not cite sufficient legislative history to suggest a private right of action was intended); Anspach v. City of Phila., 630 F. Supp. 2d 488, 496 (E.D. Pa. 2008) (finding that no language in Title X of the Public Health Service Act—in which the Church Amendments are located—speaks in terms of individual rights).

191. *See infra* notes 199–201 and accompanying text.

192. Vt. All. for Ethical Healthcare, Inc. v. Hoser, 274 F. Supp. 3d 227, 231–32 (D. Vt. 2017).

193. *Id.* at 232. Regarding the § 1983 claim, the court stated that "[e]ven if the court were to break new ground by recognizing a private right of action, enforceable through operation of § 1983," this pre-enforcement suit was not ripe for review since Plaintiffs had not yet "been required to perform actions which violate their religious conscience." *Id.* at 240.

194. *Id.*

195. *Id.*

196. *Id.*

individual right.[197] Moreover, as discussed in the next Section, the language of Section (d) supports the creation of a private right.[198]

III. IMPLYING A PRIVATE RIGHT OF ACTION IN SECTION (D) OF THE CHURCH AMENDMENTS

As demonstrated by these cases, courts have yet to perform an in-depth analysis of whether Section (d) confers a private right of action. Instead, many courts analyze the Church Amendments as a whole. As the Supreme Court explained in *Blessing v. Freestone*, it is inappropriate for courts to take a "blanket approach" in determining whether a "multifaceted statutory scheme" creates enforceable rights.[199] Rather, courts should "determine exactly what rights, considered in their most concrete, specific form," are being asserted.[200] For example, in *Blessing*, a blanket approach was inappropriate when "many other provisions" of the multifaceted statutory scheme did not fit the traditional criteria for identifying private rights.[201]

Additionally, in *Alexander v. Sandoval*, the Supreme Court held that § 602 of Title VI does not confer a private right of action, despite having "no doubt" that § 601 of Title VI confers one.[202] The Supreme Court reasoned that the language of § 602 does not contain the same "rights-creating" language present in § 601.[203] More recently, the Supreme Court in *Health and Hospital Corporation of Marion County v. Talevski* held that one provision of a statute created a private right.[204] Since the provisions of the Church Amendments were enacted at different times and under significant time pressures, the provisions should not be viewed as a single Section of the same Act.[205] As discussed below, Section (d) contains "rights-creating" language that is a

197. *See supra* Section II.B.1; Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 698–99 (2d Cir. 2010) (finding "colorable evidence" of congressional intent to create an individual right).

198. *See infra* Section III.A.

199. Blessing v. Freestone, 520 U.S. 329, 344 (1997); *see also* Gonzaga Univ. v. Doe, 536 U.S. 273, 294 (2002) (Stevens, J., dissenting) ("[A]s we have stated previously, a 'blanket approach' to determining whether a statute creates rights enforceable under [§ 1983] is inappropriate.").

200. *Blessing*, 520 U.S. at 346.

201. *Id.* at 344.

202. *See* Alexander v. Sandoval, 532 U.S. 275, 276 (2001).

203. *Id.*

204. Health and Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 184 (2023); *see* 42 U.S.C. § 1396r(c).

205. *See infra* Section III.B.

distinct variation from the other provisions of the Church Amendments, which like in *Sandoval* necessitates an independent analysis of Section (d).[206]

Currently, the Supreme Court "treats the question of implied rights of action as a question of statutory interpretation."[207] For the current Court, this means employing a textualist approach.[208] Accordingly, Section A looks first at the text of Section (d), arguing that the "rights-creating" language of Section (d) supports legislative intent to create an individual right.[209] Section B examines the statutory history of the Church Amendments, which highlights the meaningful variations between the language of Section (d) and the other provisions of the Church Amendments. Section C discusses the controversy over legislative context, arguing that its use is appropriate in a narrow set of circumstances.

A. Text of the Statute

A textual approach to implied private rights of action can be somewhat paradoxical since by nature they are *implied* rather than explicitly written in the text of a statute. In *Alexander v. Sandoval*, Justice Scalia suggested that congressional intent to create a private right of action is the appropriate inquiry for determining whether a statute implies a private right of action.[210] Moreover, the congressional intent must be two-fold: Congress must have intended to create both a private right and a private remedy.[211]

In *Cannon v. University of Chicago*, the Supreme Court implied a private right of action in Title IX based on the "right- or duty-creating language" of the statute.[212] The relevant Section of Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied

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206. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 55 (2023) ("[A] material variation in terms suggests a variation in meaning." (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012)).

207. Anthony J. Bellia, *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2078 (2017).

208. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 n.1 (2020) ("Justice Kagan commented several years ago that 'w[e are] all textualists now.' Although that may be an exaggeration, Justice Kagan's comment captures how the rise of modern textualism has impacted the way that judges approach cases." (citations omitted)); Cross, *supra* note 149, at 2222 ("[T]extualist methodology plainly has gained significant traction with the current U.S. Supreme Court.").

209. Alexander v. Sandoval, 532 U.S. 275, 288 (2001).

210. *Id.* at 286; Bellia, *supra* note 207, at 2086.

211. *Sandoval*, 532 U.S. at 286.

212. Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979).

the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[213] The Supreme Court in *Cannon* held that the "dispositive language" in Title IX had an "unmistakable focus on the benefited class," and therefore "unquestionably . . . favors the implication of a private cause of action."[214]

Unlike the Court's modern approach, the Court in *Cannon* liberally implied private rights of action when rights-creating language was present.[215] The Court even noted that, with the exception of one case involving tribal law, the Supreme Court "has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case."[216]

Conversely, the modern Court essentially treats rights-creating language as a gatekeeper of sorts, opening the door to other means of statutory interpretation if rights-creating language is present.[217] Nonetheless, the Court still places significant emphasis on the rights-creating, individual-focused language in *Cannon* for this gatekeeping function.[218] Like the language in Title IX, Section (d) was written with rights-creating language and an unmistakable focus on the individual:

> **Individual rights respecting certain requirements contrary to religious beliefs or moral convictions.** No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.[219]

While there are some distinctions between Title IX's "shall . . . be subjected to discrimination" and Section (d)'s "shall be required to perform" language, Justice Alito's dissent in *Maine Community Health Options v. United States*[220] suggests that the language of Section (d) is similar enough to Title IX to obtain rights-creating status. In that case, Justice Alito expressed concerns that the majority's decision to imply a private right of action from

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213. 20 U.S.C. § 1681(a).
214. *Cannon*, 441 U.S. at 691–94.
215. *See id.* at 690 n.13.
216. *Id.*
217. *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001).
218. *Id.*
219. 42 U.S.C. § 300a-7(d).
220. Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1331 (2020) (Alito, J., dissenting).

the language "the Secretary . . . shall pay" would result in a private right of action for a plethora of statutes that contain the language "all persons . . . shall have."[221]

Additionally, the language of Section (d) is more analogous to the language of Title IX than the language of statutes in which the Supreme Court did not find rights-creating language. For example, in *Gonzaga University v. Doe*, the Supreme Court held that the language of FERPA was "two steps removed" from the interests of the individual affected.[222] FERPA's language reads: "No funds shall be made available . . . ," instructing the Secretary rather than addressing the individual.[223] In contrast, Section (d) specifically identifies "individual" as the subject and beneficiary of the statute.

While the Church Amendments were enacted pursuant to Congress' spending power,[224] which might appear similar to a condition on federal funds in FERPA, the Supreme Court recently held that a Section of a statute titled "Requirements relating to residents' rights" that was directed at facilities nonetheless recognized an individual right because it contained "rights-creating language."[225]

In addition to the language of Section (d), the court in *Cenzon-DeCarlo* noted that while a title alone cannot confer individual rights, it provides "evidence of Congressional intent to confer them."[226] The Second Circuit in *Cenzon-DeCarlo* said that "Section 300 as printed in the United States Code does not contain the label 'individual rights' at the passage in question."[227] However, Section (d) does explicitly contain the label "individual rights."[228] The district court in *Hellwege* noted that the "individual rights" title "strongly suggests that Congress intended to create an individual right" in Section (d).[229]

Based on Supreme Court precedent, the language of Section (d) is consistent with congressional intent to create a private right.[230] While this

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221. *Id.* at 1333.

222. Gonzaga Univ. v. Doe, 536 U.S. 273, 274 (2002).

223. Family Education and Privacy Rights Act of 1974, 20 U.S.C. § 1232g(a)(1)(A).

224. *See, e.g.*, 2019 Final Rule, *supra* note 31, at 23178, 23191, 23222.

225. Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 183–86 (2023); *see* 42 U.S.C. § 1396r(c)(1)(A)(ii) (requiring nursing homes to "protect and promote" residents' "right to be free from" abuse).

226. Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 697 (2d Cir. 2010).

227. *Id.*

228. The title of Section (d) reads: "Individual rights respecting certain requirements contrary to religious beliefs or moral convictions." 42 U.S.C. § 300a-7(d).

229. Hellwege v. Tampa Fam. Health Ctrs., 103 F. Supp. 3d 1303, 1310 (M.D. Fla. 2015).

230. The Supreme Court has noted that for § 1983 actions, "the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied

would have been sufficient to imply a private right of action under the Court's precedent in the 1970s, the Supreme Court held in *Sandoval* that the creation of an individual right does not necessarily imply a private right of action.[231] However, this does at least open the door to the use of other statutory interpretation tools to the extent that they clarify the text.[232]

B. Statutory and Legislative History

Another useful tool for textualists is to compare the language in the enacted provisions of the statute, as well as the language between prior unenacted versions of each provision, to identify meaningful variations in language.[233] Statutory history is distinct from legislative history, and the current Court is more likely to use statutory history than legislative history.[234] Statutory history in a broad sense is "the entire circumstances of a statute's creation and evolution," whereas legislative history typically refers to "the internal legislative pre-history of a statute—the internal institutional progress of a bill to enactment and the deliberation accompanying that progress."[235] This Section focuses on statutory history since its use is more widely

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right of action case, the express purpose of which is to determine whether or not a statute confers rights on a particular class of persons." Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002). Consequently, enforcement through 42 U.S.C. § 1983 could be possible when state action is involved. *See* Jackson Women's Health Org. v. Currier, 760 F.3d 448, 460–61 (5th Cir. 2014) (Garza, J., dissenting) ("Federal law, however, prohibits entities receiving certain funding or contracts from discriminating 'in the extension of staff or other privileges to any physician . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion.' Thus, when a state affords private hospitals the authority to grant admitting privileges, those hospitals must faithfully exercise their authority in a non-discriminatory manner." (footnote omitted) (citation omitted)); *see also* Vt. All. for Ethical Healthcare, Inc. v. Hoser, 274 F. Supp. 3d 227, 240 (D. Vt. 2017). *But see* Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 950 (D. Mont. 1973) (referencing legislative history of the Church Amendments that indicates an intent to forbid the use of federal funds as a basis for § 1983 actions).

231. Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

232. *See id.* at 276.

233. One semantic canon, the presumption of consistent usage, posits that "a material variation in terms suggests a variation in meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012); *see* BRANNON, *supra* note 206, at 55 n.559.

234. *See* ESKRIDGE, JR. ET AL., *supra* note 132, at 727 ("The formal history of a statute's evolution is widely considered relevant to statutory interpretation, even in jurisdictions whose courts will not examine legislative debates.").

235. *Id.* Certain types of legislative history are afforded more weight than others. *See* BRANNON, *supra* note 206, at 44.

accepted, but includes relevant discussions of legislative history to contextualize the statutory history.

Articles discussing the legislative history of the Church Amendments often focus on select statements made during a Senate floor debate that seem to strongly suggest that the Church Amendments do not create a private right of action.[236] However, this limited selection is misleading because those statements were discussions of the earliest draft of the language, which differs significantly from the language that was enacted.[237] Drawing conclusions about legislative intent from statutory and legislative history necessarily requires making assumptions, and as in most cases, this history can be construed or manipulated to support both sides.[238]

This Section seeks to lay out a more holistic vision of the statutory and legislative history of the Church Amendments, which—while not conclusive evidence of either position—paints a vivid picture of the urgent context in which the statute was enacted. This context should caution against over-reliance on the statutory and legislative history of the Church Amendments. This Section proceeds chronologically, starting first with Sections (b) and (c)(1) enacted in 1973, and then Sections (c)(2) and (d) enacted in 1974.[239] This Section concludes with a discussion of the implications that could be drawn from the statutory and legislative history of the Church Amendments, ultimately arguing that the complexities in enacting the statute support reliance on legislative context.

1. Origin of the Church Amendments

Numerous appropriations authorizations that served as the primary sources of federal healthcare funding were set to expire on June 30, 1973.[240] The Nixon Administration was attempting to utilize the expiration of these authorities to drastically cut federal healthcare funding, which many members of Congress viewed as detrimental to the health and wellbeing of

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236. *See, e.g.*, Robin Fretwell Wilson, *Empowering Private Protection of Conscience*, 9 AVE MARIA L. REV. 101, 111–16 (2010). Select statements detailed *infra* notes 255–256 and accompanying text.

237. *See infra* Section III.B.1.

238. As Judge Harold Leventhal famously stated, using legislative history is like "looking over a crowd and picking out your friends." BRANNON, *supra* note 206, at 42 (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

239. Section (a) was a one-year extension to the expiring authorities and was removed the following year. *See* Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91.

240. *See id.*; 119 CONG. REC. 9582 (1973).

American citizens.[241] On June 18, 1973, Congress enacted the Health Programs Extension Act of 1973 as a temporary solution, extending the expiring authorities by one year to give Congress time to thoroughly examine the vast number of programs that were set to expire.[242]

During the March 27, 1973 Senate debate on this matter, Senator Church (D-ID) introduced a floor amendment to the bill that became known as the Church Amendment.[243] The amendment was prompted in part by the Supreme Court's decision in *Roe v. Wade*,[244] decided just two months prior.[245] Senator Church believed the decision raised "a serious question as to its possible impact upon the Federal Government's extensive involvement in medicine and medical care."[246] Particularly, he was concerned that "zealous administrators" would issue regulations requiring all hospitals and physicians receiving federal funds to perform abortions regardless of religious beliefs prohibiting abortions.[247] He urged that "if Congress fails to clarify its

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241. *See, e.g.*, 119 CONG. REC. 9594 (1973) (statement of Sen. Humphrey) ("[T]he President's budget for fiscal 1974 simply recommends the termination of a number of these authorities. . . . This constitutes a record of total irresponsibility on the part of the executive branch with respect to planning and action to meet the critical health care needs of America.").

242. *Id.* at 9592, 9607.

243. The language of the amendment initially proposed by Senator Church reads:

> Sec. 6. It is hereby declared to be the policy of the Federal Government, in the administration of all Federal programs, that religious beliefs which proscribe the performance of abortions or sterilization procedures (or limit the circumstances under which abortions or sterilizations may be performed) shall be respected.
>
> Sec. 7. Any provision of law, regulation, contract, or other agreement to the contrary notwithstanding, on and after the enactment of the Act, there shall not be imposed, applied, or enforced, in or in connection with the administration of any program established or financed totally or in part by the Federal Government which provides or assists in paying for health care services for individuals or assists hospitals or other health care institutions, any requirement, condition, or limitation, which would result in causing or attempting to cause, or obligate, any physician, or other health care institution, to perform, assist in the performance of, or make facilities available for or to assist in the performance of, any abortion or sterilization procedure on any individual, if the performance of such abortion or sterilization procedure on such individual would be contrary to the religious beliefs of such physician or other health care personnel, or of the person or group sponsoring or administering such hospital or other institution.

Id. at 9595.

244. Roe v. Wade, 410 U.S. 113 (1973).

245. 119 CONG. REC. 9595 (1973).

246. *Id.*

247. *Id.*

intention, then we face a plethora of lawsuits."[248] Senator Church emphasized that "[n]othing is more fundamental to our national birthright than freedom of religion. Religious belief must remain above the reach of secular authority."[249] Accordingly, the proposed amendment "is meant to give protection to the physicians, to the nurses, to the hospitals themselves, if they are religious affiliated institutions" by clarifying that federal funds "will not be used as an excuse for requiring physicians, nurses, or institutions to perform abortions or sterilizations that are contrary to their religious precepts."[250] In other words, his amendment sought to clarify that "no federal funding . . . may be conditioned upon the violation of religious precepts."[251]

After Senator Church's initial proposal, the amendment underwent several modifications. First, based on a suggestion from Senator Adlai Stevenson, the amendment was modified to include "moral convictions" in addition to religious beliefs.[252] Second, Senator Jacob Javits authored two additional Sections to be included in the amendment: a nondiscrimination provision that protects individuals with different views than their institutional employer, and a provision requiring healthcare institutions to post public notice of policies against abortion or sterilization.[253] Senator Javits stated that the nondiscrimination portion "seeks to balance out a statement of policy. We are going to respect whatever the religious or moral convictions are on either side of the case, and our purpose is to respect them."[254] Just before voting on the amendment, Senator John Pastore asked whether a hospital that bars a physician for performing an abortion at another hospital would be denied

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248. *Id.*
249. *Id.*
250. *Id.* at 9597.
251. *Id.* at 9595.
252. *Id.* at 9596.
253. *See id.* at 9603. The language of the provisions proposed by Senator Javits read:

> Sec. 8. In respect of a hospital or other health care institution referred to in Section 7 such hospital or health care institution shall not discriminate in the employment, promotion, extension of staff or other privileges or termination of employment of any physicians or other health care personnel on the basis of their personal religious or moral convictions regarding abortion or sterilization or their participation in such procedures.
>
> Sec. 9. Any individual, hospital or other health care institution declining to participate in such procedures on the grounds of such religious or moral convictions shall post notice of such policy in a public place in such institution.

Id.
254. *Id.* at 9604.

federal funds.[255] The ensuing discussion yields the closest resemblance to a contemplation of a remedy:

> Mr. Church: No.
>
> Mr. Jackson: There is no penalty.
>
> . . . .
>
> Mr. Kennedy: As I understand it, these hospitals are already receiving Federal funds. Therefore the requirement is that they shall not discriminate.
>
> Mr. Pastore: But if they do, what happens?
>
> Mr. Jackson: Nothing.
>
> Mr. Pastore: Then, what are we doing? We have wasted a whole morning doing nothing.
>
> . . . .
>
> Mr. Javits: [A hospital] may lose the benefits of Federal funds because they are discriminating against a doctor . . . .
>
> Mr. Pastore: So there is a penalty.
>
> Mr. Javits: I hope so. I do not know if it will be so adjudicated by the administrator, but it is there.[256]

This modified version of the Church Amendment passed the Senate with bipartisan support.[257] While this exchange seems to suggest that administrative enforcement and legal remedies were contemplated, debates in the House were less specific, and the language of the amendment changed significantly, so it seems inaccurate to attribute intent to the entirety of Congress based solely on this discussion between only a few Senators.[258]

On April 2, 1973, similar legislation was introduced in the House of Representatives.[259] The bill emerged from the House with the language that is now codified in Section (b) of the Church Amendments.[260] On May 31,

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255. *See id.*

256. *Id.*

257. *See id.* (approved by a vote of ninety-two to one).

258. *See* Cross, *supra* note 149, at 2228–29.

259. *See* H.R. 6445, 93d Cong. § 5 (1973). H.R. 6445 included additional requirements for certification of compliance, including allowing employees the opportunity to sign "a statement of conscientious objection." *Id.*

260. *See* H.R. 8146, 93d Cong. § 401 (1973). Section (b) as codified reads:

1973, Congressman John Heinz introduced a nondiscrimination provision similar to that introduced by Senator Javits, but with the language of what is now Section (c)(1) of the Church Amendments.[261] Congressman Heinz stated that the provision "assure[s] people who work in hospitals, clinics, and other

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> (b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions.
>
> The receipt of any grant, contract, loan, or loan guarantee under [specified Federal Acts] by any individual or entity does not authorize any court or any public official or other public authority to require—
>
> (1) Such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
>
> (2) Such entity to—
>
> (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or
>
> (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

42 U.S.C. § 300a-7(b).

261. 119 CONG. REC. 17463 (1973). Section (c)(1) as codified reads:

> (c) Discrimination prohibition
>
> (1) No entity which receives a grant, contract, loan, or loan guarantee under [specified Federal Acts] after June 18, 1973, may—
>
> (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
>
> (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
>
> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting the sterilization procedures or abortions.

42 U.S.C.§ 300a-7(c)(1).

such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent."[262] He described the purpose of this provision as a clarification that Congress "will not tolerate discrimination of any kind against health personnel because of their beliefs or actions with regard to abortions or sterilizations."[263] Despite this strong language, the House did not discuss how this assurance would be enforced. This version of the conscience amendment containing sections (b) and (c)(1) passed the House with bipartisan support.[264]

On June 5, 1973, with less than a month until the expiration of the various federal healthcare funding programs, the Senate concurred in the House amendments to the bill in order to expedite the legislation.[265]

2. Subsequent Additions to the Church Amendments

A few weeks after the first iteration of the Church Amendments were enacted, Senator Ted Kennedy introduced two complementary pieces of legislation related to biomedical and behavioral research—the National Research Service Awards Act and the Protection of Human Subjects Act.[266] On August 3, 1973, the Senate Committee on Labor and Public Welfare issued a report containing the first appearance of a conscience amendment for these Acts.[267]

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262. 119 CONG. REC. 17463 (1973).
263. *Id.*
264. *Id.* (approved by a vote of 372 to 1).
265. 119 CONG. REC. 18069, 18072 (1973) (approved by a vote of ninety-four to zero).
266. *See* S. 2071, 93d Cong. (1973); S. 2072, 93d Cong. (1973).
267. The conscience amendment originating in the Senate Committee reads:

> Sec. 1204. (a)(1) No individual shall be required to perform or assist in the performance of a health service program or research activity for which the provision of this title are applicable funded in whole or in part by the Department of [Health and Human Services] if such performance or assistance would be contrary to his religious beliefs or moral convictions.
>
> (2) No entity shall be required to make its facilities available for the performance of any health service program or research activity funded in whole or in part by the Department of [Health and Human Services] if such performance is prohibited by the entity on the basis of religious beliefs or moral convictions.
>
> (3) No entity may (A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or (B) discriminate in the extension of staff or other services to any physician or other health care personnel solely because he performed or assisted in the performance of a lawful health service program or research activity for which

Once the bill emerged from conference, the conscience amendment no longer contained the provision protecting entities.[268] Some members of Congress expressed concerns that courts, upon looking to the legislative history, would read into the removal of this provision as an indication of legislative intent not to protect the conscience rights of institutions.[269] The cosponsors assured that the House removed that provision because it was already protected in the Church Amendment provision enacted in the previous session.[270] However, some members were not satisfied with that answer, including then-Senator Joe Biden, who described the omission as "a grave infringement upon civil liberties."[271] This conscience amendment was initially supposed to appear separate from the previously enacted provisions, but they were ultimately included together to address concerns about the omitted Section.[272] Like the first round of amendments, Congress was faced with another time crunch—this time with two days until the relevant laws expired.[273] While there was more disagreement surrounding this amendment than the first, it still passed with bipartisan support.[274]

It is notable that the same Congress enacted both Section (c)(2), with "no entity shall" language, and Section (d), with "no individual shall" language because this further suggests that the distinction in the language of Section (d) is a meaningful departure from the language in the other Sections. Additionally, the removal of the Section protecting entities implicates the rule

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> the provisions of this title are applicable in an unrelated facility, or solely because he refused to perform or assist in the performance of such a health service program or research activity, in a facility controlled by such entity on the grounds that his performance or assistance in the performance of such health service program or research activity would be contrary to his religious beliefs or moral convictions.
>
> (b) The provisions of this title shall not be construed as superseding the provisions of [sections (b) and (c)(1) of the Church Amendments].

S. REP. NO. 93-381, at 91 (1973).

268. *See* 120 CONG. REC. S11776 (daily ed. June 27, 1974).

269. *See id.* at S11778 (statement of Sen. Ted Kennedy) ("There is some concern that [removing that provision] may have some impact or influence on the judicial process when it reviews the legislative history of this legislation."); 120 CONG. REC. 21735 (1974).

270. 120 CONG. REC. S11778 (daily ed. June 27, 1974); 120 CONG. REC. 21735 (1974).

271. 120 CONG. REC. S11780 (daily ed. June 27, 1974).

272. *See* 120 CONG. REC. H5898 (daily ed. June 28, 1974).

273. *See* 120 CONG. REC. S11779 (daily ed. June 27, 1974) (statement of Sen. Ted Kennedy) ("Obviously, we are in no way trying to suggest that the importance of this conscience amendment is diminished by the time constraints we are facing."); *id.* (statement of Sen. James Buckley) (showing dissatisfaction that "[t]he report on this bill was available only a half hour ago").

274. 120 CONG. REC. H5898 (daily ed. June 28, 1974) (approved in the Senate by a vote of 72 to 14; approved in the House by a vote of 311 to 10).

against surplusage;[275] the notion that Congress removed a duplicative Section suggests that the remaining Section adds something distinct from the previously enacted Section. Legislative history isn't particularly helpful in determining whether Congress intended to create a private right of action, but it's worth noting that legislative discussion surrounding Section (d) emphasized that it is an individual right, while the other provisions are portrayed more as policy statements or conditions for funding.

The urgent nature and vast topics Congress had to cover when enacting the Church Amendments tends to suggest that Congress wasn't paying particularly close attention to the language and enforcement of the statutes. However, Congress' discussion of *Roe* and other developments in the law suggest that Congress was at least somewhat aware of prevailing precedent at the time, supporting the idea that using legislative context here is appropriate.

C. Legislative Context

In the spirit of abiding by congressional intent, some scholars argue that considering the legislative context at the time of a statute's enactments is critical to understanding congressional intent.[276] Even textualist judges consider the legal and social context of the enacting legislature when interpreting statutes.[277] For the purposes of implied private rights of action, "legislative context can be defined as the act of viewing the fundamental question—did Congress intend to create a private right of action—within the historical context in which the legislation was enacted."[278] While controversial, this is particularly important for implying private rights of action in statutes enacted during the 1970s.[279]

The prevailing view around the time the Church Amendments were enacted was that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to

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275. SCALIA & GARNER, *supra* note 233, at 150 ("If possible, every word and every provision is to be given effect . . . . [N]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

276. *See* Mank, *supra* note 138, at 830; Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV 608, 615 (2022).

277. *See* Krishnakumar, *supra* note 276, at 615 (2022); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (using dictionaries from the year the statute was enacted).

278. Marcantel, *supra* note 147, at 271 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175–76 (2005)).

279. Mank, *supra* note 138, at 816.

create a private cause of action."[280] Legislative context relies on the presumption that Congress is aware of its contemporary legal landscape, which is not always an accurate presumption.[281] While consideration of legislative context might not be appropriate in every case, the legislative history of the Church Amendments demonstrates that the enacting Congress was aware of the Supreme Court's decision in *Roe v. Wade*, a district court case out of Montana, and that legislative history was a standard tool of interpretation at the time, providing some evidence that the enacting Congress actually was cognizant of its legal landscape.[282]

The use of legislative context played an important role in *Cannon*, where the Supreme Court, in holding that the language of Title IX confers an implied right of action, considered the "backdrop" of precedent at the time of enactment.[283] As Justice Brennan pointed out, "[i]t would make no sense . . . to apply a test first enunciated in 1975 to a statute enacted in 1866."[284] Yet the current bright-line presumption against implied private rights of action does just that. In an analysis centered on legislative intent, it seems counterproductive to retroactively impose onto Congress the Court's later holdings on private rights of action.[285]

It is particularly troubling that two nondiscrimination statutes enacted in the same legislative context would receive differing treatment in modern courts based on how frequently they were litigated after enactment. For example, Title IX was litigated in federal court shortly after its enactment in 1972, and as such developed robust precedent favorable to implying a private right of action. If litigated shortly after enactment, the rights-creating language of Section (d) might have been sufficient under *Cannon* to imply a private right of action.

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280. Cort v. Ash, 422 U.S. 66, 82 (1975).

281. *See* Krishnakumar, *supra* note 276, at 615; LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 20 (2014) ("Congress is presumed to legislate with knowledge of existing common law.").

282. *See* 119 CONG. REC. 9595, 9597 (1973); 120 CONG. REC. S11779 (daily ed. June 27, 1974).

283. Cannon v. Univ. of Chi., 441 U.S. 667, 698 n.22 (1979); Marcantel, *supra* note 147, at 272; Mank, *supra* note 138, at 867.

284. Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 742 (1989) (Brennan, J., dissenting).

285. Critics of implied private rights of action point to separation of powers concerns, arguing that courts give themselves more power by implying private rights of action in statutes where Congress did not explicitly grant courts that power. *See supra* note 137 and accompanying text. However, implying private rights of action only to statutes enacted prior to the 1970s shift in private right of action jurisprudence lessens the risk of courts enforcing more statutes than Congress intended. *See* Mank, *supra* note 138, at 816.

IV. CONCLUSION

"Legislation does not exist as a normative good unto itself. Rather, the value of legislation, however efficient or justified, lies primarily in the ability to enforce it."[286] Many arguments against implied private rights of action point to the increasing burden on the federal judiciary.[287] However, alternative enforcement options for the Church Amendments are less than ideal: the HHS and EEOC are also overburdened, legislative action appears out of reach, and state laws vary greatly in protections afforded. As contentions over abortion and other medical procedures rise, courts may have the opportunity to give Section (d) the proper day in court it deserves.

286. Marcantel, *supra* note 147, at 252.
287. *Id.* at 278.