FUNDING RELIGION OR RELIGIOUS INCLUSION: AN ANALYSIS OF THE RESCINDED RELIGIOUS RESTRICTIONS IN THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM

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The effects of the student debt crisis are far-reaching as student loan debt impacts the financial stability, career choices, and quality of life of millions of Americans from long-graduated Baby Boomers to Generation Z.[1] The Federal Reserve estimates that total student debt is $1.7 trillion.[2] There is no indication that this snowballing crisis can slow down without executive or legislative intervention. In fact, according to a 2020 publication from the Congressional Budget Office, $500 billion in new debt will be incurred over the next five years.[3] Congress has already authorized student loan forgiveness in income-driven repayment plans, but the U.S. Department of Education has struggled with administering loan forgiveness with lengthy application delays.[4]

The Public Service Loan Forgiveness program is a critical lifeline that allows federal student loan borrowers to have their loans discharged after many years of working in the public service sector.[5] The need is apparent when student loan debt ranks as the top cause of financial stress for public service employees, who typically earn less than private sector employees.[6] However, in practice, Public Student Laon Forgiveness applicants consider the program's requirements to be complicated and the Department of

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[1] Stefan Stolba, *Millenials' Student Debt Continues to Rise*, EXPERIAN (July 5, 2019), https://www.experian.com/blogs/ask-experian/research/millennials-and-student-loan-debt-study/.

[2] *Student Loans Owned and Securitized, Outstanding*, FRED ECON. DATA (2021), https://fred.stlouisfed.org/series/SLOAS.

[3] *Income-Driven Repayment Plans for Student Loans: Budgetary Costs and Policy Options*, CONG. BUDGET OFF. (Feb. 2020), https://www.cbo.gov/system/files/2020-02/55968-CBO-IDRP.pdf.

[4] Adam S. Minsky, *Borrowers Face Huge Delays Applying for Student Loan Forgiveness Program*, FORBES (Mar. 11, 2021), https://www.forbes.com/sites/adamminsky/2021/03/11/borrowers-face-huge-delays-applying-for-student-loan-forgiveness-program/?sh=3a4f2ca730f6.

[5] *Id.*

[6] *Id.*

Education's Federal Student Aid Office is blamed for poor management of the program.[7] Qualified Public Student Loan Forgiveness applicants are put in processing backlogs after completing years of public sector employment and years of payments to the Department of Education.[8] There is no mandated timeline for approval from the agency or the authorizing statute, so borrowers can remain in loan forgiveness limbo indefinitely.[9] In the midst of this administrative challenge, the Department of Education has focused on revising its agency regulations defining Public Student Loan Forgiveness eligibility requirements to match recent judicial law regarding religious exercise and government entanglement.[10]

I. INTRODUCTION

President George W. Bush signed the College Cost Reduction and Access Act of 2007 as an amendment to the Higher Education Act of 1965.[11] The College Cost Reduction and Access Act introduced the Public Service Loan Forgiveness (hereinafter, PSLF) program, which cancels Federal Direct Loans owed by federal student loan borrowers (hereinafter, borrowers) who, after October 1, 2007, submitted 120 qualifying monthly payments to the Department of Education while employed full-time with a public service organization in certain public service jobs.[12] A public service organization can be a private organization or a tax-exempt non-profit.[13] The purpose of the College Cost Reduction and Access Act was to make a college education more affordable to the nation's students.[14] The PSLF program was specifically included in the Act

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See infra* note 19.
[11] College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401, 121 Stat. 784 (2007) [hereinafter *College Reduction Act*].
[12] *Id.*
[13] *Id.*
[14] *See* Nancy Pelosi, *College Cost Reduction Act*, YOUTUBE (Sept. 18, 2007), https://www.youtube.com/watch?v=x2Q7NWR3XVM; *see also* Diana Jean Schemo, *Congress Approves Student Loan Bill*, N.Y. TIMES (Sept. 7, 2007), https://www.nytimes.com/2007/09/07/education/07cnd-loans.html.

to encourage borrowers to enter and remain in important low-paying public sector jobs such as public legal aid professions, public teachers, and public health professions.[15] The Act received wide bipartisan support at the time of enactment.[16] While the support was largely focused on the expansion of grant funds for low-income students, the PSLF program went largely unnoticed for a number of years.[17]

The same year the College Cost Reduction and Access Act was enacted, the Department of Education conferred to bring its agency's student loan regulations in line with the statutory changes to the Higher Education Act as amended by the College Cost Reduction and Access Act.[18] However, in 2008 when the Department of Education implemented regulations establishing the PSLF program, it materially changed the definition of a "public service organization" from the definition Congress provided for eligible borrowers employed in public service jobs.[19] The most notable change in the definition was a religious exclusion that was absent from the College Cost Reduction and Access Act.[20] The then-new Department of Education regulation 34 C.F.R. § 685.219(b) excluded borrowers from participating in the PSLF program if they were employed by a private organization that "engaged in religious activities, unless the qualifying activities are unrelated to religious instruction, worship services, or any form of proselytizing."[21] A borrower employed by a tax-exempt non-profit organization under sections 501(a) and 501(c)(3) of the Internal Revenue Code,

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[15] Letter from Federal Student Aid Office, Dept. of Educ., to Federal Student Loan Borrower (Nov. 2014) (on file with the Federal Student Aid Office), https://studentaid.gov/sites/default/files/public-service-loan-forgiveness-employment-certification-borrower-letter.pdf [hereinafter *Letter*].
[16] *See* Press Release, George W. Bush, President, *President Bush Signs College Cost Reduction and Access Act* (Sept. 27, 2007) (on file with the White House), https://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070927-3.html.
[17] Will Sealy, *PSLF: An Unforgiving Forgiveness Program*, MEDIUM (Feb. 11, 2019), https://medium.com/summer-blog/pslf-an-unforgiving-forgiveness-program-49d177509b0f.
[18] Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 72 Fed. Reg. 61959 (Nov. 1, 2007).
[19] Public Service Loan Forgiveness Program, 34 C.F.R. § 685.219 (2008) (amended Aug. 14, 2020) [hereinafter *Forgiveness Program*].
[20] *Id.*
[21] See *id.*; *see also* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 63231 (Oct. 23, 2008) [hereinafter *Loan Program*].

respectively, could also be ineligible if the borrower engaged in the same religious activities in their position.[22] The agency's phrasing suggested that it qualified the eligibility of the PSLF participant based on her employer's status as a public service organization, not the nature of the profession. However, the exception also focused the disqualification on whether an employee engaged in religious activity as part of her employment. The Federal Student Aid Office within the Department of Education explains the practical implication of this regulation:

> "The type or nature of employment with the organization does not matter for PSLF purposes. However, when determining full-time public service employment at a not-for-profit organization you may not include time [work hours] spent participating in religious instruction, worship services, or any form of proselytizing."[23]

It is unclear whether Congress intended this religious activity exclusion in the College Cost Reduction and Access Act, or the original Higher Education Act. Neither of the two statutes mention religious activity in the definition of public service jobs or public service organizations in the context of student loan forgiveness.[24]

The religious exclusion in regulation 34 C.F.R. § 685.219(b) has been at the nexus of debate for religious organizations and seminary student borrowers who are concerned the provision violates the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (hereinafter, RFRA).[25] In 2012,

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[22] *Id.*
[23] *See Forgiveness Program*, *supra* note 19.
[24] *See College Reduction Act*, *supra* note 11.
[25] *See* Letter from Gregory S. Baylor, Senior Counsel, Alliance Defending Freedom, to Jean-Didier Gaina, Analyst, Dept. of Ed. (Jan. 10, 2020) (on file with author), https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/resources/media-resources/general-media-resources/adf-comment-submitted-to-u.s.-dept.-of-education-on-proposed-rule-regarding-student-aid-(2020-01-10)/adfcommentdoestudentaidnprm2020.pdf?sfvrsn=d27f7d14_4 [hereinafter *Letter from Baylor*]; *see also* Shay O'Reilly, *Department of Education: Religious*

the Department of Education republished the 2008 definition of "public service organization" and doubled down, stating that the language was needed to be consistent with other education loan programs.[26] The regulation was consistent with the treatment of corresponding regulations including the Family Federal Education Loan (FEEL) program[27] and the Perkins Loan program.[28] Still, critics rightly questioned the inconsistencies surrounding the Department of Education's religious exclusion with its authorizing statute[29] and its overall management of the PSLF program when more education about the program became widespread.[30]

Americans owe more than $1.7 trillion dollars in student loans to date and many continuously struggle to progress financially under the burden of student loan debt.[31] These borrowers include clergymen and seminary students who believed the regulation forced them to choose between exercising their religion and gaining a meaningful government benefit.[32] This is especially true when one considers their employment with an organization that engages in religious activity an extension of them practicing their religion.[33]

Vocations Not Included in 'Public Service' Debt Forgiveness, GENERATION PROGRESS (Feb. 15, 2012), https://genprogress.org/department-of-education-religious-vocations-not-included-in-public-service/ ("While it seems logical to avoid subsidizing religious practice, many students are less than pleased . . . the cost of education for the clergy can run in the six figures; students are often faced with monumental debt upon beginning their service, and clergy salaries are typically low.").

[26] William D. Ford Federal Direct Loan Program, 73 Fed. Reg. 76414, 8 (Dec. 28, 2012).

[27] Deferment, 34 C.F.R. § 682.210(m) (1992) (amended Aug. 14, 2020).

[28] Deferment of Repayment - NDSLs Made on or After October 1, 1980, But Before July 1, 1993, 34 C.F.R. § 674.36(c)(4) (1999) (amended Aug. 14, 2020).

[29] *See Letter from Baylor*, *supra* note 25.

[30] Keith Donnelly, *Navigating the Public Service Loan Forgiveness Program*, CPA J. (June 2020), https://www.cpajournal.com/2020/06/10/navigating-the-public-service-loan-forgiveness-program/.

[31] Adam Looney, *Dept. of Education's College Scorecard Shows Where Student Loans Pay Off . . . and Where They Don't*, BROOKINGS INST. (Nov. 10, 2020), https://www.brookings.edu/research/ed-depts-college-scorecard-shows-where-student-loans-pay-off-and-where-they-dont/.

[32] Jaweed Kaleem, *Clergy Launch Campaign for Student Loan Forgiveness, Aim to Qualify for 'Public Service' Rule*, HUFFINGTON POST (Feb. 8, 2012), https://www.huffpost.com/entry/student-loan-forgiveness-clergy_n_1261334.

[33] Espinoza v. Mont. Dep't of Revenue, 140 U.S. 2246, 2284 (2020) (Justice Breyer discusses this reality in his dissenting opinion of the *Espinoza* case stating ". . . at least some teachers at religious schools see their work as a form of ministry."). *See,*

The PSLF program's religious exclusion could be reasonably understood to be the Department of Education's attempt to expressly separate church and government. The provision could also be reasonably understood as purposefully restrictive toward those whose chosen profession aligns with practicing their religion. Many borrowers make long-term decisions for their life trajectory based on their student loan debt, and the religious exclusion in regulation 34 C.F.R. § 685.219(b) did not reflect the general legislative intent behind the Higher Education Act's purpose of supporting the education of students for their chosen career.

More than a decade later, the Department of Education amended the regulations classifying the eligibility of borrowers employed by faith-based entities to participate in the PSLF program in response to the United States Supreme Court decision in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*.[34] The agency withdrew the religious exclusion in 34 C.F.R. § 685.219(b) and proposed PSLF regulation 34 C.F.R. § 685.219(c)(4), which would not count work hours borrowers spent participating in religious instruction, worship services, or any form of proselytizing while employed by a public service organization toward meeting the 30 hour full-time employment requirement.[35] The same assertions of religious discrimination ensued.[36] It was disputed whether this new regulation was meaningfully distinct from the previous regulation regarding its effect of forcing borrowers to choose between practicing their religion or gaining an otherwise-available public government benefit.[37] Specifically, commenters argued that the previously proposed 34 C.F.R. § 685.219(c)(4) regulation would impose a special burden on potential PSLF applicants who engage in religious activities as a part of their employment.[38] In response

e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 192 (2012).

[34] Federal Perkins Loan Program, Federal Work-Study Programs, Federal Supplemental Educational Opportunity Grant Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, National Direct Student Loan Program, Teacher Education Assistance for College and Higher Education Grant Program, Federal Pell Grant Program, Leveraging Educational Assistance Partnership Program, and Gaining Early Awareness and Readiness for Undergraduate Programs, 85 Fed. Reg. 49798, 9 (Aug. 14, 2020) [hereinafter *Federal Programs*].

[35] *Id.*

[36] *See Letter from Baylor*, *supra* note 25.

[37] *Id.*

[38] *Id.*

to the concerns of religious discrimination, the Department of Education agreed with the critics' application of the First Amendment and RFRA and announced that it will not adopt the proposed regulation which would have excluded work hours related to worship, religious instruction, and proselytizing from the full-time work requirement of the PSLF program.[39]

This note will detail the principles of the Free Exercise Clause and the Religious Freedom Restoration Act to determine whether the previously proposed regulation 34 C.F.R. § 685.219(c)(4) work hour requirement would constitute a violation of the Free Exercise Clause and Religious Freedom Restoration Act as an undue or substantial burden placed on PSLF applicants engaging in religious activities as part of their employment, and subsequently overcome strict scrutiny judicial review. Next, this note will examine the Supreme Court's likely view on whether the Establishment Clause would require or permit the government to disqualify PSLF applicants based on work hours spent performing religious activities from obtaining this public benefit. Finally, we analyze how the Supreme Court's decision should have affected the Department of Education's recent position on allowing certain PSLF applicants, who give religious instruction, conduct worship service, proselytize, or fundraise to support religious activities as part of their employment duties, to qualify for loan forgiveness. The note will demonstrate the larger implications of the Department of Education's bending ear towards commenters of the proposed regulatory changes who believe religious activities should not be excluded in the calculation of work hours for PSLF to comply with religious freedoms.

II. RECOGNIZING THE CHARACTERISTICS OF A FREE EXERCISE VIOLATION

The First Amendment of the U.S. Constitution provides, in part, that "**Congress shall make no law** respecting an establishment of religion, or **prohibiting the free exercise** thereof."[40] Free exercise involves the belief and performance of, or abstention from physical acts like: profession, assembling with others for worship, participating in sacramental use of foods,

[39] *See Federal Programs*, *supra* note 34, at 49806, 49807.
[40] U.S. CONST. amend. I. (emphasis added).

proselytizing, and abstaining from certain foods or certain modes of transportation.[41] The U.S. Supreme Court generally applies two principles for resolving challenges to the Free Exercise Clause: (i) subjecting laws that impose a substantial burden by withholding a public benefit because of religious belief, practice, or identity to the strictest scrutiny[42], and (ii) determining whether the a substantial burden on the free exercise of religion is justified by demonstrating the law advances a compelling government interest through narrowly tailored application.[43] In order to analyze the principles of the Free Exercise Clause of the First Amendment, we must first define closely related terms within these principles such as neutrality, burden, and compelling government interest.

A. Exploring the Neutrality Doctrine

When the Court applies the first Free Exercise principle to cases involving government funding, it analyses whether a government program is facially neutral, as to the religious or secular nature of the recipient.[44] The First Amendment does not distinguish between laws that are generally applicable and laws that target particular religious practices.[45] Therefore, neutrality is not a determinative consideration, and any general application of a neutral law is not automatically constitutional under the Free Exercise Clause.[46] However, the Court has acknowledged that when

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[41] Employment Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872, 877 (1990).

[42] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); *see also* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993) (held that a facially neutral ordinance prohibiting sacrificial rituals integral to Santeria was unconstitutional).

[43] Widmar v. Vincent, 454 U.S. 263, 270 (1981) (reasoned that in order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech . . . it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.); *see* Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980); *see, e.g.,* Sherbert v. Verner, 374 U.S. 398 (1963).

[44] *Trinity*, 137 S. Ct. 2227. While neutrality is not outcome determinative, influential Justice Ginsberg reminds us that the doctrine is still relevant and should still be considered when noting the differential treatment between religious and secular institutions to determine that a burden on a plaintiff's religious exercise is present. *Espinoza*, 140 S. Ct. at 2278 (Ginsburg, J., dissenting).

[45] *Smith*, 494 U.S. at 894.

[46] *Trinity*, 137 S. Ct. at 2021.

it customarily rejects Free Exercise challenges, the laws in question have been neutral and generally applicable without regard to religion, distinguished from cases where the law has singled out the religious status of organizations or persons.[47]

Foundational examples of the Neutrality Doctrine at play are displayed in the Court's reasoning in four heavily cited cases: *Everson v. Bd. of Educ.*, *Emp. Div. Dept. of Human Res. of Ore. v. Smith*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, and *Trinity*. We analyze these cases in chronological order to highlight how the Court has built on their definition and treatment of religion-neutral laws that impact religious liberty. The *Everson* Court defined governmental neutrality in terms of non-favoritism and non-hostility to religion, and mandated that government be impartial between religions, as well as between religion and nonreligion.[48] In *Smith*, the challenged state law fit the *Everson* definition of neutral because it was a drug law that imposed criminal penalties for those violating it, regardless of an individual's religious affiliation or non-affiliation.[49] The criminal law was upheld and found to not violate the Free Exercise Clause, even though it punished conduct engaged in as a religious observance or practice.[50] Comparatively, the Court that decided *Church of Lukumi* found a state policy was presumptively unconstitutional because, although it seemed to be facially neutral to religion, the Court found that the challenged ordinance was not effectively neutral because it disparately impacted one religious minority.[51] The government presented public safety concerns, but did not present a compelling government interest to overcome the violation to the Free Exercise Clause arising out of the exclusionary ordinance.[52]

The *Trinity* case is one where the Court distinguished the aforementioned examples of neutral law from those that single out the religious for disfavored treatment.[53] In *Trinity*, a church was ineligible, under a state policy, to participate in a program that offered reimbursement grants to qualifying non-profit organizations

[47] *Id.* at 2020.
[48] *Everson*, 330 U.S. at 15-16.
[49] *Trinity*, 137 S. Ct. at 2021 (citing *Smith*, 494 U.S. at 877).
[50] *Id.*
[51] *Lukumi,* 508 U.S. at 533-43.
[52] *Id.*
[53] *Trinity*, 137 S. Ct. at 2020.

because it was a religiously affiliated organization.[54] The funds were granted on a competitive basis, but the Court regarded the funds as generally available except for the exclusion of churches.[55] The tension between the church's right to free religious exercise and the access to grant funds arose with the explicit exclusion of churches.[56] The policy presented the church with the choice to either participate in an otherwise available benefit or remain a religious organization.[57] When the government conditions a public benefit like this, the policy, law, or regulation violates the Free Exercise Clause by disqualifying religious organizations from a public benefit solely for exercising their constitutional right to practice their religion in their preferred way.[58]

A notable exception to the Neutrality Doctrine is revealed in *Locke v. Davey* where the Supreme Court upheld a state's exclusion of a theology student from a college scholarship program.[59] The exclusion was a clear negative treatment of religious persons seeking to enter the field of religious education. The stated purpose of the state's Promise Scholarship Program was to assist students with postsecondary school expenses.[60] The student invoked the Free Exercise Clause to challenge the state's denial of his scholarship based on his decision to pursue a theology degree.[61] Chief Justice Roberts, who penned the majority opinion for the *Trinity* case, uses *Locke* to distinguish the differing outcomes of a church's overturned disqualification for state grant funds compared to an upheld state scholarship program that disqualified a student from obtaining funds based on the student's pursuit of a degree in theology.[62] According to the Court, the student invoking the Free Exercise Clause in *Locke* was not denied a scholarship because of his status as a religious person; he was denied a scholarship because he would

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[54] *Id.* at 2020-22.
[55] *Id.* at 2019.
[56] Not only is governmental exclusion of religion generally forbidden, but ". . . governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 52–55 (1985)).
[57] *Trinity*, 137 S. Ct. at 2021-22.
[58] *Id.*
[59] *Locke*, 540 U.S. at 715-23.
[60] *Id.* at 715.
[61] *Id.*
[62] *Trinity*, 137 S. Ct. at 2023.

use the funds to train for the ministry.[63] The student sought funding for an "essentially religious endeavor" which revealed a historical opposition to funding church leaders based on the historic compelling government interest of separation of church and state.[64] Together these cases demonstrate that where an individual's conduct is motivated by her religious beliefs, the government may regulate or prohibit the activity regardless of the law's religious neutrality when the conduct opposes a compelling government interest. This applies to cases where there is evidence of the government imposing a substantial burden.

B. What Constitutes a Burden on Religious Liberty?

In determining what a burden to religious practice is, the Court considers whether the government's actions coerce individuals into violating their religious beliefs, or put the proposed recipient of a government benefit in a position to choose between maintaining religious status or receiving a government benefit.[65] Additionally, the Court instructs us to analyze these specific effects on individuals when the government action would interfere significantly with a person's ability to pursue spiritual fulfillment according to their own religious beliefs.[66] If the situation does not present these issues, then there is likely no violation of the Free Exercise Clause.[67]

The Court has incorporated the Neutrality Doctrine to its reasoning when deciding whether a substantial burden exists. For example, in *Hernandez v. Comm'r*, the Supreme Court disagreed with the petitioner's argument that the Internal Revenue Service (herein, IRS) imposed a substantial burden. Church members sought to gain a federal tax deduction for payments made to its

[63] *Id.*
[64] *Id.*
[65] Lyng v. Nw. Indian Cemetery Protective Assn., 485 U.S. 439, 499 (1988) (held that the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred because the affected individuals were not being "coerced by the Government's action into violating their religious beliefs.").
[66] *Id.*
[67] *Id.*

church for auditing and training based on the claim that the payments were qualified charitable contributions under an IRS federal regulatory statute.[68] The tax deduction was a generally available federal benefit, but the IRS disallowed these deductions finding the payments were not charitable contributions within the meaning of the statute.[69] The petitioners argued that when the IRS's tax deduction exclusion deterred churchgoers from engaging in auditing and training sessions.[70] The petitioners also argued that the IRS's exclusion in participating in the charitable contribution is a substantial burden because it interfered with the church's observance of a religious exchange doctrine.[71]

The Court first acknowledged that it does not question the centrality of religious beliefs or practices.[72] Next, the Court notes that there is no evidence that the religious practice generally does not require nor forbid the result of not getting the tax-deductible public benefit.[73] It further reasons that any burden resulting from disallowance derives from church members simply having less money available, and this burden is no different than that imposed by any tax.[74] Plainly, church members can still engage in the religious practice of paying for auditing and training despite not deducing the payments from their federal taxes. *Hernandez* demonstrates that a burden does not rise to the level of substantial simply because religious members or religious organizations do not qualify for a public benefit through practicing their religion.

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[68] *Hernandez*, 490 U.S. at 683-93.
[69] *Id*. A charitable contribution is a "voluntary transfer of property by the owner to another without consideration therefor." The Court explains that the church members' payments do not qualify because the members get consideration in the form of religious services in exchange for payment. The Court further explains that some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service but would not qualify as a charitable contribution for the same reasons.
[70] *Id*.
[71] *Hernandez*, 490 U.S. at 698.
[72] *See id.; see also Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 141-142 (1987); *Thomas v. Review Bd. of Indiana Emp. Sec. Div*., 450 U.S., at 717-719; *Wisconsin v. Yoder*, 406 U.S. 205, 220-221 (1972).
[73] *See Hernandez*, 490 U.S. at 699*; see also* United States v. Ballard, 332 U.S. 78 (1944) (finding that the government may not determine the truth or falsity of a person's religious beliefs, but it may determine a person's sincerity in his claim of religious belief).
[74] *Hernandez*, 490 U.S. at 699.

The *Hernandez* case is consistent with the Court's earlier approach in *Braunfeld v. Brown* which involved a challenge to a Pennsylvania Sunday closing law.[75] The appellants were Orthodox Jews who brought concerns of substantial burden to the Court stating that the state's mandate to close business on Sundays threatened the successfulness of their business because, in accordance with their practicing their religious belief, they close business from sundown on Friday to sundown on Saturday.[76] The law was facially neutral as defined in the *Everson* court.[77] The state had a secular purpose in enacting the law– to provide a uniform day of rest that eliminates the atmosphere of commercial noise and activity but had the effect of putting the appellants at an economic disadvantage by "impairing the ability of appellants to earn a livelihood."[78] Since the law was facially neutral respecting religion, the constitutionality of the law was presumed.[79] The *Braunfeld* Court importantly stated that "[t]he freedom to hold religious beliefs and opinions is absolute."[80] However, the Court acknowledges that religious practice protections are reasonably limited: "[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."[81] Thus, in the face of neutral legislative restrictions on religious practice such as in *Braunfeld* and *Hernandez*, an indirect religious burden is permissible because it would be unreasonable to "expect, much less require, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[82]

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[75] *Braunfeld*, 36 U.S. at 634.
[76] *Id*. (citing *Braunfeld*, 36 U.S. at 601) ("Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday.").
[77] *Braunfeld*, 36 U.S. at 607.
[78] *Id*. (citing *Braunfeld*, 36 U.S. at 608).
[79] *Braunfeld*, 36 U.S. at 607. The Court's longstanding stance that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid" is not at issue here.
[80] *Id*. (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1878)).
[81] *Id*.
[82] *Id*. (citing *Braunfeld*, 36 U.S. at 606).

The Supreme Court has distinguished indirect burdens from direct ones arising out of government conduct, but the difference between the two do not determine whether the government-imposed burden on the fundamental right of religious liberty is substantial or not. Indirect, facially neutral government action can still impose an impermissible burden on religious practice. For instance, in *Thomas v. Review Bd. of Ind. Emp't. Sec. Div.*, the state denied unemployment benefits to a claimant who quit his job because his religious beliefs prohibited him from engaging in the production of weapons, a changed condition of his job.[83] The claimant argued that the denial of benefits constituted an improper substantial burden on his right to comply with his religious beliefs.[84] The Court agreed and reasoned that when the state denies an otherwise publicly available benefit based on conduct mandated by a religious belief, resulting in substantial pressure on a religious beneficiary to modify their behavior and to violate their beliefs, a burden upon religion exists.[85] The Court stated that despite this burden being an indirect one, the infringement upon the claimant's right to act on his religious believes still establishes a burden.[86]

Similarly, in *Sherbert v. Verner*, a state denied unemployment benefits to the appellant because she was a Seventh Day Adventist whose religious faith commanded the observance of Saturday as a day she cannot work and was consequently terminated and ineligible for unemployment benefits.[87] The Court found that the ineligibility for benefits derived solely from the practice of the appellant's religion.[88] The appellant was faced with the impermissible choice to practice her religion by resting on Saturday and forfeit this otherwise available public benefit or forgo a religious principle to obtain the government benefit.[89] Again, governmental imposition of such a choice puts an unconstitutional burden upon the free exercise of religion.[90]

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[83] *Thomas*, 450 U.S. at 709-10.
[84] *Id.*
[85] *Id.* at 717-18.
[86] *Id.*
[87] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[88] *Id.* at 404.
[89] *Id.*
[90] *Id.*

C. When a Governmental Interest is Compelling Enough to Overcome the Burden it Places on the Free Exercise of Religion

The Court makes clear that government action should not penalize religious activity by an outright denial of a person's equal share of the rights, benefits, and privileges enjoyed by other citizens, but this principle can be overcome by a compelling government interest.[91] The Court has not expressly defined "religious activity," however, the Court has not disputed a religious activity constitutes any activity that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.[92] Few Supreme Court decisions over the past century have accepted the government's claims of prohibiting a religious activity based on a compelling government interest.[93]

It should be noted that the Court treats faith-based organizations similarly to individuals who bring a Free Exercise challenge to a government action that discriminates based on religious status or affiliation as compared with discrimination based on religious activity. For example, in *Trinity*, where a church asserted Free Exercise claims, the Court reasoned that the state interest (to quash religious establishment concerns) was not particularly compelling as compared to other compelling government interests mentioned in *Smith* (upholding a drug policy or protecting public health and safety), where individuals asserted Free Exercise claims.[94] The focus was on the compelling state interest, not whether the Free Exercise challenger was an entity or an individual.

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[91] *Widmar*, 454 U.S. at 270.
[92] Rosenberger v. Univ. of Va., 515 U.S. 819 (1995).
[93] *See* Locke v. Davey, 540 U.S. 714 (2004) (upholding a state-funded scholarship program which excluded devotional theology majors did not impose more than a relatively minor burden on program participants); Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding a uniform dress requirement and striking down a free exercise challenge by a Jewish Air Force doctor who violated the uniform dress requirements by wearing a yarmulke while on duty); *Reynolds*, 98 U.S. at 145 (upholding a state law outlawing polygamy).
[94] *Trinity*, 137 S. Ct. at 2024 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)) ("denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"). *Compare Smith*, 494 U.S. at 872 (upholding a drug policy which effectively prohibited the religious practice of sacramental consumption of peyote).

The following United Stated Supreme Court cases are key to providing insight into when a compelling government interest justifies religious discrimination based on both religious activity and religious status. As previously discussed, in *Smith*, individuals practicing their religion by ingesting peyote invoked the Free Exercise Clause when faced with the state's drug laws.[95] The Court limited the free exercise of this religious activity by upholding the state' drug law citing this as one of few compelling government interests to limit the constitutional right to exercise religion in the manner of an individual's choosing.[96] *Prince v. Massachusetts* is another case which illustrates a compelling government interest that overrides an individual's free exercise of religion. There, the Supreme Court held that a state could force the vaccination of children whose parents would not allow such action for religious reasons.[97] The Court reasoned that the state had a compelling government interest in prioritizing the protection of public health and safety over the religion-based opposition to vaccinating children.[98] Similarly, the Court has found compelling state interests in other neutral public welfare areas such as collecting income taxes, facilitating a comprehensive Social Security system, and military conscription.[99] The significance of these cases brought by individuals lie in the Court's traditional reasoning[100] that an

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[95] *See generally Smith*, 494 U.S. at 872.
[96] *Id.*
[97] *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944); *see also First Amendment and Religion*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion.
[98] *Id.*
[99] *Smith*, 494 U.S. at 905 (citing Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699-700 (1989) (holding the public interest in maintaining a uniform tax system outweighed the potential burden on petitioners.); United States v. Lee, 455 U.S. 252, 258-59 (1982) (stating that not all burdens on religion were unconstitutional where the Court found that it was necessary for the tax imposed on employers to support the social security system to be uniformly applicable to all despite paying into and participation in such a system was prohibited by the Amish faith); Gillette v. United States, 401 U.S. 437, 460 (1971) (finding governmental interests to fairly administering who goes to war is sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars).
[100] *See Lukumi*, 508 U.S. at 532-33 (disfavoring of broad ordinances which prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health.); *see also Everson*, 330 U.S. at 17 (favoring a state's provisions intended to guarantee free transportation to the state's faith-based and non-faith-based accredited schools, which the state deems to be best for the school children's welfare).

overriding compelling government interest aligns with its reverence for protecting the welfare of the general public.

However, in situations where the distribution of public government funds is at issue and the law, regulation, or policy is not neutral, the Court treats exclusion based on religious status differently than exclusion based on the religious use of the challenger in determining whether a compelling government interest exists. Religious exclusions are prohibited when the government discriminates based on religious status but may be permissible if the government discriminates based on the religious use of public funds. The Court compared *Trinity* to *Espinoza* and attempted to distinguish this principle.[101] Similar to *Trinity*, the *Espinoza* case demonstrates a Free Exercise violation where a state policy excluded religious schools "owned or controlled in whole or in part by any church, religious sect, or denomination" from accessing scholarship money, funded by taxpayer donations.[102] The state's religious exclusion barred religious schools from public benefits solely because of the religious character, or status, of the schools.[103] The provision also barred parents, who wished to send their children to a religious school, from those same benefits because of the religious status of the school.[104] The state argued that *Trinity* should not govern *Espinoza* because the provision discriminated not based of the religious character of the recipients, but based on how the funds would be used—for "religious education."[105] And although the Court mentioned that religious status and religious use was one of the main differences between the *Trinity* and *Locke* treatment, Chief Justice Roberts, when writing the *Espinoza* majority opinion, declined to address treatment of discrimination with respect to "religious uses of funding or other forms of

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[101] *Espinoza*, 140 S. Ct. at 2251-61.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *See Espinoza*, 140 S. Ct. at 2255-56 (acknowledging that "[s]ome Members of the Court . . . have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. The majority saw no need to consider such concerns because the state had expressly discriminated 'based on religious identity,' which was enough to invalidate the state policy without addressing how government funds were used); *see also Comer*, 137 S. Ct. 2012 (2017) (Gorsuch & Thomas, JJ., concurring in part) (citing *Lukumi*, 508 U.S. at 520 and *Thomas*, 450 U.S. at 707).

discrimination."[106] Instead, the Court which decided *Espinoza* found that the state's proposed compelling government interest of banning aid to a religious school simply because it is religious is analogous to the *Trinity* case where the proposed compelling government interest of banning aid to a church simply because it is a church failed.[107] Thus, excluding a religious institution or individual because of their religious status alone is not considered a compelling state interest.

Relatively recently, the Court found a compelling state interest in not directly funding religious training via a state scholarship program.[108] In *Locke*, the Supreme Court noted how religious instruction was a disfavored religious activity in regard to First Amendment challenges.[109] The Court states that since the founding of the United States, there have been prevalent consensus among citizens opposing the use of taxpayer funds to support church leaders.[110] The Court considered this a hallmark of establishing religion because "religious instruction is of a different ilk."[111] Aside from similar government interests, the Free Exercise Clause has been interpreted to prohibit the government from discriminating against religious institutions and persons who would ordinarily have the choice to engage or disengage in religious activities.[112]

In contrast, the church in *Trinity* was denied solely on its status as a church or religious institution even though its funding use would have been to improve its playground.[113] Justice Thomas, in a concurring opinion on *Trinity*, gave further instruction on applying *Locke* to future free religious exercise challenges regarding funding.[114] He stated that *Locke* is to be narrowly construed, and limited to the context of grant support for ministerial training being

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[106] *Id*.
[107] *Espinoza*, 140 S. Ct. at 2249-50.
[108] *Locke*, 540 U.S. at 715-23.
[109] *Id*. at 722-23.
[110] *Id*.
[111] *Id*.
[112] *See generally Espinoza*, 140 S. Ct. at 2251-61 (finding a state regulation prohibiting the use of scholarship funds for religious schools in violation of the Free Exercise Clause solely because of the school's religious status. The Court emphasizes it has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices.).
[113] *See generally Trinity*, 137 S. Ct. at 2012.
[114] *Id.* at 2025.

exempt from heightened scrutiny and facial neutrality.[115] Justice Scalia argues in the *Locke* dissent that because training for secular jobs is funded, training for religious jobs is required.[116] The majority disagreed and highlighted that training for religious professions and training for secular professions are not interchangeable.[117] The Court clarifies that training someone to lead a congregation is an essentially religious endeavor generally disfavored in light of providing government funding to support.[118] Similarly, counting hours of religious instruction towards PSLF eligibility full-time employment hours would likely be considered funding religious endeavors applying the same *Locke* reasoning.

D. The Complex Distinction between Religious Status and Religious Use

The Supreme Court opinions have outlined an important distinction between discrimination based on religious status or belief, and religious use or practice. However, the justices are divided on whether this distinction exists and whether it is important when considering Free Exercise violations.[119] We must understand this distinction in order to accurately assess how the Court would view the Department of Education's previously proposed 34 C.F.R. § 685.219(c)(4) PSLF work hour requirement because the difference in views could be the key to upholding such a government action.

As previously discussed, the Court acknowledges that a government-imposed burden on religious conduct is permitted where a compelling state interest exists, whereas religious belief has absolute protection under the First Amendment.[120] Chief Justice Roberts writes the 2020 *Espinoza* case majority opinion in accordance with this distinction between religious status based discrimination and religious use based discrimination.[121] While the Chief Justice cited the distinction as the main difference in

[115] *Id.*
[116] *Locke*, 540 U.S. at 726.
[117] *Id.*
[118] *Id.*
[119] *Espinoza*, 140 S. Ct. at 2246 (Gorsuch, J., concurring).
[120] *Braunfeld*, 36 U.S. at 607 ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions").
[121] *See generally Espinoza*, 140 S. Ct. at 2246.

upholding the religious exclusion in *Locke* and striking down the religious exclusion in *Trinity*, Justices Gorsuch, Breyer, and Kagan all have contrasting views on this matter.[122] Justice Gorsuch, who joined the Court's majority opinion, expressed his indifference to the distinction saying that "whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way unless the State can show its law serves some compelling and narrowly tailored governmental interest."[123] He states that the right to be religious without the right to express those religious beliefs through conduct would hardly amount to a right at all.[124]

Justice Breyer disagrees with the majority's application of religious use based discrimination.[125] He argues that the *Espinoza* case was one of religious status discrimination, not of religious use discrimination, aligning better with the circumstances in *Locke* than *Trinity*.[126] In his dissenting opinion, Justice Breyer connects both the study of devotional theology and the religious influence over students in primary education as critical to the training of the ministry, thus recognizing both activities in *Locke* and *Espinoza* as "activities necessary to help assure a religion's survival."[127] He further reasons that it is the individual student in *Locke* and parents in *Espinoza* who have asserted their Free Exercise rights were violated by government religious exclusions that prevent them from using public funds to further a religious activity.[128] In *Locke*, the religious activity is obtaining a religious education. In *Espinoza*, the religious activity is sending children to a religious school. Therefore, he argues, the Court should have focused on what the parents or schools would *do* with the state funds.[129] To Justice Breyer, the religious activity is so similar in nature that the

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[122] *Id*. at 2283-84 (Gorsuch & Breyer, JJ., dissenting in which Kagan, J., joined as to Part I).
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Espinoza*, 140 S. Ct. at 2284 ("The majority finds that the school-playground case, Trinity Lutheran, and not the religious-studies case, Locke, controls here. I disagree. In my view, the program at issue here is strikingly similar to the program we upheld in Locke and importantly different from the program we found unconstitutional in Trinity Lutheran.").
[127] *Id*. (citing Zelman v. Simmons-Harris, 536 U.S. 639, 725 (2002)) (Breyer, J., dissenting).
[128] *Id*.
[129] *Id*.

government restriction is also the same— a decision to not fund the instilling of religious truths through religious instruction and training of clergy.[130] In support of his reasoning, and in response to the majority pointing to cases where the Court has upheld government programs where public funds find their way to religious schools through private choice, Justice Breyer highlights that these outcomes do not affirm that providing such aid is required based on the Free Exercise Clause.[131]

III. THE RELIGIOUS FREEDOM RESTORATION ACT, "SUBSTANTIAL BURDEN" AND THE SOLIDIFIED COMPELLING GOVERNMENT INTEREST TEST

The Religious Freedom Restoration Act of 1993 was enacted in direct response to the Supreme Court's decision in *Smith*.[132] The statute states:

> "[The RFRA] prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[133]

The scope of the RFRA today protects individuals, private, and public organizations seeking redress against the federal government, as the statute's applications to the states was struck down as an overextension of Congress's remedial powers under the

[130] *Id.*
[131] *See id.* at 2287 (citing *Zelman*, 536 U.S. at 649-53); *see also Trinity*, 137 S. Ct. at 2012.
[132] *Smith*, 494 U.S. at 872.
[133] 42 U.S.C. § 2000bb-1 (1997).

Fourteenth Amendment.[134] The definition of religious exercise includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[135] There is much disagreement in the legal community about what qualifies as a substantial burden, in part due to the mixed signals sent by the United States Supreme Court regarding how to define "substantial" under federal statutory and constitutional law.[136] Petitioners can assert both Free Exercise claims and RFRA claims for governmental violation of religious freedom as the laws are largely similar. However, although a compelling government interest may be acceptable to overcome Free Exercise challenges, the same is not necessarily true for RFRA claims where the government must go through the least restrictive means test. This is why the RFRA is arguably more powerful with regard to enforcement.

A. Substantial Burden on the Free Exercise of Religion

The following cases are discussed to provide a basic understanding of when the Supreme Court has found a substantial burden of the free exercise of religion on grounds provided by the RFRA. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, *546 U.S. 418 (2006)*, the O Centro Esp´ırita Beneficente Uni˜a do Vegetal (UDV) brought an action challenging the Controlled Substance Act claiming its prohibition on importing hoasca, a sacramental plant containing the controlled substance dimethyltryptamine (DMT), substantially burdened their free exercise of religion.[137] Due to strikingly similar circumstances as compared to those in *Smith* where religious individuals were

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[134] *See Flores*, 521 U.S. at 536; *see also* Burwell v. Hobby Lobby Stores, Inc., 134 U.S. 2751 (2014) (finding that for-profit organizations are protected under the RFRA); Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) ("In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment." (citing *Flores*, 521 U.S. at 532-36)).

[135] *Burwell*, 134 S. Ct. 2751, 2761 (2014) ("RLUIPA amended RFRA's definition of the 'exercise of religion.'" (citing 42 U.S.C. § 2000bb-2(4) (1993))).

[136] Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633 (2015), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2832&context=nlr.

[137] *Id*. (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 426 ("[T]he Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV.")).

prohibited from ingesting peyote due to a drug law, the religious group in *Gonzalez* was found to be substantially burdened by the federal statute.[138]

In *Hobby Lobby* the Court was asked to decide whether the Affordable Care Act substantially burdened the free exercise rights of for-profit corporations, which opposed providing health insurance to be used for abortions and contraceptives. The opposition to abortions derived from the religious beliefs of the organization.[139] The organizations presented evidence that the members would have to violate their religious belief and pay fines if they did not comply with the mandate to demonstrate a substantial burden.[140] The Court ultimately accepted the argument that this constitutes a substantial burden because there was some connection between generally providing health insurance (the mandated action) and the religious belief that destroying an embryo is wrong (the burden).[141] In its reasoning, the Court looked favorably on the sincerity of the belief, keeping with its aforementioned historical principle of not judging the centrality of the belief.[142] In summary, the Court uses much of the same criteria for what they consider a burden for Free Exercise Clause challengers and for what constitutes substantial burden concerning RFRA challenges. The criteria for both are not difficult to meet.

B. The Compelling Government Interest Test and Least Restrictive Means Test Meet

The Court deciding *Smith* construed the Free Exercise Clause to hold that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[143] Through the RFRA, Congress strengthened the compelling government interest test by relying on the interpretation of the Free Exercise Clause in *Smith* and requiring that a generally applicable law placing a "substantial burden" on the free exercise of religion must be justified by a

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[138] *Id.*
[139] *Hobby Lobby*, 134 U.S. 2751 (2014).
[140] *See id.* at 2776.
[141] *Id.* at 2777-78.
[142] *See Hernandez*, 490 U.S. at 698; *see also Hobbie*, 480 U.S. 136, 141-142 (1987); *Thomas*, 450 U.S. at 717-19; *Yoder*, 406 U.S. at 220-21.
[143] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638 (1999) (*citing Flores*, 521 U.S. at 512-14).

"compelling governmental interest" and must employ the "least restrictive means" of furthering that interest.[144] The Court found the RFRA to have exceeded Congress's authority to be applied to the states under Section 5 of the Fourteenth Amendment.[145] However, the statute's applicability to federal agencies is still in effect and is relevant in exploring its effect on the Department of Education's disregarded PSLF regulation 34 C.F.R. § 685.219(c)(4). The Act's stated purposes are:

> "'(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U. S. 398 (1963) and *Wisconsin v. Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
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> '(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." § 2000bb(b).'"[146]

In *Hobby Lobby* the government stated that its compelling government interest was to guarantee cost-free access to health insurance, and ultimately healthcare.[147] The Court did not delve deep into a discussion outlining why it found the state interest acceptable under RFRA.[148] However, the Court is consistent with Free Exercise Clause claims in determining that public health and welfare generally is a compelling government interest to justify a government-imposed burden on free exercise.[149] In order to satisfy the daunting least restrictive means requirement of the RFRA, the Court requires the government to employ the least restrictive measures possible to achieve its goal.[150] This test is difficult to

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[144] *Flores*, 521 U.S. at 515-16.
[145] *Id.*
[146] *Id.*
[147] *Hobby Lobby*, 134 U.S. 2780.
[148] *Id.*
[149] *See generally Prince*, 321 U.S. at 158; *see also* U.S. COURTS, *supra* note 104.
[150] *Flores*, 521 U.S. at 534.

satisfy mainly because it is a content-based test that is determined on a case-by-case basis.[151] For example, in *Gonzales* the government asserted that "applying the Controlled Substances Act in this case was the least restrictive means of advancing . . . compelling governmental interests" but the Court did not agree.[152] The government action must be narrowly tailored to accomplish its goal.[153] In *Gonzales*, Congress's placement of the compound in the plant did not satisfy to the level of compelling state interest, as it did in *Smith* because the RFRA heightened the *Smith* standard. The PSLF program work hour requirement is narrowly tailed enough to accomplish the goal of not wanting to fund the clergy for participating in religious activity, but this compelling government interest may not rise to the level of being the least restrictive means of accomplishing this goal.

IV. THE FREE EXERCISE CLAIM RELIES ON THE DISTINCTION BETWEEN RELIGIOUS USE AND RELIGIOUS STATUS

A potential Free Exercise claim against the Department of Education's PSLF program seem to fall somewhere between *Trinity* and *Locke* because of the similarity in facts dealing with policies that bar a religious person or entity from using otherwise publicly available government funds. The PSLF program regulation 34 C.F.R. § 685.219(b) excluded religious organizations that engaged in religious activities from participating in the program and was subsequently withdrawn because of concerns that the regulation violated the Free Exercise Clause and the RFRA. The Department of Education was correct in concluding that the scrapped regulation excluded religious persons or entities from using otherwise publicly available funds based on their religious status alone and was impermissible. However, the 34 C.F.R. § 685.219(c)(4) work hour

[151] *Id.* ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If 'compelling interest' really means what it says . . . , many laws will not meet the test . . . . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.").
[152] *See generally Gonzales*, 546 U.S. at 418.
[153] *Yoder*, 406 U.S. at 205.

requirement should be categorized as a religious use exclusion justified by the historic compelling government interest of not funding the clergy as described in *Locke*.

The *Smith* opinion states how the free exercise of religion involves the belief and performance of, or abstention from physical acts like profession and Congress intended for the PSLF program to encourage those with student loan debt to enter into low-paying public sector jobs. [154] The Free Exercise clause and the legislative intent behind the PSLF program were not immediately at odds until the Department of Education's work hours requirement proposed to exclude those who engaged in religious activity in their profession from the loan forgiveness program. However, the Court also stated that "the state's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on students.[155] Therefore, the federal agency's attempt to balance this compelling government interest with the free exercise rights of borrowers with the would have likely been successful against First Amendment challenges.

The principles outlined in *Trinity* and *Locke* are helpful to further understand how the Court would interpret the Department of Education's previously proposed language of excluding borrowers from counting in the program if their work hours include religious instruction, worship services, or any form of proselytizing in regulation 34 C.F.R. § 685.219(c)(4). Based on the Court's reasoning in *Trinity* and *Locke*, there are Free Exercise concerns regarding the proposed language of the PSLF program's eligibility requirements where the regulation would disqualify applicants who engage in religious activity as a part of their employment. Even those who view their employment with a religious organization as a way of practicing their beliefs may have been excluded from the PSLF program. For example, borrowers who view their employment with a faith-based organization as a form of proselytization, even if it contains no explicit call to conversion, may not count those service hours, where the Department of Education may not have intended to exclude it. As described by commenters, there were some burden on the borrower attempting to separate and record the time spent on religious activities and time spent doing secular activities.[156]

[154] *Smith*, 494 U.S. at 877.
[155] *Locke*, 540 U.S. at 725.
[156] *Federal Programs*, *supra* note 34.

There are also limitations on the Department of Education in overseeing and verifying such a religious activity restriction due to the Establishment Clause.[157] However, it is difficult to discern whether the burden that critics outline, of separating religious work hours from secular ones, is significant enough in principle. A heavier burden on the borrowers would exist where some borrowers would not be able to qualify for loan forgiveness at all under PSLF because their employment is entirely or mostly spent providing religious instruction, worship services, or any form of proselytizing. Since either scenario is possible with the work hours restriction in place, the Supreme Court would find that the government is burdening these borrowers by withholding a publicly available benefit based on their exercise of religion.

The distinction between prohibited religious status discrimination and the permissible religious use in determining whether the Department of Education's proposed PSLF program qualifying work hours restriction would overcome the Free Exercise challenge is not so easily drawn. After the old regulation was repealed, there was no religious eligibility exclusion on an employer's status as a faith-based organization. This repeal is appropriate to satisfy the reasoning in *Trinity* where exemptions based on religious status is impermissible. Now, the Department of Education's proposed restriction of the PSLF program excluding hours spent on a distinct category of activities within an employee's workday is more analogous to the situation in *Locke* where denial is based on rejecting the funding of a specific religious activity-religious instruction. The Court deciding *Locke* reasoned that pursing a degree in theology is devotional in nature and designed to invoke religious faith.[158] A Court applying the same principles demonstrated in *Locke* would find ministerial training to include religious instruction, worship and proselytizing. Therefore, the proposed PSLF program's restriction on counting hours performing religious instruction, worship and proselytizing is very closely related to, and would be described as, an "essentially religious endeavor" like the ministerial training was in *Locke*. Here, time spent on religious instruction should also be excluded as proposed through the PSLF program regulation.

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[157] *Federal Programs*, *supra* note 34.
[158] *Locke*, 540 U.S. at 715-17.

Although these cases reflect the constitutionality of state grant regulations and policies, the principles are still relevant to PSLF program eligibility requirements as government scholarships and grant programs are akin to student loan forgiveness in that they both achieve the same goal of providing financial aid to students to expand educational accessibility. Therefore, comparing these two public government benefits are appropriate. This is especially true when analyzing the First Amendment implication of the various versions of the regulation language as compared to the congressional language of the authorizing statutes, CCRA and Higher Education Act.

Notable in the Scalia dissent in *Locke* is the Court's claim of a long tradition and government interest against the use of public funds for training of the clergy.[159] The *Trinity* majority opinion also describes the use of public funds for training clergy as the major distinction between the *Trinity* and *Locke* decisions.[160] The Department of Education's current and proposed regulation language goes beyond religious instruction by excluding worship services, or any form of proselytizing from applicable service hours for PSLF.[161] The agency announced that the final regulations will set religious individuals and entities on equal footing with their secular counterparts by allowing such individuals and entities to qualify for the same aid already available to non-religious individuals and entities.[162]

We apply the Supreme Court's first Free Exercise principle to determine whether the Court would apply strict scrutiny to the proposed language of the PSLF program employment eligibility criteria. The proposed language of the criteria demonstrates that a government benefit of student loan forgiveness would be withheld from certain borrowers if a full-time 30-hour work week is not maintained with a qualified employer. The Court specifies that the withholding of a government benefit must be due to religious status, belief, practice, or identity.[163] Here, the applicable exclusion applies

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[159] *Locke*, 540 U.S. at 736. *See generally* Witters v. State, Comm'n for the Blind, 689 P.2d 53, 56 (1984) ("It is not the role of the State to pay for the religious education of future ministers"), *rev'd sub nom.*, Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).
[160] *Trinity*, 137 S. Ct. at 2026.
[161] *Federal Programs*, *supra* note 34.
[162] *Id.* at 120.
[163] *Id.*

to religious practice if the borrower regards practicing their religion to specifically include engaging in religious instruction, worship or proselytizing as part of their employment. As shown in *Lyng*, the Court also considers whether the government coerces individuals into violating their religious beliefs or put the proposed recipient of a government benefit in a position to choose between maintaining religious status or receiving a government benefit.[164]

The examples the Court provided which satisfy the first principle are not similar to borrowers looking to count religious instruction, worship or proselytizing as part of their employment. In *Trinity*, the church would have had to choose between its status as a church and the government benefit because its status was the core of its exclusion. Dissimilarly, the student in *Locke* was not considered by the Court to face this conflict because scholarship recipients were free to use state funds at accredited religious and non-religious schools alike, but the program could not be used for the training of the clergy. The theology degree exclusion did not prevent the student from violating his beliefs, nor did it present the student with the conflict of maintaining religious status or receiving a government benefit. Although the student may argue that the exclusion interfered with his ability to pursue spiritual fulfillment, this consideration has been deemed to be non-determinative by the Court in establishing a substantial burden based on religious practice. Similar to the Promise Scholarship Program in *Locke*, the Student Loan Programs provides aid to students attending pervasively religious schools, so long as they are accredited and otherwise eligible to participate in the Student Loan Programs, including PSLF.[165] And under the proposed work hour regulation, the borrowers are still eligible to be employed by faith-based organizations and gain the benefit of the PSLF program.[166] Those who would not be able to reach the 30 hours a week requirement due to the religious activity exclusion in the proposed regulation are likely those whose position is specifically to provide religious instruction, worship or proselytizing like clergy.

From a practical perspective, religious activities may be intertwined with secular work at faith-based organizations, making it difficult to clearly separate PSLF eligible work hours. The

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[164] *Lyng*, 485 U.S. at 499.
[165] *Locke*, 540 U.S. 712 at 724.
[166] *Federal Programs*, *supra* note 34.

application of the proposed regulation easily creates uncertainty and confusion on the part of the borrowers and employing organizations. Conversely, many other employees like attorneys, teachers, or clinical practitioners are faced with the same circumstance of performing various job-related activities that they are prohibited from including in their billable hours or timesheets. Consequently, these hours would not be including in their PSLF eligible work hours either. The PSLF program application states that full-time employment must be at least 30 hours a week, but applicants must also meet their employer's definition for "full-time employment."[167] The burden of ensuring the applicant achieves full-time hours according to the PSLF program and their employer is not "special" as nearly all employees are required to track their work hours and separate some activities from others in some form. Moreover, religious persons working in positions where their employers required to use their work breaks for prayer are also not including their prayer time or religious activity in work hour requirements.

The Court is not clear on how to weigh the considerations, and the circumstances indicate that the reasoning in *Locke* would be more applicable to the PSLF program eligibility criteria than *Trinity*. However, the attitude of the Court is to generally impose strict scrutiny in Free Exercise cases. Strict scrutiny is the appropriate level of judicial review here since the time-keeping provision in the proposed regulation expressly excludes religious activity. Thus, the first principle of a Free Exercise challenge is likely met and the PSLF program criteria must overcome the second principle to survive strict scrutiny. In evaluating whether the proposed PSLF program criteria would overcome strict scrutiny, the Court instructs us that the government would need to present a compelling government interest of the highest degree that is narrowly tailored to accomplish that interest. In determining a compelling government interest, the Court may consider that a meaningful difference exists between not funding devotional degrees, like explained in *Locke*, and not providing loan forgiveness to those whose job-related religious activities prevent them from fulfilling the work hour requirement, as with the PSLF program. Here, the borrowers may have a devotional degree or not, but the

[167] *Public Service Loan Forgiveness: Employment Certification Form*, DEP'T OF EDUC. 5, https://myfedloan.org/documents/repayment/fd/pslf-ecf.pdf.

focus is on excluding the use of a government benefit (loan forgiveness) to pursue employment that amount to practicing their religion.

The Department of Education may not believe their interest in not funding the clergy is compelling enough, but the Court which decided *Locke* described this interest as being a historic compelling government interest. Justice Thomas, who concurred with the *Locke* decision, stated its application should be limited to the context of grant support of ministerial training.[168] The PSLF program does not deal with supporting ministerial training, but instead supporting ministerial employment. The government would have a stronger interest in refusing to this kind of support. Therefore, the proposed work hour regulation should be upheld as overcoming the borrowers' burden. The agency could try to avoid the compelling government interest test by arguing that the exclusion of such funding places a relatively minor burden to applicants.[169] This would be a weak argument as graduates with student debt often cannot afford to live on their own, take second or third jobs to make monthly student loan payments, are unable to save for retirement, and pass on social lives because of the financial burden of student loans. The Department of Education's proposed work-hour requirement would pass a Free Exercise claim provided that the agency properly aligns its circumstances with *Locke* as achieving a compelling government interest by employing permissible religious use discrimination.

V. THE CHARACTERISTICS OF ENTANGLING THE GOVERNMENT IN RELIGIOUS AFFAIRS AS PROHIBITED BY THE ESTABLISHMENT CLAUSE

The tension between the Free Exercise Clause and the Establishment Clause has been one long felt and naturally examined through the interpretation of the U.S. Supreme Court.[170]

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[168] *Locke*, 540 U.S. at 726.
[169] *Locke*, 540 U.S. at 724.
[170] *See* Tilton v. Richardson, 403 U.S. 672, 677 (1971) (noting "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause"); Sylvia Sohn Penneys, Note, *And Now for a Moment of Silence: Wallace v. Jaffree*, 39 U. MIAMI L. REV. 935, 940 (1985) (recognizing potential tension between these two clauses if both are interpreted broadly). *See generally* Katie Hosford, Notes & Comments, *The Search for a Distinct Religious - Liberty Jurisprudence*

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."[171] When a state, federal, or local body provides funds to religious organizations, religious schools, or students attending those schools, the Establishment Clause is provoked.[172] Additionally, when a plaintiff makes a Free Exercise claim, the government is able to defend its religious exclusion on the basis that the restrictive regulation is required to prevent it from establishing religion.[173]

The Department of Education has not, to date, faced litigation over the religious exclusion in its PSLF regulations. This is in part due to its bending ear toward critics and resulting rescinded religious exclusion and discarded proposal of the work-hour requirement. The agency reasoned that it was following the Establishment Clause when it adopted the religious exclusion in regulation 34 C.F.R. § 685.219(b) and the work hour limitations in regulation 34 C.F.R. § 685.219(c)(4).[174] However, the Supreme Court's rulings over the past century have shifted towards narrowing the Establishment Clause's ability to prohibit the government from lending public funds to religious institutions who engage in inherently religious activities.[175]

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under the Washington State Constitution, 75 WASH. L. REV. 643, 644 (2000) (claiming that "free exercise and separation of church and state have potential to lead to contradictory results").

[171] U.S. CONST. amend. I.

[172] *See, e.g.*, *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton*, 403 U.S. 672 (1971).

[173] *Espinoza*, 140 S. Ct. at 2263.

[174] *Loan Program*, *supra* note 21.

[175] *See Everson*, 330 U.S. 1, 7 (1947) (providing a history of the Religion Clauses and the objectives of the founding fathers that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . ." Where a New Jersey statute is promulgated to promote public education by reimbursing parents for transportation costs to secular and parochial schools, the Court upholds the statute because this does not constitute supporting religion. The Court does not deny the value or the necessity for religious training, teaching or observance, but it does deny that the state can undertake or sustain them in any form or degree); *see also Tilton*, 403 U.S. at 675 (finding that tax-raised funds may not be granted to institutions of higher learning if it is possible that those funds will be used for sectarian activities in the future having the effect of advancing religion).

In resolving Establishment Clause disputes, the Supreme Court incorporates the neutrality doctrine into the *Lemon* test.[176] The government will pass the *Lemon* test if all three principles are met: (i) the government acted with a neutral or secular legislative purpose, (ii) its principal or primary effect neither advanced nor inhibited religion, and (iii) it did not foster an excessive government entanglement with religion."[177] When analyzing the first neutrality principle, the Court that decided *Lemon* deferred to the legislative intent and the language of the challenged statutes.[178] The *Lemon* opinion did not analyze the second principle,[179] but other Supreme Court cases before and after *Lemon* have discussed how to apply it. For example, in *Nyquist* the challenged provision was neutral, proposed a secular purpose, and therefore, passed the first prong of the *Lemon* test.[180] However, a provision that authorized direct payments to nonpublic schools for maintenance and repair were given without any restriction on usage.[181] The qualifying school beneficiaries of this program included almost exclusively Roman Catholic schools.[182] Additionally, the statute, without any restrictions, allowed a qualifying school to pay the salaries of employees who maintain the school chapel, the cost of renovating classrooms in which religion is taught, the cost of heating and lighting those same facilities out of state funds.[183] Absent the appropriate restrictions on expenditures for the aforementioned and similar purposes, the Court found the statute had a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.[184] The Court distinguishes this case from others by recognizing that religious organizations, including schools, perform secular and religious functions, and that some permissible aid

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[176] *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (O'Connor and Thomas, JJ., concurring that "[a] central tool in our analysis of cases in this area has been the *Lemon* test."); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Jeremy T. Bunnow, Note, *Reinventing the Lemon: Agostini v. Felton and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133 (1998).
[177] *Lemon*, 403 U.S. at 612-13.
[178] *Id.*
[179] *Id.*
[180] Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 775.

provided by the government may be channeled to the secular functions without providing direct aid to the sectarian.[185]

The *Nyquist* opinion dictus mentions that an indirect and incidental effect beneficial to religious institutions has never been considered by the Court a sufficient enough defect to warrant the invalidation of a law under the Establishment Clause.[186] Further, the Establishment Clause does not prohibit narrowly channeling some forms of aid to the secular functions of a religious organization without providing some indirect or incidental aid to the sectarian functions.[187] In applying the second principle of neither advancing nor inhibiting religion, the Courts consider whether the proposed beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.[188] If the answer to this query is "no," the program should be struck down under the Establishment Clause.[189]

The last principle of entanglement has been discussed at length through many Supreme Court cases. In one notable case, *Agostini v. Felton*, the entanglement principle was folded into the second "primary effect" principle and cases like *Zelman* and *Lynch* follow this approach.[190] The Court noted that when deciding challenges to the Religion Clauses, it values private choice. Here, the Court diverts it attention from the entanglement principles and emphasizes the importance of the availability of private choice.[191] While the Court recognizes that its jurisprudence with respect to the constitutionality of direct aid programs has changed significantly over the past two decades,[192] it claims its jurisprudence

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[185] *Id.*
[186] *Nyquist*, 413 U.S.at 775-76 (citing McGowan v. Maryland, 366 U.S. 420 (1961) (finding Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services.); Walz v. Tax Com. of N.Y., 397 U.S. 664 (1970) (finding property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden).
[187] *Id.*
[188] *Zelman*, 536 U.S. at 662.
[189] *Id.*
[190] *See Zelman*, 536 U.S. at 668; *see also Lynch v. Donelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).
[191] *Id.*
[192] Agostini v. Felton, 521 U.S. 203, 236 (1997).

with respect to true private choice programs has remained consistent and unbroken.[193] Three times the Court has confronted Establishment Clause challenges to neutral government programs that provided aid directly to a broad class of individuals, who, in turn, directed the aid to religious schools or institutions of their own choosing.[194] And three times the Court has rejected such challenges.[195] In these cases, the Court viewed the challenged program as a whole and emphasized the principle of private choice, almost excusing the provision by noting that public funds were made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children."[196]

The emphasis on private choice seems to overshadow the primary effect and entanglement principles of the *Lemon* test as the Court saw fit in different cases as a way to get around the *Lemon* test. For example, the Court which decided *Zelman* quoted *Mitchell*, an earlier case, regarding free choice: "If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." [197] In *Zelman*, taxpayers sought to enjoin a state program that granted scholarship money to parents because some parents chose to use the money to pay tuition at a religious school.[198] The state program was neutral in regard to religion and the only eligibility requirement is based on financial need.[199] Still the taxpayers claimed the program violated the Establishment Clause.[200] However, the scholarship program did not offend the Establishment Clause.[201] In the case of challenging indirect government aid being distributed to religious persons or organizations, the Court clarifies that the basic inquiry when trying to determine whether a program that distributes aid to

193 *Zelman*, 536 U.S. at 649.
194 *Id.*
195 *Id.*
196 *Zelman*, 536 U.S. at 650.
197 *Id.* at 652-63 (citing *Mitchell*, 530 U.S. at 810).
198 *Zelman*, 536 U.S. at 639.
199 *Id.*
200 *Id.* at 648.
201 *Id.*

beneficiaries, rather than directly to service providers, has the primary effect of advancing or inhibiting religion.[202]

The Court seems to further add to the *Lemon* test, the principle of free choice stating that when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, 'no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief'."[203] For these reasons, the Court states that it has never found a program of true private choice to offend the Establishment Clause.[204] However, this is an unfounded claim to make by the Court as the private choice factor is a recently added principle that has never been applied or discussed as heavily as the in *Zelman*, in relation to the *Lemon* test. The dissenting Justices Stevens, Souter and Breyer re-introduced the original principles of the *Lemon* test and noted that the fact that the Court's suspicion of “divertability” reflected a concern with the substance of the no-aid principle is apparent in its rejection of stratagems invented to dodge it.[205]

In the previously discussed *Hernandez* case, the Court claimed that the tax benefit that the petitioner-church members sought out of the IRS code threatened excessive entanglement between church and state.[206] The IRS code § 170 was facially neutral to religion and designed to provide a generally available public benefit of providing a tax deduction to taxpayers who made charitable contributions.[207] The church members did not receive this benefit because the payments made to its church for religious training and services did not qualify as a charitable contribution as defined in the section.[208] Further, the Court reasoned that if § 170 provided the deduction for payments made to obtain religious services, the payments church members made to its church in

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[202] *Lemon*, 403 U.S. at 612-13.
[203] *Id.*
[204] *Id.*
[205] *Id.* at 692. (quotation added)
[206] *Hernandez*, 490 U.S. at 694.
[207] *Id.* at 696.
[208] *Id.* at 687 (observing that the term "charitable contribution" in § 170 is synonymous with the word "gift," which case law had defined "as a *voluntary transfer* of property by the owner to another *without consideration* therefor.") (quoting DeJong v. Comm'n of Internal Revenue, 36 T.C. 896 (Tax 1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962) (emphasis in original)).

exchange for religious training would force the IRS to differentiate "religious" benefits from "secular" ones.[209] Explicitly, if the church members had their way, payments made to churches in exchange for religious training or religious services would qualify for a publicly available government benefit simply because church members are practicing their religion. The Court refuses to make a definitive statement on the constitutionality of the church members' alternative interpretation of § 170, but it warned that pervasive monitoring is a central danger against which the Court has held the Establishment Clause guards.[210]

The church members argued that § 170 already entangles the government in religious affairs by engaging in the supervision of religious beliefs and practices.[211] The Court acknowledged the government's interaction with religion in this situation since many charitable contributions are made to religious organizations, but the Court differentiated between allowable interaction and unconstitutional entanglement.[212] The Court stated that routine regulatory interaction alone, which does not involve inquiries into religious doctrine or religious organizational records, does not violate the non-entanglement command of the First Amendment.[213] The Court's treatment of the challenges raised in *Hernandez* suggest that requiring PSLF applicants to differentiate between religious and secular activities in their employment may not constitute entanglement by the Department of Education because the agency does not involve inquiries into religious doctrine. Employment timesheets from religious organizations may be considered "religious organizational records" but since the PSLF applicants would be creating their own records of work hours

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[209] *Id.*
[210] *See id.*; *see also Widmar*, 454 U.S. 263, 272, n.11 ("[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech'" than by opening its forum to religious as well as nonreligious speakers). *Cf. Thomas*, 450 U.S. at 716. *See generally Aguilar v. Felton*, 473 U.S. 402, 413 (1985).
[211] *Hernandez*, 490 U.S. at 695.
[212] *Id.*
[213] *Hernandez*, 490 U.S. at 697-98 (citing Tony & Susan Alamo Found. v. Sec. of Lab., 471 U.S. 290, 305 (1985)). *Cf. Lemon*, 403 U.S. at 621-22 (finding that a school-aid statute authorizing government inspection of parochial school records created impermissible "intimate and continuing relationship between church and state" because it required the government "to determine which expenditures are religious and which are secular").

excluding time conducting religious instruction, worship, or proselytizing this would not be a religious organizational record.

The Supreme Court that decided *Espinoza* also discussed the Establishment Clause.[214] The Court relied more heavily on the neutrality doctrine than when analyzing the impact of the Establishment Clause on government funding policies as compared to the Free Exercise Clause's impact when it repeats that ". . . [T]he Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[215] Specifically, as it relates to the Department of Education's PSLF program eligibility work hours requirement, the Establishment Clause is not offended when the government support makes its way to religious institutions only as a result of individuals independently choosing to spend their public benefit or loan forgiveness at such institutions.[216]

VI. ESTABLISHMENT CLAUSE ANALYSIS

A claim by the Department of Education asserting that the work hours requirement is permitted by the Establishment Clause would fail because it would not satisfy all the elements of the *Lemon* test. Although the Department of Education's current regulation changes were criticized based on commenters' Free Exercise Clause challenges, allowing PSLF participants to count religious activities toward obtaining a government benefit posed an Establishment Clause issue. Proponents of the religious exclusion in the PSLF work hour requirement expressed concerns that it would violate the Establishment Clause if borrowers received loan forgiveness to work on inherently religious activities.[217] Commenters also expressed that the proposed provision would have raised a significant threat of entanglement under the Establishment Clause when the government tried to evaluate whether a religious organization's employees are properly defining work that touches on religious instruction, worship, or proselytizing.[218] The current

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[214] *Espinoza*, 140 S. Ct. at 2254.
[215] *See, e.g., Locke*, 540 U.S. at 719; *Rosenberger*, 515 U.S. at 839; *see also Trinity*, 137 S. Ct. 2012 (noting the parties' agreement that the Establishment Clause was not violated by including churches in a playground resurfacing program).
[216] *Espinoza*, 140 S. Ct. at 2254. See *Locke*, 540 U.S. at 719; *Zelman*, 536 U.S. at 649-53.
[217] *See supra* note 18, at 116.
[218] *Id.*

language of the PSLF eligibility requirements, without the religious exclusion or work hour requirement, effectively still encounter this same problem. Critics of the proposed work hour regulation rightfully disapproved based on the belief that the government could be considered to be regulating religious activities through its administration of the PSLF program.[219] A major difference between *Locke* and the proposed language of the PSLF program is that the school rather than the state determined if the degree major is devotional in nature. The Department of Education is ultimately responsible for determining whether the applicant is eligible to receive the PSLF benefit because the agency is reviewing the application documents showing qualified employment.[220] However, the Department of Education would not have been involved in separating out the religious activity work hours from the secular work hours. That would have been left to the applicant and the employer to then approve the work hours. Therefore, the agency would not be regulating religious affairs.

In applying the *Lemon* test, we must first determine if the government acted with a neutral or secular legislative purpose when enacting the statute. Here, as mentioned previously, the Department of Education did implement the PSLF program in accordance with the authorizing state, the CCRA, for the secular purpose of make a college education more affordable to the nation's students.[221] Next, we question the neutrality of the specific work hour requirement. The regulation itself is not neutral with respect to religion and clearly excludes counting time spent conducting religious instruction, worshipping, and proselytizing. The *Lemon* test only questions the *legislative* intent, however, but this is unlikely going to stop the Supreme Court from considering the intent of the Department of Education in implementing the program. Additionally, the Court would also consider the agency's subsequent intent in including a religious activity exclusion in the form of a restriction on religious activity for qualifying work hours. The agency cited wanting to be consistent with other loan programs in implementing the first provision excluding participation in the PSLF program. This is a facially neutral secular purpose. Comparatively, the agency cited wanting to prevent Establishment Clause entanglement issues in implementing the work hour

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[219] *See* Letter, *supra* note 15.
[220] DEP'T OF EDUC., *supra* note 167.
[221] *See supra* note 11.

religious activity exclusion.[222] The Court stated in *Espinoza* that the government is able to defend its religious exclusion on the basis that the restrictive regulation is required to prevent it from establishing religion.[223] However, the Court was referring to Free Exercise claims and this does not necessarily mean that this reasoning constitutes a facially neutral secular purpose.

The agency would have a hard time establishing that even the intent behind the regulation was neutral with respect to religion because the Establishment Clause deals solely with religion. Unlike the laws and regulations in *Nyquist*, *Zelman*, and *Hernandez*, which did not mention religion at all, the Department of Education's work hour religious activity exclusion is not neutral. The *Lemon* test states that having a secular legislative purpose satisfies the first determinative prong, but the Court deciding *Zelman* introduced the viewing the government funding program as a whole. If the Court applied the *Zelman* criteria to the *Lemon* test, the work hour religious activity exclusion in the proposed PSLF regulation would fail because it not neutral.

Although the first prong is likely unsatisfied, we analyze the next step in the *Lemon* test regarding whether the principal or primary effect neither advanced nor inhibited religion. This prong of the *Lemon* test would be highly disputed in an action based on the proposed work hour requirement. The proponents of the religious activity exclusion in the proposed work hour requirement would argue that the PSLF program with no religious exclusion would have the effect of religion. In *Nyquist*, where there were no religious restrictions, the Court found that the primary effect of advancing religion because the beneficiaries were almost exclusively religious schools, and largely subsidized these schools. The PSLF program applicants consist of teachers, lawyers, healthcare professionals, government employees, and many other professions. The Department of Education has not provided public data on how many of those applicants are employed by religious organizations, so we are unable to presume that they would be the exclusive beneficiaries of the program. Further, the Court recently stated in *Espinoza* that the Establishment Clause is not offended when religious observers and organizations benefit from neutral

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[222] *See supra* note 181.
[223] *Espinoza*, 140 S. Ct. at 2263.

government programs.[224] However, it is a valid concern for proponents of the exclusion to not want others in the program counting hours practicing religion, even if it is a part of a chosen profession.

The critics of the regulation have already argued that the effect of PSLF applicants having to separate out their work hours for years inhibit religion when religious instruction, worshipping, and proselytizing are a part of their employment. The Department of Education, of course, would argue the opposite. The agency would have asserted that the regulation did not inhibit religion because borrowers were still able to freely exercise their religion as a part of their jobs or not. The counter argument brought by any challenger would be persuasive if the challenger were a pastor, minister, rabbi, church musician or other clergyperson whose main function in their employment is to perform religious instruction, worship, or proselytizing. The work hour requirement would completely bar these borrowers from participating in the loan forgiveness program. However, in *Hernandez* where a church claimed the IRS' neutral tax code interfered with the church's observance of a religious exchange doctrine by excluding churchgoers from participating in the charitable contribution tax deduction, the Court deemed it permissible to for religious members to not qualify for a public benefit through practicing their religion.[225] We must also note how the Court has historically deemed it permissible to discriminate against funding clergy. The agency could have argued that those not qualifying for the government benefit of loan forgiveness through practicing their religion by conducting religious instruction, worshiping, or proselytizing is not inhibiting religion as these activities are genuinely done without a government benefit.

Finally, we assess the last prong in the *Lemon* test to determine if the regulation fostered an excessive government entanglement with religion. Justice Thomas, in writing his concurring opinion for *Espinoza* stated that he did not believe anti-establishment interest in *Locke* because the government did not

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[224] *See Espinoza*, 140 S. Ct. at 2254. See *Locke*, 540 U.S. at 719; *see also Zelman*, 536 U.S. 639 (2002) (finding that ". . . [w]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").
[225] *Hernandez*, 490 U.S. at 699.

coerce the student to study theology, nor did it conscript taxpayers to into supporting any form of orthodoxy.[226] Justice Thomas expresses his view of what constitutes "entanglement," but fortunately for the Department of Education, the majority of the justices do not necessarily share this view.[227] The Court's varying opinions in *Espinoza*, including Justice Breyer's dissent, offers insight into other viewpoints on the Department of Education's stated interest in avoiding entanglement. Justice Breyer highlights that the Court has previously found that a government "policy preference for skating as far as possible from religious establishment concerns" could not satisfy the last step in the *Lemon* test. [228] However, the play in the joints factor most of the justices agree with demonstrate flexibility in Establishment Clause concerns. Justice Breyer discusses how in *Locke*, which the PSLF regulation most closely resembles, the Court assumed that the Establishment Clause permitted the government to support students seeking such degrees.[229] In a First Amendment dispute, the Department of Education could remind the Court that it concluded in *Locke* that the Free Exercise Clause did not require it to do so.[230]

VII. CONCLUSION

The Department of Education jumped the gun and pre-emptively took out an allowable religious exclusion. They should have let the Supreme Court determine whether the work hours requirement constituted impermissible entanglement if someone brings a strong enough claim of Establishment Clause violations. The regulation does violate the Free Exercise Clause of the First Amendment. However, the government would be able to justify the burden on borrowers performing the religious activities mentioned in the regulation based on the same compelling government interest Washington state used in *Locke*. After analyzing the relevant Free Exercise cases, these circumstances more closely align with *Locke* and the treatment of religious use-based discrimination explained in *Espinoza*. Further, there is enough variation in the current justices' views of religious status protections as compared to

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[226] *Espinoza*, 140 S. Ct. at 2246 (Thomas, J., concurring).
[227] *Id.*
[228] *See generally Trinity*, 137 S. Ct. at 2012.
[229] *Espinoza*, 140 S. Ct. at 2246 (Breyer, J., dissenting) (citing *Locke*, 540 U.S. at 719).
[230] *Id.*

religious use protection to uphold the proposed PSLF work hours eligibility requirement. The regulation is narrowly tailored to exclude only religious instruction, worshipping, and proselytizing, which is religious conduct the Court has routinely shied away from providing unlimited protections when a state actor is involved.

Based on the limited number of cases detailing the least restrictive means test, the PSLF work hour requirement would most likely fail challenges from borrowers who assert a free exercise violation claim based on the Religious Freedom Restoration Act. Although the strongest argument for a compelling government interest is the government's decision not to fund the training of clergypersons and avoid entanglement, the Court could find that the work hours requirement may not be the least restrictive means of achieving these interests. Court is costly and onerous, but when the Department of Education withdrew its work hours requirement in the PSLF program it conveyed a message of the government's fear of religious discrimination challenges in the wake of shrinking separation of church and state principles. Yet, the ultimate impact of the Department of Education withdrawing the work hours regulation is the inclusion of more applicants to the PSLF program, which was designed to encourage public service jobs and aid in borrowers managing their debt.