

## *Little Sisters of the Poor v. Pennsylvania: The Not So Little Effect of Interfering with the ACA's Contraceptive Mandate*

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***LITTLE SISTERS OF THE POOR V. PENNSYLVANIA: THE  
NOT SO LITTLE EFFECT OF INTERFERING WITH THE  
ACA’S CONTRACEPTIVE MANDATE***

SABRINA RUBIS\*

INTRODUCTION

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,<sup>1</sup> the Supreme Court decided whether government agencies created lawful exemptions from a regulatory requirement of the Affordable Care Act (ACA) that requires employers to provide contraceptive coverage to their employees through their employer-based health insurance plans.<sup>2</sup> This requirement is known as the “contraceptive mandate.”<sup>3</sup> The Court’s decision ultimately turned on its interpretation of the ACA’s language. The Supreme Court, in a 7-2 decision, upheld the two blanket exemptions, allowing employers and educational institutions to opt out of providing contraception to their employees and students due to their religious or conscientious beliefs.<sup>4</sup>

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\*JD Candidate 2022, University of Maryland Francis King Carey School of Law. I would like to thank my parents, Russ and Gloria Rubis, for their endless support and whose unconditional love, sacrifice, and strength have profoundly shaped the person I am today. I would like to thank my sister, Oksana Rubis, for her encouragement, wisdom, for being my rock and listening ear, and for being an exceptional example for empathy, determination, and being unapologetically yourself. I would also like to thank Professor Paula Monopoli for her guidance and valuable insight over the years, whose class inspired me to write this advocacy piece. I would like to express my gratitude to the many editors of the *Journal of Race, Religion, Gender & Class* for their hard work and contributions to this case note. I would also like to thank my family and friends for their kindness and support, especially during the times I needed it the most. Last but not least, this article is dedicated to all women—both in my life and beyond—whose voices deserve to be continuously uplifted, empowered, and heard.

<sup>1</sup> 140 S. Ct. 2367 (2020).

<sup>2</sup> *Id.* at 2372-73.

<sup>3</sup> *Id.* at 2373. *See also* 42 U.S.C. § 300gg-13(a)(4) (“A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”).

<sup>4</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2386. *See also Little Sisters of the Poor v. Pennsylvania and New Jersey/Trump v. Pennsylvania and New Jersey*, ACLU, <https://www.aclu.org/cases/little-sisters-poor-v-pennsylvania-and-new-jerseytrump-v-pennsylvania-and-new-jersey> (last visited Jan. 7, 2022); Brief for ACLU as Amici Curiae Supporting Respondents at 2, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-431, 19-454) (explaining that both employers and universities may deny health care coverage to their female employees and students).

The Court was wrong in its decision to uphold the broad blanket exemptions, which now deny tens of thousands of women seamless access to no-cost contraceptive coverage under the ACA. The Court failed to adequately weigh the exemptions' detrimental impact on women.<sup>5</sup> The Court should have given greater weight to the history of the Women's Health Amendment, the role of gender in shaping policy, and legal precedent.<sup>6</sup> The Court should have also utilized the Administrative Procedure Act's arbitrary and capricious standard when analyzing the exemptions.<sup>7</sup> Lastly, the Court's decision leaves many legal questions unanswered, which may have broader implications in the areas of constitutional law, civil rights law, and gender rights law.<sup>8</sup>

## I. THE CASE

*Little Sisters of the Poor v. Pennsylvania* was a 2020 U.S. Supreme Court case that followed a series of cases concerning the "legality of agency rules providing religious and moral exemptions to the contraception mandate created under the Affordable Care Act."<sup>9</sup> The contraception mandate is carved out from a provision of the ACA and requires employers to provide their employees with all Food and Drug Administration-approved contraceptive protection in their employer-based health insurance plans.<sup>10</sup> The statute reads: "with respect to women,' '[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).'"<sup>11</sup>

Since the mandate's inception in 2011, numerous religious employers objected to the mandate, asserting that this provision of contraceptive health care coverage would infringe on their religious

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<sup>5</sup> See *infra* Section IV.A.

<sup>6</sup> See *infra* Section IV.B.

<sup>7</sup> See *infra* Section IV.C.

<sup>8</sup> See *infra* Section IV.D.

<sup>9</sup> *Little Sisters of the Poor v. Pennsylvania*, BALLOTPEdia, [https://ballotpedia.org/Little\\_Sisters\\_of\\_the\\_Poor\\_Saints\\_Peter\\_and\\_Paul\\_Home\\_v.\\_Pennsylvania](https://ballotpedia.org/Little_Sisters_of_the_Poor_Saints_Peter_and_Paul_Home_v._Pennsylvania) (last visited Sept. 18, 2021).

<sup>10</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2374 (2012) (citing Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54)).

<sup>11</sup> *Id.* at 2379-80 (citing 42 U.S.C. § 300gg-13(a)(4)).

rights and beliefs.<sup>12</sup> The Little Sisters of the Poor, an international congregation of Roman Catholic women who have “operated homes for the elderly poor in the United States since 1868,”<sup>13</sup> were one of many religious organizations that had opposed the contraception mandate for years.<sup>14</sup>

After years of litigation, and in response to the concern of religious employers, the Departments of Health and Human Services (HHS), Labor, and Treasury (together, hereinafter “Departments” or “government”) carved out certain exemptions and accommodations for objecting religious employers.<sup>15</sup> Religious employers, like the Little Sisters, continued to challenge these accommodations as a violation of their religious rights, but appellate courts around the country held that this process did not violate their rights and ruled against them.<sup>16</sup>

In 2013, the Little Sisters went to court seeking an exemption from the mandate but lost at both the district court and appellate court levels.<sup>17</sup> At this point, the Sisters appealed to the U.S. Supreme Court, and Justice Sotomayor “issued an emergency injunction to grant immediate relief for the Little Sisters.”<sup>18</sup> In 2014, the Court granted an injunction against enforcement of the contraceptive mandate and the need to use the accommodation while the case continued.<sup>19</sup> Later, in 2016, the Supreme Court overturned lower courts’ decisions, instructing the government and religious organizations to find a solution that would

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<sup>12</sup> *Id.* at 2374. Many employers objected to the contraceptive mandate, maintaining that this provision of contraceptive coverage violated their religious beliefs, including the belief that life starts at conception and that using contraception to avoid procreation is morally wrong. Many employers also felt that certain services provided in the FDA-approved contraceptive methods (Plan B, sterilization, etc.) would make the employer “complicit in abortion.” *Id.* at 2377.

<sup>13</sup> *Id.* at 2375. *See also* *Mission Statement*, LITTLE SISTERS OF THE POOR, <https://littlesistersofthepoor.org/mission-statement/> (last visited Oct. 17, 2021).

<sup>14</sup> *BALLOTPEDIA*, *supra* note 9.

<sup>15</sup> *See infra* Section II.

<sup>16</sup> *See* Katie Keith, *Will The Supreme Court Take Up The Contraceptive Mandate (Again)?*, HEALTH AFFS. (Jan. 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200107.852383/full/>.

<sup>17</sup> *On the Road to the Supreme Court (again)*, BECKET, <https://www.dropbox.com/s/mpc801bpr34r7uh/LSP%202020%20Timeline.pdf?dl=0> (last visited Sept. 18, 2021).

<sup>18</sup> *Id.*

<sup>19</sup> *See* W. Cole Durham & Robert Smith, *RFRA Protections in the Contraceptive Mandate Litigation*, in 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 3.20 (2d ed. 2020) (citing *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 571 U.S. 1171 (2014) (stating that the Supreme Court granted an injunction until the U.S. Court of Appeals for the Tenth Circuit “decided on the merits of the Little Sisters’ challenge”)).

accommodate both religious groups and employees seeking contraceptive coverage.<sup>20</sup>

Following a series of Supreme Court cases and continued challenges to the accommodation by religious groups,<sup>21</sup> under Trump's administration, HHS created broader blanket exemptions to the contraceptive mandate in October of 2017.<sup>22</sup> These new exemptions, which now included a "moral" component, expanded those employers and institutions eligible for the exemption to include religious non-profit and for-profit entities who have religious or conscientious objections.<sup>23</sup> Additionally, these new rules were promulgated by the Departments without first issuing a notice of proposed rulemaking or soliciting public comment pursuant to the Administrative Procedure Act (APA).<sup>24</sup>

Within a week of the promulgation of these new exemptions, many states, including Pennsylvania, sued the federal government, maintaining that the exemptions were both "procedurally and substantively invalid."<sup>25</sup> Specifically, Pennsylvania filed an action seeking declaratory and injunctive relief; the state of New Jersey joined Pennsylvania's suit, and both states filed an amended complaint.<sup>26</sup> Together, they challenged the exemptions in federal district court, maintaining that the new exemptions violate the U.S. Constitution, federal anti-discrimination law, and the APA.<sup>27</sup>

Pennsylvania and New Jersey further maintained that the final "rules were substantively unlawful because the Departments lacked statutory authority under either the ACA or the [Religious Freedom Restoration Act] (RFRA) to promulgate the exemptions."<sup>28</sup> The states also argued that the exemption violated the APA because they were "not adequately justified by good cause, meaning that the Departments

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<sup>20</sup> See *Zubik v. Burwell*, 136 S. Ct. 1557, 60 (2016); see also Zack Smith, *Little Sisters of Poor Win Big at Supreme Court, But Fight Isn't Over*, DAILY SIGNAL (July 8, 2020), <https://www.dailysignal.com/2020/07/08/little-sisters-of-poor-win-big-at-supreme-court-but-the-fight-isnt-over/> ("[The] Supreme Court in *Zubik v. Burwell* basically told both the religious organizations and the federal government to work out their disagreements and find a solution. In doing so, the court did not rule on the merits of whether the Religious Freedom Restoration Act required the organizations to be exempted from the mandate.").

<sup>21</sup> *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2375 (2020).

<sup>22</sup> *On the Road to the Supreme Court (again)*, *supra* note 17.

<sup>23</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2378.

<sup>24</sup> *Id.* at 2384.

<sup>25</sup> *Id.* at 2378.

<sup>26</sup> *Id.* The amended complaint argued that the newly promulgated rules were invalid under the Administrative Procedure Act (APA). *Id.*

<sup>27</sup> *Pennsylvania v. President U.S.*, 930 F.3d 543, 560, 576 n.9 (3d Cir. 2019).

<sup>28</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2378.

impermissibly used the Interim Final Rule (IFR) procedure to bypass the APA’s notice and comment procedures.”<sup>29</sup> Lastly, the states maintained that the “purported procedural defects of the IFRs likewise infected” the final exemptions.<sup>30</sup>

After holding a hearing and reviewing evidence submitted by the states, the District Court held that the states were likely to succeed on both claims and granted a preliminary nationwide injunction against the broad exemptions and enjoined their enforcement.<sup>31</sup> The federal government then appealed this decision, “as did one of the homes operated by the Little Sisters, which had in the meantime joined the suit to defend the religious exemption.”<sup>32</sup> The Little Sisters appealed the District Court’s preliminary injunction, and that appeal was consolidated with the federal government’s appeal.<sup>33</sup>

While that appeal was pending, the Departments issued rules finalizing the exemptions. However, in 2019, the Third Circuit held that the Departments lacked statutory and procedural authority to promulgate these exemptions and affirmed the District Court’s nationwide injunction.<sup>34</sup> First, the Third Circuit interpreted the ACA as authorizing the government agencies to determine *which* services to include as preventive care, but not to carve out exemptions from those requirements.<sup>35</sup> Second, the court disagreed that the previous accommodation “substantially burdened the Little Sisters’ free exercise

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<sup>29</sup> *Id.* See generally Brian Wolfman & Bradley Girard, *Argument preview: The Administrative Procedure Act, notice-and-comment rule making, and “interpretive” rules*, SCOTUSBLOG (Nov. 26, 2014, 10:13 AM) (“The APA generally requires that, to become effective, a legislative rule must go through what is known as notice-and-comment rulemaking – a lengthy process in which the public is given an opportunity to comment on a proposed version of the rule and the agency responds to the comments.”); OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (explaining that “when an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an ‘interim final rule,’ or ‘interim rule’”); MAEVE P. CAREY, THE FED. RULEMAKING PROCESS: AN OVERVIEW 7-8 (CONG. RES. SERV. 2013). Interim final rules were created to assist agencies in moving more quickly, often used to get around the notice and comment process. Agencies typically utilize interim final rules when they believe that rule will not be contested or is non-controversial, with that rule becoming immediately effective after the comment period. *Id.*

<sup>30</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2378.

<sup>31</sup> *Id.* at 2378-79. The District Court issued this injunction against the implementation of the exemptions the same day the exemptions were scheduled to take effect. *Id.*

<sup>32</sup> *Id.* at 2379. The Little Sisters initially moved to intervene in the District Court to defend the 2017 religious-exemption IFR, but the District Court denied that motion. The Third Circuit later reversed. *Id.*

<sup>33</sup> *Id.* This case is consolidated with the case *Trump v. Pennsylvania*. 140 S. Ct. 918, 919 (2020).

<sup>34</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2378-79.

<sup>35</sup> *Id.* at 2379.

rights and thus rejected their RFRA claim.”<sup>36</sup> Third, the Third Circuit held that the RFRA did not compel or allow the religious exemption because they had concluded that the accommodation process did not impose a substantial burden on the free exercise of religion.<sup>37</sup> Fourth, the Third Circuit held that the Departments violated the APA by not providing notice of proposed rulemaking and “lacked good cause to bypass” this process when promulgating the 2017 IFRs (exemptions).<sup>38</sup> Fifth, the Third Circuit decided that because the IFRs and final rules were virtually identical, “[t]he notice and comment exercise surrounding the Final Rules [did] not reflect any real open-mindedness.”<sup>39</sup> Finally, the Third Circuit held that the Little Sisters lacked standing to intervene in the suit and appeal.<sup>40</sup>

In 2019, the Little Sisters appealed to the U.S. Supreme Court after losing in the Third Circuit, and in 2020, the Supreme Court granted certiorari to review the lower court’s decision.<sup>41</sup>

## II. LEGAL BACKGROUND

The *Little Sisters* litigation has an extensive history, raising many foundational issues including separation of church and state, religious freedom, standing law, administrative law, statutory

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<sup>36</sup> *Id.* at 2376. See *Pennsylvania v. President U.S.*, 930 F.3d 543, 573 (3d Cir. 2019) (The Third Circuit did not find religious objectors’ disapproval of the accommodation process to be persuasive because the court is required to examine the conduct of the objector, not third parties, and through the accommodation process, all the conduct falls on third parties to provide contraception.

<sup>37</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2379.

<sup>38</sup> *Id.* “Respondents point to the fact that the 2018 final rules were preceded by a document entitled ‘Interim Final Rules with Request for Comments,’ not a document entitled ‘General Notice of Proposed Rulemaking.’ They claim that since this was insufficient to satisfy § 553(b)’s requirement, the final rules were procedurally invalid.” *Id.* at 2384.

<sup>39</sup> *Id.* at 2379 (quoting *Pennsylvania v. President U.S.*, 930 F.3d 543, 568-569 (3d Cir. 2019)). See *Pennsylvania v. President U.S.*, 930 F.3d 543, 569 (3d Cir. 2019) (citing *United States v. Reynolds*, 710 F.3d 498, 511 (3d Cir. 2013); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449-50 (3d Cir. 2011)) (alteration in original) (“‘[A] chance to comment . . . [enables] ‘the agency to maintain [] a flexible and open-minded attitude towards its own rules . . . .’” In sum, “[t]he opportunity for comment must be a meaningful opportunity.”).

<sup>40</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2379 n.6. The Third Circuit held that the Little Sisters lacked appellate standing because a District Court had already enjoined the mandate from being applied to plans which the Little Sisters were a part of. However, the Court disagreed with the lower court, finding that the Little Sisters had standing because the federal government, the other party to the suit, “clearly had standing to invoke the Third Circuit’s appellate jurisdiction,” and both parties sought to get rid of the injunction against the religious exemption. *Id.*

<sup>41</sup> *Id.* at 2379.

interpretation, and women’s rights issues.<sup>42</sup> The core of this case deals with the ACA’s contraceptive mandate, which has existed for over a decade.<sup>43</sup> Litigation around this mandate has lasted just as long. Section II.A will discuss an overview of the Affordable Care Act of 2010 (ACA), the Women’s Health Amendment (WHA), and the Contraceptive Mandate.<sup>44</sup> Section II.B will discuss the promulgation of Interim Final Rules (IFRs) in an effort to modify the contraceptive mandate and the subsequent litigation that resulted.<sup>45</sup> Section II.C will discuss the history and outcome of precedent cases and the Departments’ attempts at complying with these decisions.<sup>46</sup> Section II.D will discuss the two broad exemptions created in light of *Hobby Lobby* and *Zubik*.<sup>47</sup>

A. *Overview of the Affordable Care Act of 2010, the Women’s Health Amendment, and the Contraceptive Mandate*

The Patient Protection and Affordable Care Act<sup>48</sup> is a U.S. health reform law enacted in March of 2010 by former President Obama. This law, also known as the “Affordable Care Act” or “Obamacare,” was passed in an effort to make “affordable health insurance available to more people.”<sup>49</sup> In general, the ACA requires insurance and health plans to cover recommended preventive health services without cost sharing, copayments, deductibles, or other out-of-pocket costs.<sup>50</sup> In 2010, the

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<sup>42</sup> See SCOTUSblog, *Debrief: Little Sisters of the Poor v. Pennsylvania*, YOUTUBE (May 8, 2020), <https://www.youtube.com/watch?v=2uvp5aoJHuM&t=1867s/>.

<sup>43</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2373

<sup>44</sup> See *infra* Section II.A.

<sup>45</sup> See *infra* Section II.B.

<sup>46</sup> See *infra* Section II.C.

<sup>47</sup> See *infra* Section II.D.

<sup>48</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 *et seq.*).

<sup>49</sup> *Affordable Care Act (ACA)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/affordable-care-act/> (last visited May 28, 2021). See also *Women’s Preventive Services Guidelines*, HEALTH RES. SERVS. ADMIN., <https://www.hrsa.gov/womens-guidelines/index.html> (last visited Sept. 21, 2021) (“The Affordable Care Act . . . helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services.”).

<sup>50</sup> See 26 U.S.C. §§ 4980H(a), (c)(2), 5000A(f)(2); *Little Sisters of the Poor*, 140 S. Ct. at 2373; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696-97 (2014) (first citing 26 U.S.C. § 5000A(f)(2), 4980H(a), (c)(2)); then citing §§ 4980D(a)–(b) (“ACA generally requires employers with 50 or more full-time employees to offer ‘a group health plan or group health insurance coverage’ that provides ‘minimum essential coverage . . .’ [I]f a covered employer provides group health insurance but its plan fails to comply with ACA’s group-health-plan

Departments issued interim final rules which mainly focused on implementing aspects of the ACA and determining what would count as “preventive care.”<sup>51</sup> In this original bill draft, the ACA specified three categories of preventive care that health plans must cover. The ACA consulted the United States Preventive Task Force, an “independent panel of experts,” in deciding what specific preventive services should be covered by insurers.<sup>52</sup> These enumerated services did not include preventive care *specific to women*.<sup>53</sup>

In an effort to address women’s preventive health care needs, in 2011, Former Senator Barbara Mikulski introduced the Women’s Health Amendment (WHA), which is now codified into the ACA as Section 300gg–13(a)(4).<sup>54</sup> As a result of this amendment, “the preventive health services that group health plans must cover include, ‘with respect to women,’ ‘preventive care and screenings . . . provided for in comprehensive guidelines supported by [HRSA].’”<sup>55</sup> The statute does not define “preventive care and screenings,” nor does it include a list of those services.<sup>56</sup> Through the WHA, however, Congress gave HRSA the ability to decide what types of preventive care and screenings must be covered in insurance plans.<sup>57</sup>

Pursuant to Section 300gg–13(a)(4), HRSA consulted the Institute of Medicine (IOM),<sup>58</sup> now known as the National Academy of

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requirements, the employer may be required to pay \$100 per day for each affected “individual.””).

<sup>51</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2373.

<sup>52</sup> *Hobby Lobby*, 573 U.S. at 741 (Ginsburg, J., dissenting).

<sup>53</sup> *See id.*; *Little Sisters of the Poor*, 140 S. Ct. at 2401 (2020).

<sup>54</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2401 (citing 42 U.S.C. § 300gg–13(a)(4)).

<sup>55</sup> *Id.* Additionally, this one sentence of the federal mandate is what the Court interpreted in its opinion. *Id.* at 2379–80 (majority opinion).

<sup>56</sup> *Id.* at 2373 (citing *Hobby Lobby*, 573 U.S. at 697).

<sup>57</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2380. *See also* 26 C.F.R. § 54.9815-2713 (2014). *See About HRSA*, HEALTH RESOURCES & SERV. ADMIN. (Nov. 2021), <https://www.hrsa.gov/about/index.html> (stating that HRSA is a department dedicated to improving “health care to people who are geographically isolated, economically or medically vulnerable.”).

<sup>58</sup> INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 2 (2011). The IOM study lists several recommendations for women’s preventive healthcare needs, including contraceptive services, and how these services would benefit women’s health and well-being, such as avoiding unintended pregnancies, alleviating health issues, and effectively participating in family planning. The IOM recommended that the HRSA guidelines cover all FDA-approved contraceptive methods. *See Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting) (stating that IOM consisted of a panel of independent experts, including “specialists in disease prevention [and] women’s health,” who prepared an extensive report evaluating “the efficacy of a number of preventive services.”).

Medicine,<sup>59</sup> to determine what “preventive services are necessary for women’s health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women.”<sup>60</sup> After many rounds of guidance and recommendations about the services that would be covered, in 2011, HRSA promulgated the Women’s Preventive Services Guidelines,<sup>61</sup> which directed that health plans include “all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”<sup>62</sup> These regulations later became known as the “contraceptive mandate.”<sup>63</sup>

Along with contraception, the 2011 guidelines encompassed services such as well-woman visits, breastfeeding support, and annual checkups and screenings for breast cancer, cervical cancer, postpartum depression, and gestational diabetes as part of these recommended preventive services.<sup>64</sup> As a result of the WHA, “women cannot be charged more simply because they are women, nor can they be denied health insurance coverage because of a preexisting women’s health condition, such as breast cancer, pregnancy, or depression.”<sup>65</sup> Additionally, employers who do not comply with the contraceptive mandate may face penalties, including potential fines.<sup>66</sup>

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<sup>59</sup> See generally *About the National Academy of Medicine*, NAT’L ACAD. MED., <https://nam.edu/about-the-nam/> (last visited Aug. 15, 2021) (explaining that the National Academy of Medicine (NAM) is one of three academies that comprise the National Academies of Sciences, Engineering, and Medicine; NAM’s overall mission is “to improve health for all by advancing science, accelerating health equity, and providing independent, authoritative, and trusted advice nationally and globally”).

<sup>60</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting) (citing *Women’s Preventive Services Guidelines*, *supra* note 49).

<sup>61</sup> *Id.* at 2401-02 (Ginsburg, J., dissenting). The Women’s Preventive Services Guidelines, HRSA’s first set of guidelines, officially amended the original 2010 IFR, which mainly focused on implementing aspects of Section 300gg-13 and determining what would count as “preventive care services.” *Id.* at 2374 (majority opinion). The original 2010 IFRs did not include contraception or women’s preventive health care services. *Id.* at 2401-02 (Ginsburg, J., dissenting). See *Women’s Preventive Services Guidelines*, *supra* note 49.

<sup>62</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2402 (Ginsburg, J., dissenting) (alteration in original) (quoting 77 Fed. Reg. 8725 (2012)).

<sup>63</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2373.

<sup>64</sup> *Id.* at 2402 (Ginsburg, J., dissenting) (citing *Women’s Preventive Services Guidelines*, *supra* note 49); *Women’s Preventive Services Guidelines*, *supra* note 49 (“HRSA is supporting the IOM’s recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.”).

<sup>65</sup> *Affordable Care Act Improves Women’s Health*, OFF. WOMEN’S HEALTH, <https://www.womenshealth.gov/30-achievements/31> (last visited Sept. 21, 2021).

<sup>66</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2373 (citing 26 U.S.C. §§ 4980D(a)-(b)). See also §§ 4980H(a), (c)(1).

*B. The Promulgation of Interim Final Rules (IFRs) in an Effort to Modify the Contraceptive Mandate and Subsequent Litigation Around the Contraceptive Mandate*

Shortly after the passage of the ACA's contraceptive mandate, many employers and institutions objected to providing contraception to their employees.<sup>67</sup> The Departments received various comments and lawsuits from religious employers expressing their concern that the new guidelines would infringe on their religious freedoms if they were forced to include contraception in their health insurance plans.<sup>68</sup>

After formulating the 2011 IFR, which consisted of the contraceptive mandate, the Departments determined that it was permissible for HRSA to consider the views and beliefs of objecting employers and concluded that HRSA had the discretion to create accommodations in order to address the mandate's effect on said employers.<sup>69</sup> The Departments began issuing new interim rules, but the Departments did not create these rules pursuant to the notice and comment rulemaking process, "which the Administrative Procedure Act (APA) often requires before an agency's regulation can 'have the force and effect of law.'"<sup>70</sup> The Departments instead followed the APA's good cause exception, which allows an agency to circumvent the notice and comment process and promulgate IFRs that carry "immediate legal force."<sup>71</sup>

Moreover, the Departments interpreted HRSA's discretion to not only determine the extent to which HRSA "will provide for and support the coverage of additional women's preventive care and screenings," but also to "include the ability to exempt entities from coverage requirements."<sup>72</sup> Thus, by 2012, the Departments created an

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<sup>67</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2374.

<sup>68</sup> *Id.* See also Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 Fed. Reg. 46,623 (Aug. 3, 2011) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

<sup>69</sup> *Id.* at 2374 (citing Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the ACA, 76 Fed. Reg. at 46,623).

<sup>70</sup> *Id.* (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015)).

<sup>71</sup> *Id.* See also JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 2 (2016) ("The APA's 'good cause' exception(s) thus permits agencies to issue substantive rules that bind the public without following Section 553's notice and comment requirement and to waive the 30-day publication requirement.")

<sup>72</sup> Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,794 (Oct. 13, 2017) (codified at 26

exemption for religious employers and established a four-part test to identify which employers qualified under this exemption.<sup>73</sup> This became known as the “church exemption” because the last criterion required the entity to “be a church, an integrated auxiliary, a convention or association of churches, or ‘the exclusively religious activities of any religious order.’”<sup>74</sup> These guidelines were scheduled to go into effect in early August of 2012 and would exempt these organizations from the contraceptive mandate. Because this exemption narrowly applied to churches, non-profits such as the Little Sisters could not qualify under this exemption.<sup>75</sup> By February 2012, in response to complaints by certain non-profits, the Departments promulgated a final rule that temporarily prohibited the mandate’s guidelines from applying to some religious non-profit groups.<sup>76</sup> Many religious employers, including the Little Sisters, continued to file suit in the meantime.

The Departments noted that they intended to create new additional rules to better accommodate those non-profit organizations who could not qualify under the church exemption.<sup>77</sup> An interim final rule was then created in 2013 by the Departments, which became known as the “self-certification accommodation” process.<sup>78</sup> Here, the Departments re-defined what “religious employer” meant under the

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C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (explaining that “because the text refers to Guidelines ‘supported by HRSA for purposes of this paragraph,’ the Departments have consistently interpreted that authority to afford HRSA broad discretion to consider the requirements of coverage and cost-sharing in determining the nature and extent of preventive care and screenings recommended in the guidelines”).

<sup>73</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2374.

<sup>74</sup> *Id.* See generally Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (to be codified 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156) (outlining the criteria for the “church exemption” rule, stating that the 2011 IFR explained that “a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code”).

<sup>75</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2374 (citing Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725-26 (Feb. 15, 2012) (codified 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)). See also Lara Cartwright-Smith & Sara Rosenbaum, *Controversy, Contraception, and Conscience: Insurance Coverage Standards Under the Patient Protection and Affordable Care Act*, 127 PUB. HEALTH REPS. 541, 542 (2012).

<sup>76</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2374. Until that rule was created, the 2012 rule offered a temporary safeguard to protect the aforementioned non-exempted employers. This safe harbor protected non-profits “whose plans have consistently not covered all or the same subset of contraceptive services” due to religious reasons. *Id.* at 2374-75.

<sup>77</sup> *Id.* at 2374 (citing Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8727).

<sup>78</sup> *Id.* at 2375.

accommodation.<sup>79</sup> These new regulations defined religious organizations as organizations that “(1) [o]ppos[e] providing coverage for some or all of the contraceptive services . . . on account of religious objections; (2) [are] organized and operat[e] as . . . nonprofit entit[ies]; (3) hol[d] [themselves] out as . . . religious organization[s]; and (4) self-certif[y] that [they] satisf[y] the first three criteria.”<sup>80</sup> This accommodation process required an eligible organization to self-certify to HHS, their health insurance providers, or third-party administrators of their religious objections to contraception by providing “a copy of the self-certification form,” which then “would exclude contraceptive coverage from the group health plan and provide payments to beneficiaries for contraceptive services separate from the health plan.”<sup>81</sup> Therefore, under this accommodation, employees would be given separate payments for contraception through their insurance or the third-party provider without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.<sup>82</sup> Thus, religious employers would no longer be obligated to purchase contraceptive coverage and did not have to “contract, arrange, pay, or refer for contraceptive coverage.”<sup>83</sup> This process was specifically created to protect religious organizations while still ensuring that women had access to contraceptive services.

However, while some employers were satisfied with the accommodation, many religious employers, such as the Little Sisters, continued to oppose the new accommodation process as a violation of their religious beliefs. The Little Sisters challenged the self-certification accommodation, arguing that completing this certification form “would force them to violate their religious beliefs by ‘tak[ing] actions that directly cause *others* to provide contraception or appear to participate in

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (alteration in original) (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874) (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156)).

<sup>81</sup> *Id.* at 2375 (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,878).

<sup>82</sup> *See id.* (reasoning that the Departments had stated in the past that the accommodation sought to “‘[p]rotect[t]’ religious organizations ‘from having to contract, arrange, pay, or refer for [contraceptive] coverage’ in a way that was consistent with and did not violate the Religious Freedom Restoration Act of 1993 (RFRA)”); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682-83 (2014).

<sup>83</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2375. *See also* *Hobby Lobby*, 573 U.S. at 699 (citing Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,877).

the Department's delivery scheme."<sup>84</sup> By participating in the accommodation process, the Little Sisters argued that notifying their insurance or the government effectively triggers the coverage of their employees by someone else, which the Little Sisters believe makes them complicit in providing contraception.<sup>85</sup> While the Little Sisters continued litigating, other lawsuits regarding the contraceptive mandate made their way to the Supreme Court.

*C. The History and Outcome of Precedent Cases and the  
Departments' Attempt at Complying with These Decisions*

By 2013, many employers brought suits challenging the accommodation process and the contraceptive mandate itself, including the Little Sisters. In the 2014 case of *Burwell v. Hobby Lobby Stores, Inc.*,<sup>86</sup> the Supreme Court held that under the RFRA, closely held *for-profit* corporations were entitled to invoke the exemption if they had sincerely held religious objections to contraceptive coverage.<sup>87</sup>

The respondents in *Hobby Lobby*, owners of three closely held for-profit corporations,<sup>88</sup> opposed four methods of contraception that were covered by the contraceptive mandate.<sup>89</sup> Based on the respondents' individual Christian beliefs, such as the belief that life begins at

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<sup>84</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2376 (alteration in original) (citing *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1168 (10th Cir. 2015) (emphasis added)).

<sup>85</sup> See *Debrief: Little Sisters of the Poor v. Pennsylvania*, *supra* note 42; see also *Little Sisters of the Poor*, 140 S. Ct. at 2391 (Alito, J., concurring) ("The inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections.").

<sup>86</sup> 573 U.S. 682 ("The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the 'Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability' unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" (alteration in original) (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a)-(b))). HHS and the dissent in *Hobby Lobby* made several arguments to demonstrate that a for-profit corporation cannot "engage in the 'exercise of religion' within the meaning of RFRA." *Id.* at 713. The majority disagreed, however, citing various reasons for its holding, such as corporations being treated as "individuals" for RFRA purposes. *Id.* at 707-09.

<sup>87</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2383 (citing *Hobby Lobby*, 573 U.S. at 723-24).

<sup>88</sup> This case involved two families who owned companies; the Greens own the nationwide chain Hobby Lobby and the Hahns own Conestoga Wood Specialties. See *Hobby Lobby*, 573 U.S. at 700-02. Hobby Lobby is a privately held arts and crafts company owned by Evangelical Christians with more than 500 stores around the United States. *Id.* at 702. One of the Greens' sons also had an affiliated business called Mardel, which "operates 35 Christian bookstores and employs close to 400 people." *Id.* All of these companies are organized as for-profit corporations. *Id.* at 700, 702.

<sup>89</sup> *Id.* at 701-03.

conception, the respondents opposed providing certain methods of contraception to employees because the respondents believed it would make them “complicit in abortion.”<sup>90</sup> Thus, the respondents maintained that the mandate substantially burdened their free exercise and sought exemption from the contraceptive mandate as to the four objectionable contraceptive methods.<sup>91</sup>

The Court reasoned that the mandate substantially burdened the free exercise of for-profit corporations in forcing them to provide their employees with these contraceptive methods.<sup>92</sup> The Court also held that the contraceptive mandate did not utilize the least restrictive means of serving a compelling governmental interest, stating that the self-certification accommodation was “a less burdensome alternative.”<sup>93</sup> As a result, these companies could not be required to provide contraceptive coverage.

Then, in *Wheaton College v. Burwell*, the Court decided that an entity (in this case, a college) seeking an exemption did not need to file the accommodation form.<sup>94</sup> Rather, the entity’s notification to HHS was sufficient to receive the exemption. The Departments then promulgated a final rule in compliance with these rulings. Later, in *Zubik v. Burwell*,<sup>95</sup> the Supreme Court considered a challenge to the self-certification accommodation, in which employers argued that submitting the self-certification accommodation notice still constituted a substantial burden to the exercise of their religion.<sup>96</sup> The Court vacated and remanded the cases without deciding the RFRA question and resolving the legal issue.<sup>97</sup> Instead, the Court directed the parties “to attempt to come to an agreement.”<sup>98</sup> Because all parties here had accepted that an alternative approach was feasible, the Court directed

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<sup>90</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2377 (citing *Hobby Lobby*, 573 U.S. at 691, 720). The respondents challenged on the grounds that the mandate violated the RFRA, stating that “[i]f the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price.” *Hobby Lobby*, 573 U.S. at 691. In *Hobby Lobby*, the employers opposed four methods of contraception that “may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus,” such as emergency contraception and the “morning after pill,” methods that they believed constituted early abortion. *Id.* at 697-702.

<sup>91</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2377-78.

<sup>92</sup> *Id.* at 2370.

<sup>93</sup> *Id.* at 2377 (citing *Hobby Lobby*, 573 U.S. at 730-31).

<sup>94</sup> 134 S. Ct. 2806 (2014).

<sup>95</sup> 136 S. Ct. 1557 (2016) (per curiam).

<sup>96</sup> *Id.* at 1559.

<sup>97</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2388 (Alito, J., concurring).

<sup>98</sup> *Id.*

the government to “accommodat[e] petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.”<sup>99</sup>

After these decisions, the Departments initiated the task of reformulating rules regarding the contraceptive mandate.<sup>100</sup> The Departments reformulated the rules both under *Zubik*’s direction to accommodate religious employers, but also “against the backdrop of *Hobby Lobby*’s pronouncement that the mandate, standing alone, violated RFRA as applied to all religious entities with complicity-based objections.”<sup>101</sup> In 2016, the Departments ultimately decided that “no feasible approach” had been identified to comply with *Zubik*, the government could not find a way to sufficiently accommodate both parties.<sup>102</sup>

#### *D. Two Broad Exemptions Created in Light of Hobby Lobby and Zubik*

In 2017, the Departments again tried to comply with *Zubik* by promulgating the final rules that served as the motivation behind the *Little Sisters* litigation. The Departments carved out two broad exemptions for those employers who objected to the mandate on religious or moral grounds.<sup>103</sup> The exemptions extended to non-profit as well as for-profit employers, including publicly traded companies.<sup>104</sup>

The religious exemption ultimately expanded the original church exemption to include employers who object to the mandate

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<sup>99</sup> *Id.* at 2376 (majority opinion) (alteration in original) (citing *Zubik*, 136 S. Ct. at 1560). The Departments maintained that the self-certification accommodation was consistent with the RFRA “because it did not impose a substantial burden, and even if it did, it utilized the least restrictive means of achieving the Government’s interests.” However, after the case was remanded, the Departments attempted to create rules that complied with both *Hobby Lobby* and *Zubik*. *Id.* at 2377.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* The *Little Sisters* and other religious employers continued to object to participating in any behavior that would result in their employees obtaining contraception under their insurance plans, and the Departments maintained that there was no other way of providing contraceptive coverage to employees without using the employer’s plan, issuer, or third-party administrator. *Id.* (Alito, J., concurring). See also Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,545-46 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

<sup>103</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2377-78.

<sup>104</sup> *Id.* The self-certification accommodation is still optional under the Court’s decision, but employers do not have to utilize the accommodation, meaning they can be exempted altogether if they hold “sincerely held religious or moral beliefs.” *Id.* at 2399-2400 (Kagan, J., concurring).

“based on its sincerely held religious beliefs.”<sup>105</sup> Because these employers were exempt, they did not have to use the accommodation process, which was still available under the new exemptions.<sup>106</sup> As with the prior IFRs, the Departments again invoked Section 300gg–13(a)(4) as authority to promulgate the “religious exemption.”<sup>107</sup> The Departments maintained that Section 300gg–13(a)(4) included the ability to exempt entities from coverage requirements.<sup>108</sup> The Departments further maintained that RFRA “compelled the creation of, or at least provided the discretion to create, the religious exemption.”<sup>109</sup> The Departments believed that the Court’s reasoning in *Hobby Lobby* extends “for the purposes of analyzing a substantial burden,” which includes the burdens that an entity would face in “participating in the self-certification accommodation process.”<sup>110</sup>

The second rule created a moral exemption for employers who objected on moral grounds “to providing some or all forms of contraceptive coverage.”<sup>111</sup> This exemption also extended to non-profits and for-profits with no publicly traded components.<sup>112</sup> The Departments invoked their authority under the ACA to create the moral exemption as well.<sup>113</sup> As a result, the broad exemptions allow *any* employer or entity

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<sup>105</sup> *Id.* at 2370 (majority opinion). *See also* 45 C.F.R. § 147.132 (2021).

<sup>106</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2377 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,806 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)).

<sup>107</sup> *Id.* (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,794).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2377 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,800-06). The Departments explained: “We know from *Hobby Lobby* that, in the absence of any accommodation, the contraceptive-coverage requirement imposes a substantial burden on certain objecting employers. We know from other lawsuits and public comments that many religious entities have objections to complying with the [self-certification] accommodation based on their sincerely held religious beliefs.” *Id.* at 2377-78 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,806).

<sup>110</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2378 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,800).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,844).

with religious or moral beliefs to completely opt out of the contraceptive mandate.<sup>114</sup>

### III. COURT'S REASONING

The Supreme Court reversed the Third Circuit's judgment and remanded the case with instructions to end the nationwide preliminary injunction.<sup>115</sup> The Court determined whether the ACA permits the federal government to create rules exempting employers who hold religious or moral beliefs from providing contraceptive coverage in their employee health plans. The Court specifically addressed two issues: (1) whether the Departments had the statutory authority under the ACA to promulgate the exemptions, and (2) whether the Departments procedurally complied with federal laws governing the administrative agency rulemaking process when promulgating the exemptions.<sup>116</sup> The Court found that the two exemptions were substantively and procedurally valid, holding that the Departments had the authority pursuant to the ACA to create the religious and moral blanket exemptions from the contraceptive mandate and that the Departments also complied with the Administrative Procedure Act's (APA) procedural requirements.<sup>117</sup> In a footnote, the majority also held that the Little Sisters had standing in this case.<sup>118</sup> The Court also found that the ACA gave the Departments the authority to promulgate these rules, so the Court did not consider the issue of whether RFRA required or authorized the exceptions.<sup>119</sup> Nevertheless, Justice Thomas believes that "that the contraceptive mandate is capable of violating RFRA."<sup>120</sup>

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<sup>114</sup> *Id.* (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,802, 47,810-11, 47,850, 47,861-62).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2379, 2384.

<sup>117</sup> *Id.* at 2386.

<sup>118</sup> *Id.* at 2379 n.6.

<sup>119</sup> *Id.* at 2382.

<sup>120</sup> *Id.* at 2383. See also *Affordable Care Act — Contraceptive Mandate — Religious Exemptions — Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 134 HARV. L. REV. 560, 563 (2020) (citing *Little Sisters of the Poor*, 140 S. Ct. at 2383) (discussing Justice Thomas' rejection of the states' claims that the agencies could not consider RFRA when formulating the religious exemption because RFRA applies to all Federal law unless Congress explicitly excluded a statute from RFRA's reach)).

Writing for the majority, Justice Clarence Thomas agreed with the Departments,<sup>121</sup> and used the plain language of the statute to reject the states' claims.<sup>122</sup> The issue turned on an interpretation of what exactly HRSA can "provide for."<sup>123</sup> The Court interpreted "as provided for" in the statute to be a broad grant of authority and discretion to determine what counts as preventive care and screenings.<sup>124</sup> Justice Thomas writes: "On its face . . . the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover."<sup>125</sup> Justice Thomas further supports his decision by reasoning that the statute does not contain "an exhaustive or illustrative list of the preventive care and screenings" and is silent as to what the comprehensive guidelines must contain or how HRSA must create them.<sup>126</sup> Thus, Thomas writes, this same authority that empowers HRSA to decide *what* preventive care to include also "include[es] the ability for HRSA to identify and craft exemptions from its own Guidelines."<sup>127</sup> The Court further reasons in a footnote that the Court's decisions in *Hobby Lobby* and *Zubik* support the idea that the ACA statute empowered HRSA to create the exemptions since the Departments had the authority to create the initial church exemption as well as the 2013 self-certification accommodation.<sup>128</sup>

As for the second issue, the Court ruled that the Trump administration met the procedural requirements outlined in the APA

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<sup>121</sup> The Departments argued that the phrase "as provided for" permits HRSA "to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers' religious objections." *Little Sisters of the Poor*, 140 S. Ct. at 2380 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 FR 57,536, 57,540-41 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)). The Departments also maintained that such as with the Church exemption, "their role as the administering agencies permits them to guide HRSA in its discretion . . .". *Id.* (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,794 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)).

<sup>122</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2380. The States, on the other hand, argued that Section 300gg-13(a)(4) of the ACA allowed HRSA "to only list the preventive care and screenings that health plans 'shall . . . provide,' not to exempt entities from covering those identified services." *Id.*

<sup>123</sup> *Id.* at 2397 (Kagan, J., concurring).

<sup>124</sup> *Id.* at 2379-80 (majority opinion).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2380.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2381 n.7. The Court explains that "it would be passing strange for this Court to direct the Departments to make such an accommodation if it thought the ACA did not authorize one." *Id.*

when enacting the two exemptions.<sup>129</sup> The Court found that the Departments had not violated the APA's procedural requirements. The states argued that the rulemaking procedure for the exemptions was defective because the Departments named the relevant document "Interim Final Rules with Request for Comments" instead of "General Notice of Proposed Rulemaking."<sup>130</sup> The Court, however, ruled that the 2017 IFR's request for comments "readily satisfied the APA notice requirements,"<sup>131</sup> as the request explained the Departments' view that they had authority both under the ACA and under the RFRA to promulgate the exemptions.<sup>132</sup> Thus, Justice Thomas opined that the exemptions "contained all of the elements of a notice of proposed rulemaking as required by the APA."<sup>133</sup> The Court went on to say that even if the Departments were required to publish a document called "notice of proposed rulemaking," there was no "prejudicial error."<sup>134</sup>

Additionally, Justice Thomas rejected the "open-mindedness test" argued by the Respondents and upheld by the Third Circuit.<sup>135</sup> Justice Thomas notes that the "open-mindedness" test has "no basis in the APA," and instead, focused on the APA's objective criteria.<sup>136</sup> Thus, the Court held that each of the APA's procedural requirements was satisfied: The Departments "'request[ed] and encourage[ed] public comments on all matters addressed' in the rules;" the Departments "'gave interested parties 60 days to submit comments;" the final rules contained a "concise statement on their basis and purpose;" and the final

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<sup>129</sup> *Id.* at 2384.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (citing 5 U.S.C. § 553(b)) ("[T]he APA requires agencies to publish a notice of proposed rulemaking in the Federal Register before promulgating a rule that has legal force."). *See also id.* at 2384 (citing §§ 553(b)(2)-(3)).

<sup>132</sup> *Id.* at 2384 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,794, 47,844, 47,800-06 (Oct. 13, 2017) (codified at 26 C.F.R pt. 54, 29 C.F.R pt. 2590, 45 C.F.R pt. 147)). Justice Thomas maintained that the Departments issued an IFR that discussed "its position in fulsome detail and 'provide[d] the public with an opportunity to comment on whether [the] regulations . . . should be permanent or subject to modification'"). *Id.* (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,815, 47,852, 47,855).

<sup>133</sup> *Id.* at 2384.

<sup>134</sup> *Id.* at 2385.

<sup>135</sup> *Id.* Respondents argued that the final rules made small changes to the IFRs, "leaving their substance unchanged." *Id.* The Third Circuit also used this test, maintaining that the final rules were "'virtually identical' to the IFRs" and thus, the Departments did not have the "requisite 'flexible and open-minded attitude' when they promulgated the final rules." *Id.* (citing *Pennsylvania v. President U.S.*, 930 F.3d 543, 569 (3d Cir. 2019)).

<sup>136</sup> *Id.* at 2385-86 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)).

rules were published in November 2018 and became effective in January 2019, “more than 30 days after being published.”<sup>137</sup>

Justice Alito concurred with the Court’s decision, reasoning that the Court should have gone further and should have ruled that the exemptions were valid under RFRA.<sup>138</sup> He stated: “RFRA compels an exemption for the Little Sisters and any other employer” to the mandate, and thus, would hold that the exemptions are not arbitrary and capricious for this reason.<sup>139</sup> Furthermore, Justice Alito believes that requiring religious employers to comply with the mandate would violate the RFRA and impose a substantial burden on employers since the Little Sisters “have a sincere religious objection to the use of contraceptives and [they] also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct.”<sup>140</sup> Lastly, Justice Alito maintained that there are many exceptions in the ACA that already exclude many people from the contraceptive mandate (such as excluding those working for employers with fifty employees or less or those who do not work outside of the home); that Congress did not mandate coverage in the ACA itself but left it to the government to decide; and that ensuring women have access to seamless no-cost contraception is not a compelling governmental interest, and even if it were, the mandate was not the “least restrictive means” of carrying this interest out.<sup>141</sup>

Justice Kagan also offered a concurring opinion, maintaining that the ACA’s language granting HRSA’s authority was ambiguous.<sup>142</sup> Justice Kagan reasoned that it is difficult to determine what Congress intended, and thus, the *Chevron* Doctrine should apply, which “instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency.”<sup>143</sup> She further maintained

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<sup>137</sup> *Id.* at 2386 (citing Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,813, 47,854, 47,792, 47,838 (Oct. 13, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 FR 57,592, 57,537-38 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)).

<sup>138</sup> *Id.* at 2387 (Alito, J., concurring).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2390.

<sup>141</sup> *Id.* at 2393-94.

<sup>142</sup> *Id.* at 2397 (Kagan, J., concurring).

<sup>143</sup> *Id.* at 2397 (“Sometimes when I squint, I read the law as giving HRSA discretion over all coverage issues . . . At other times, I see the statute as putting the agency in charge of only the ‘what’ question, and not the ‘who.’”). See generally VALERIE C. BRANNON & JARED P. COLE,

that *Chevron* should be used because “the agency’s expertise often enables a sounder assessment of which reading best fits the statutory scheme.”<sup>144</sup> However, even with this reading, Justice Kagan questioned whether the exemptions are arbitrary and capricious and would have remanded for the lower courts to decide on this issue.<sup>145</sup>

Justice Ginsburg offered a dissenting opinion, joined by Justice Sotomayor, focusing on the impact that the Court’s ruling will have on women in the long term. Justice Ginsburg reasoned that the Court reached the wrong conclusion.<sup>146</sup> First, she maintained that the plain language of the ACA authorizes HRSA to decide *only* the “type” of women’s health services, not to carve out exemptions and ultimately undermine the statutory directive to produce those services at a minimum.<sup>147</sup> Justice Ginsburg also found that the exemptions were not required nor authorized by RFRA.<sup>148</sup> Justice Ginsburg recognized that religious accommodations and exemptions may be carved out to cure violations of RFRA, but only to the extent that they do not substantially burden nonbeneficiaries.<sup>149</sup> Based on the concerns for women employees, their dependents, and students, Justice Ginsburg concluded the Court should have come to a different conclusion.

#### IV. LEGAL ANALYSIS

##### A. *The Court Failed to Adequately Weigh the Exemptions’ Harm to Women Employees*

While the Court did not deny that women would be adversely impacted by the broad religious and moral exemptions, the Court nevertheless upheld the exemptions to the detriment of women employees across the country. As Justice Ginsburg noted, “the Court casts totally aside countervailing rights and interests in its zeal to secure

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CHEVRON DEFERENCE: A PRIMER 1, 5 (CONG. RES. SERV. 2017) (stating that much deference is captured in the APA and afforded to agencies when they are interpreting their governing statutes; the *Chevron* Doctrine specifies that if the court finds that the statute is silent or ambiguous regarding the specific issue, the reviewing court must consider whether the agency’s action was based on a permissible or reasonable interpretation of the statute at issue).

<sup>144</sup> *Id.* at 2397 (citing *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

<sup>145</sup> *Id.* at 2399. *See infra* Section IV.C.

<sup>146</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

<sup>147</sup> *Id.* at 2405 (citing 42 U.S.C. § 300gg–13(a)(4) (stating that “[A] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a *minimum* provide . . . .”) (emphasis added)).

<sup>148</sup> *Id.* at 2409.

<sup>149</sup> *Id.* at 2407.

religious rights to the *n*th degree.”<sup>150</sup> The Court failed to effectively analyze how it can respect the beliefs of religious employers while protecting employees who do not share in those beliefs, and the Court should have adequately balanced these two rights.

The Court’s holding will ultimately result in many women losing access to no-cost contraception through their health insurance plans. It is reported that “more than 2.9 million Americans – including approximately 580,000 women of childbearing age – receive insurance through organizations *newly eligible* for the Court’s blanket exemptions.”<sup>151</sup> The government also estimates that “between 70,500 and 126,400 women of childbearing age . . . will experience the disappearance of the contraceptive coverage formerly available to them,” and “the numbers may be even higher.”<sup>152</sup> Accordingly, the Court’s decision will impact thousands of women in this country, specifically in terms of the adverse impact on women’s overall health and well-being; their social and economic status; and their ability to function fully as citizens in democratic society, particularly as full and equal members of the market and labor force.

In general, courts have moved away from looking at adverse impact as a way to establish a constitutional claim. The Court typically wants to see animus and intentional discrimination on the party’s part.<sup>153</sup>

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<sup>150</sup> *Id.* at 2400.

<sup>151</sup> *Id.* at 2403 (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,577-78 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)). *See also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting) (writing that “[T]housands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ” are affected by the Court’s decision).

<sup>152</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2408 (Ginsburg, J., dissenting) (citing 83 Fed. Reg. 57578–57580). *See also* *Contraceptive Use in the United States*, GUTTMACHER INST. (Oct. 2015), [https://www.guttmacher.org/sites/default/files/pdfs/pubs/fb\\_contr\\_use.pdf](https://www.guttmacher.org/sites/default/files/pdfs/pubs/fb_contr_use.pdf) (stating birth control is used nearly universally by women of reproductive age in the United States); *The Affordable Care Act’s Birth Control Benefit: Too Important to Lose Fact Sheet*, NAT’L WOMEN’S L. CTR. (May 2017), <https://nwlc.org/wp-content/uploads/2017/05/BC-Benefit-Whats-At-Stake.pdf> (citing PERRYUNDEM, CONTRACEPTIVES + POLICY THROUGH A GENDER LENS, RESULTS FROM A NATIONAL SURVEY 17 (2017)) (reporting that women are consistently using their insurance coverage to access contraceptive services and a 2017 poll found that over seventy-seven percent of women want the birth control benefit to continue).

<sup>153</sup> *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (“Title VII prohibits both intentional discrimination (known as ‘disparate treatment’) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as ‘disparate impact’)”); *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) (holding Title VII’s purpose was to prohibit employment discrimination and thus barred both intentional discrimination in employment as well as unintended disparate impact resulting from employment policies); U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973); City of

Thus, disparate impact analysis and third-party harm analysis based on race and sex have been on the wane for some time now.<sup>154</sup> However, the Court, as articulated in several other cases, is extremely deferential to religious groups in determining whether they hold sincerely held religious beliefs, usually finding that those views are reasonable.<sup>155</sup> Overall, as it is currently composed, the Court continues to favor and sympathize with religious liberty over other rights, often to the detriment of others.

For example, in many of the cases regarding the re-opening of churches during the Covid-19 global pandemic, the Court has been highly deferential to churches and houses of worship, partially relying on adverse impact when deciding these cases. *South Bay United Pentecostal Church v. Newsom*<sup>156</sup> and *Roman Catholic Diocese of Brooklyn v. Cuomo*<sup>157</sup> deal with the issue of whether state regulations that restrict attendance at churches and religious services should be

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*Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996). *But see* *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (upholding a policy that had adverse impacts on Black applicants because racially disparate impact is not enough to say there is discriminatory purpose; the Court found a legitimate governmental interest in policy, so pursuing that policy in spite of adverse impact to achieve some other benign objective was permissible); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979) (holding that the policy at issue was upheld despite it disproportionately favoring men over women because there was no intent or discriminatory purpose in favoring men, but rather the purpose was to benefit veterans in terms of availability of employment opportunities, and adverse impact on women was incidental to that purpose); *Dep’t of Homeland Sec. v. Regents of the U. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (holding that former President Trump’s negative comments towards immigrants and Latinos “fail to raise a plausible inference that the rescission [of DACA] was motivated by animus,” as they were made “remote in time and [in] unrelated contexts”).

<sup>154</sup> See *Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2187 (2021) (“The Court will find a compelling governmental interest only in preventing a circumscribed range of harms that the Court has previously recognized as especially suspect.”).

<sup>155</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 720 (1981) (holding that the Free Exercise Clause required a state to provide unemployment compensation benefits to employee who quit his job due to his belief that his religion forbade him from participating in the line of work of producing weapons); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1731 (2018); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

<sup>156</sup> 141 S. Ct. 716 (2021). This challenge was brought by a California church which sought a lower court order allowing it to hold in-person services, despite a state-wide order requiring places of worship to hold services virtually/online to prevent the spread of the Coronavirus. The State’s order forbade “any kind of indoor worship.” *Id.* at 717.

<sup>157</sup> 141 S. Ct. 63 (2020) (granting preliminary injunction and enjoining the Governor’s restrictions on religious services because applicants showed likelihood of succeeding on First Amendment claims, and because denying relief would lead to irreparable harm while granting such relief would not harm public interest). The Court stated that the state’s regulations resulted in disparate treatment against churches and that “the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.” *Id.* at 66.

suspended. The Court sided with the church in both cases, reasoning that the states cannot enforce the complete prohibition on indoor worship services.<sup>158</sup> Many of the Justices on the Court, however, would have forced the states to reopen churches at greater or full capacity, relying on the adverse impact that state policies may have on worshippers and churchgoers.<sup>159</sup>

Moreover, although religion is at the core of many cases like *Hobby Lobby*, the majority does not discuss third-party harms under the Establishment Clause in *Little Sisters*. The third-party harm principle stands for the proposition that although the government “may ‘accommodate religion beyond free exercise requirements,’ when it does so, it may not benefit religious adherents at the expense of the rights of third parties.”<sup>160</sup> In several cases, the Court has upheld or granted religious accommodations, “but only insofar as they did not impose too heavy a burden on unwitting third parties.”<sup>161</sup>

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<sup>158</sup> *Newsom*, 141 S. Ct. at 716; *Cuomo*, 141 S. Ct. at 63.

<sup>159</sup> *See Newsom*, 141 S. Ct. at 716. Justice Thomas and Justice Gorsuch would grant the application in full. *See id.* at 719-20 (Gorsuch, J., concurring) (“California singles out religion . . . . In my view, the State must do more to tailor the requirements of public health to the rights of its people.”). *But see id.* at 720 (Kagan, J., dissenting) (“The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State’s policies treat worship just as favorably as secular activities that . . . pose the same risk of COVID transmission”).

<sup>160</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2408 (2020) (Ginsburg, J., dissenting) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (holding that courts must take “adequate account” of “the burdens a requested accommodation may impose on nonbeneficiaries”)). *See also* Brief for the Church-State Scholars as Amici Curiae Supporting Respondents, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454); *Reframing the Harm*, *supra* note 154 at 2186 (citing Douglas NeJaime & Reva B. Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, in *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* 69, 74 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019)).

<sup>161</sup> *Affordable Care Act — Contraceptive Mandate*, *supra* note 120, at 560. Whether granting or denying exemptions, the Court had frequently considered third-party harms in its analysis. *See Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (creating an exemption for a Seventh-day Adventist employee to obtain unemployment benefits despite rejecting jobs that required her to work on her Sabbath, utilizing a third-party harm analysis and recognizing that such an exemption would not “abridge any other person’s religious liberties”); *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) (upholding a religious exemption that permitted Amish parents to remove their children from school so long as their children were not harmed by the exemption, explaining that the exemption interfered “with no rights or interests of others”); *United States v. Lee*, 455 U.S. 252, 261 (1982) (denying exemption to Amish employer because “granting an exemption from social security taxes . . . operates to impose the employer’s religious faith on the employees”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating a state law that allows workers the right not to work on their Sabbath because the law had disregarded the effect it would have on employers and other employees); *Cutter*, 544 U.S. at

The Court considered third-party harms in *Hobby Lobby* and *Zubik*, two precedent cases to *Little Sisters*.<sup>162</sup> The holdings of *Hobby Lobby* and *Zubik* turned on the fact that women employees would not be impacted by the accommodation and would continue to have seamless access to cost-free contraceptive coverage.<sup>163</sup> The Court should have used the third-party harm analysis under the Establishment Clause that it had committed to in prior cases, especially in light of the fact that the new exemptions will have far reaching implications on hundreds of thousands of women employees, which is “exactly the type of consequence that recognizing third-party harms was intended to guard against.”<sup>164</sup> But the Court departed from this approach, signaling that third-party harms “will no longer serve as a check on” the accommodations at issue in *Little Sisters*.<sup>165</sup>

Justice Thomas rejected a third-party harm consideration, stating that whether women would be impacted was a policy concern that “cannot justify supplanting the text’s plain meaning” and is a concern better suited for Congress.<sup>166</sup> Justice Thomas diverges from a long history of third-party harm precedent, without coming to any conclusions about RFRA in the majority opinion. This comes as no

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710 (“An accommodation must be measured so that it does not override other significant interests.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (granting a religious exemption only insofar as the accommodation would have no effect on female employees).

<sup>162</sup> *Affordable Care Act — Contraceptive Mandate*, *supra* note 120, at 567 (“[T]he Court abandoned the balance it struck in *Hobby Lobby* and abstained from the third-party harm analysis that has long shaped its religious accommodation jurisprudence.”).

<sup>163</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2407 (Ginsburg, J., dissenting). *See Hobby Lobby*, 573 U.S. at 693 (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”); *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (stating that the government had to ensure that not only were objecting employers’ needs met, it must also ensure that women covered by petitioners’ health plans “receive full and equal health coverage, including contraceptive coverage”).

<sup>164</sup> *Affordable Care Act — Contraceptive Mandate*, *supra* note 120, at 567-68.

<sup>165</sup> *Id.* at 565 (“By allowing the exemptions to stand without even a discussion of negative externalities, the Court . . . implicitly undermined a doctrine of third-party harms that has long provided a limiting principle in cases where religious freedom and other rights clash.”). *But see* Gene Schaerr & Michael Worley, *The “Third Party Harm Rule”: Law or Wishful Thinking?*, 17 *GEO. J.L. & PUB. POL’Y* 629, 641 (2019) (explaining that the Supreme Court has repeatedly “rejected Establishment Clause challenges to religious exemptions of any kind” and successful challenges fail to provide “for a general ‘rule against third-party harms’”).

<sup>166</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2381. Justice Thomas defends religion in a way that is not extended to women’s health care coverage, writing: “[T]he Little Sisters have engaged in faithful service and sacrifice . . . But for the past seven years, they . . . have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs.” *Id.* at 2386. In Justice Thomas’ majority opinion, which was over 4,000 words, the words “women” and “woman” are only mentioned seven times, even though the statute that was being analyzed by the Court contained the word “women” within the text itself. *Id.* at 2367-88.

surprise since Justice Thomas is not inclined to give much weight to precedent decisions.<sup>167</sup> Furthermore, Justice Alito also fails to analyze the third-party harm principle under RFRA, which is nevertheless “subject to the limits” of the Establishment Clause.<sup>168</sup> Justice Alito maintains that there was no “burden” on those employees no longer able to obtain contraception through the mandate because those employees were “simply not the beneficiar[ies] of something that federal law does not provide,” yet he concurrently recognized that there would be employees who would be burdened by the exemptions.<sup>169</sup>

He further contradicts himself when he discusses the financial burden to employers if they do not comply with the mandate, stating, “[W]e found these ‘severe’ financial consequences sufficient to show that the practical effect of non-compliance would be ‘substantial,’” yet altogether excludes a discussion of the financial burden women would incur if no longer provided with cost-free services under the mandate.<sup>170</sup>

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<sup>167</sup> See Jeremy Rozansky, *Precedent and the Conservative Court*, 46 NAT’L AFFS. 34 (2021), <https://nationalaffairs.com/publications/detail/precedent-and-the-conservative-test>; Jonathan Stempel, *Justice Thomas urges U.S. Supreme Court to feel free to reverse precedents*, REUTERS (June 17, 2019, 3:46 PM), <https://www.reuters.com/article/us-usa-court-thomas-idUSKCN1TI2KJ> (writing that Justice Thomas “has long expressed a greater willingness than his colleagues to overrule precedents”); Tom Goldstein, *Justice Thomas and Constitutional “Stare Decisis,”* SCOTUSBLOG (Oct. 8, 2007, 4:42 PM), <https://www.scotusblog.com/2007/10/justice-thomas-and-constitutional-stare-decisis/> (opining that Justice Thomas “thinks that, in the field of constitutional law, precedent is not entitled to any weight”).

<sup>168</sup> *Reframing the Harm*, *supra* note 154 (citing Brief for the Church-State Scholars, *supra* note 160, at 2367). See generally Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 343, 347 (2014) (“RFRA’s compliance with the Establishment Clause is [a] threshold requirement not unlike subject matter jurisdiction.”).

<sup>169</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2396 (Alito, J., concurring). See also *Reframing the Harm*, *supra* note 154, at 2188 (stating that conservative justices on the Court have shifted their view of a third-party harm analysis from one that was a framework of general applicability to one that “asks whether the harm is one that implicates a constitutionally protected” right).

<sup>170</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2390 (Alito, J., concurring). See generally Brief for National Women’s Law Center, et al. as Amici Curiae Supporting Respondents at 15-16, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-454, 19-431) (citing Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL’Y REV. 7, 10 (2011) (finding that the cost of contraception without insurance coverage is significant and that “cost is a major determinant of whether people obtain contraceptive care”)); GENERATION PROGRESS & ADVOCATES FOR YOUTH, PROTECTING BIRTH CONTROL COVERAGE FOR YOUNG PEOPLE 1 (2015), <https://www.advocatesforyouth.org/wp-content/uploads/storage/advfy/documents/Factsheets/protecting%20birth%20control%20coverage%20factsheet-2-18-15.pdf> (reporting that prior to ACA’s enactment more than fifty-five percent of young women said they experienced a time when they could not afford contraception).

Additionally, while Justice Alito in *Hobby Lobby* stated that “racially discriminatory religious exemptions would never be permissible,”<sup>171</sup> as he has maintained in other cases, he fails to consider how the Court’s decision would disproportionately and distinctly impact women of color.<sup>172</sup> The views of Justices Thomas and Alito appear in other cases as well, and the minute attention given to women and women’s health concerns continue to permeate in both written opinion and oral arguments.<sup>173</sup>

Ultimately, Justice Alito and other conservative Justices did not weigh women’s rights and reproductive rights as strongly as religious rights because they are not text-based. Because *Little Sisters* deals with the First Amendment and the Free Exercise Clause, which is found in the Constitution, textualists like Justice Gorsuch or originalists like Justice Thomas would find that protecting religious rights, as in this case, is a vibrant constitutional interest that weighs heavily. On the other hand, the right to access contraception is not, since that right is derived from a privacy right, which many Justices do not think exists in the Constitution.<sup>174</sup> The overall deference given to religion signals that the current Court is developing First Amendment Free Exercise

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consistently); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 742 (2014) (Ginsburg, J., dissenting) (“Women paid significantly more than men for preventive care . . . cost barriers operated to block many women from obtaining needed care at all.”); 155 CONG. REC. 28837, 28844 (2009) (“When [women] had to choose between feeding their children, paying the rent, and meeting other financial obligations, they skipped important preventive screenings and took a chance with their personal health.”).

<sup>171</sup> *Reframing the Harm*, *supra* note 154, at 2196 (“Justice Alito in *Hobby Lobby* explicitly stated that racially discriminatory religious exemptions would never be permissible . . . While the Court did not offer similar assurance in *Little Sisters*, there is also no evidence that the conservative Justices have changed their minds on this point.”).

<sup>172</sup> See Brief for Nat’l Women’s L. Ctr., et al., *supra* note 170, at 12-14 (stating that women of color will be particularly harmed by the exemptions and the exemptions will further exacerbate health disparities); Brief for Howard University School of Law as Amici Curiae Supporting Respondents at 2, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-454, 19-431) (explaining that the exemptions “build[] upon the various barriers that already face African-American women seeking to avail themselves of comprehensive health care and, thus, threatens to exacerbate existing disparities”).

<sup>173</sup> See, e.g., RACHEL VANSICKLE-WARD & KEVIN WALLSTEN, *THE POLITICS OF THE PILL*, 90 (Oxford Univ. Press, 2019). In the *Hobby Lobby* opinion, the focus was framed around religious liberty, and the mentions of “religion” and “religious” far outweighed mentions of “women” and “woman.” *Id.* at 91. Statements made concerning religion constituted 39% of the opinion, and statements made concerning economics were 44%, while reproductive and women’s rights-related statements constituted a total of 3%. *Id.*

<sup>174</sup> See *Little Sisters of the Poor*, 140 S. Ct. at 2396 (Alito, J., concurring).

Jurisprudence that is increasing, concerning, and largely exclusive of third-party harm considerations.<sup>175</sup>

All in all, assuming the ACA permits reasonable accommodations to be carved out pursuant to administrative or regulatory practices, a meaningful limitation should nevertheless be implemented when third parties are harmed. The harm to women employees and their dependents under their employee health plans should place a restriction on the government's ability to create these broad exemptions.<sup>176</sup> And while the Court did not consider a disparate impact analysis or undue burden analysis<sup>177</sup>, this remains an open question for the women employees affected by *Little Sisters*.<sup>178</sup> The Court has visited similar issues in the past, particularly regarding whether the Rehabilitation Act, and by extension the ACA, "provides a disparate-impact cause of action for plaintiffs alleging disability

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<sup>175</sup> See *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1784 (2021); Steven K. Green, *How the Supreme Court Found Its Faith and Put 'Religious Liberty' on a Winning Streak*, THE CONVERSATION (Apr. 13, 2021, 8:38 AM), <https://theconversation.com/how-the-supreme-court-found-its-faith-and-put-religious-liberty-on-a-winning-streak-158509>.

<sup>176</sup> *Debrief: Little Sisters of the Poor v. Pennsylvania*, *supra* note 42.

<sup>177</sup> See, e.g., DEP'T OF JUST., TITLE VI LEGAL MANUAL § VII, at 2 (2021) ("While a discriminatory impact or effect may also be evidence of intentional discrimination or disparate treatment, this section discusses disparate impact as a cause of action independent of any intent."); Michael C. Harper, *Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in Young v. UPS and EEOC v. Abercrombie & Fitch, Inc.*, 96 B.U. L. REV. 543, 543 (2016) (highlighting the difference between disparate impact and disparate treatment). Although many civil rights laws do not in themselves have disparate impact provisions, the government may nevertheless make these claims. Similarly, an undue burden analysis has been utilized in other contexts outside of the abortion line of cases, such as voting rights or Second Amendment cases. See, e.g., Brief for Appellant at 55, *McCoy v. Desantis*, No. 20-12304 (N.D. Fla. Oct. 21, 2020) (arguing that the court should have applied an undue burden standard when analyzing Appellant's gender-based claims under the Fourteenth Amendment and Nineteenth Amendment); *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> (last visited Feb. 10, 2022) (discussing the *Anderson-Burdick* line of cases which "requires courts to weigh burdens that a state imposes on electoral participation against the state's asserted benefits"); *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) (applying a substantial burden analysis to the Second Amendment right to bear arms).

<sup>178</sup> See Zach Smith et al., *Little Sisters of Poor Win Big at Supreme Court, but Fight Isn't Over*, HERITAGE FOUND. (July 9, 2020), <https://www.heritage.org/religious-liberty/commentary/little-sisters-poor-win-big-supreme-court-fight-isnt-over>. It could also be argued that other alternative practices would have a significantly less disparate impact on women. See *supra* Section IV.B.i.

discrimination,”<sup>179</sup> which could signify that *Little Sisters* and its discriminatory effect may be revisited in the near future after all.

*B. The Court Should Have Adhered to Legal Precedent and Given Greater Weight to the Women’s Health Amendment*

The Court should have considered public policy concerns, the legislative record, and legal precedent when it interpreted the ACA’s text and came to its conclusion.<sup>180</sup>

*i. The Court Was Wrong for Departing from Hobby Lobby and Zubik*

The Court’s holding significantly drifted from precedent decisions like *Hobby Lobby*, which came to its conclusion under a RFRA analysis. And while the Court in *Little Sisters* did not reach the RFRA issue, Justice Thomas nevertheless maintained that RFRA could compel the creation of the broad exemptions to protect employers’ religious rights.<sup>181</sup> Justice Alito’s concurrence is dedicated to a RFRA analysis,<sup>182</sup> maintaining that the contraceptive mandate violated RFRA since (1) the mandate substantially burdened an employer’s exercise of religion since the employer would have to pay fines if they do not comply with the mandate and the employer has a sincere religious belief that “compliance with the mandate (through the accommodation or otherwise) makes it complicit” in providing contraception to employees “to which the employer has a religious objection;” (2) providing free contraception to all women was not a compelling interest for different reasons; and (3) the accommodation would not satisfy the “least

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<sup>179</sup> Petition for Writ of Certiorari at I, *CVS Pharm. v. Doe*, No. 20-1374, 2021 U.S. LEXIS 3572 (2021); *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 2021 U.S. LEXIS 3572 (U.S. July 2, 2021) (No. 20-1374). *CVS Pharmacy v. Doe* will no longer be argued as both parties agreed to dismiss the writ of certiorari. Joint Stipulation to Dismiss at I, *CVS Pharm. v. Doe*, No. 20-1374 (U.S. Nov. 11, 2021).

<sup>180</sup> See Christina Gomez, *Canons of Statutory Construction*, COLO. LAW., Feb. 2017, at 23, 24 (explaining that courts may look to the legislative history of a statute in interpreting its meaning). In the majority opinion, Justice Thomas himself stated that “the statute is completely silent as to *what* the comprehensive guidelines must contain, or how HRSA must go about creating them.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). See also *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 744 (2014) (citing 158 CONG. REC. S539 (Feb. 9, 2012); 158 CONG. REC. S1162-S1173 (Mar. 1, 2012)) (stating that the Senate had originally voted down the “conscious amendment,” which Justice Ginsburg argued meant that Congress “left health care decisions . . . in the hands of women” and their health care providers).

<sup>181</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2377.

<sup>182</sup> *Id.* at 2389 (Alito, J., concurring).

restrictive means” standard because the government found no other workable alternatives aside from the broad exemptions.<sup>183</sup>

Justice Alito asserted that depriving women of free contraception is not one of the “gravest abuses” our government could carry out, since there is no “constitutional right” to *free* contraception, while at the same time ignoring the fact that RFRA, as many scholars have noted, is not an obligatory accommodation.<sup>184</sup> Further, Justice Alito reasoned that the “deprivation of [cost-free contraceptive services] is not a *sufficient* burden that would render the government’s interest compelling,”<sup>185</sup> despite the Court holding otherwise in *Hobby Lobby*, where six of the Justices held that providing all women with seamless access to all FDA-approved no-cost contraceptive services was a compelling governmental interest.<sup>186</sup> For instance, Justice Kennedy noted in *Hobby Lobby* that the government has a compelling interest in protecting women’s health by providing free contraception coverage, which is a position that the majority had accepted.<sup>187</sup>

Ultimately, RFRA supports “a broad interpretation of ‘compelling interest.’”<sup>188</sup> Congress concluded that a compelling interest

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<sup>183</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2391-94 (Alito, J., concurring). Justice Alito found different reasons as to why he believes free contraception under the ACA is not a compelling government interest. He further maintains that access to free contraception is not a constitutional right and thus is evidence “that Congress did not regard the provision of cost-free contraceptives to all women as compelling.” *Id.*

<sup>184</sup> *Id.* at 2392, 2396 (citing *Sherbert v. Verner*, 347 U.S. 398, 406 (1963) (stating that a “compelling interest” within RFRA context requires an examination of “[o]nly the great abuses, endangering paramount interest,” which could “give occasion for [a] permissible limitation” on free exercise)). See also Gedicks & Van Tassell, *supra* note 168, at 348 (“[i]t is easy to miss that RFRA is a ‘permissive’ accommodation – that is, a voluntary government accommodation of religion that is not constitutionally required by the Free Exercise Clause”); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law without Violating the Constitution*, 99 MICH. L. REV. 1903, 1904 (2001) (“In [RFRA’s] applications to federal law, Congress made a blanket precommitment to protect religious liberty against federal encroachment, beyond what the Supreme Court has held the Constitution to require.”).

<sup>185</sup> *Reframing the Harm*, *supra* note 154, at 2198.

<sup>186</sup> *Hobby Lobby*, 573 U.S. at 687-88.

<sup>187</sup> *Id.* at 737 (Kennedy, J., concurring). See *Little Sisters of the Poor*, 140 S. Ct. at 2381 (“[W]e have previously ‘assumed’ [seamless access to contraception without cost sharing] is a compelling governmental interest.”).

<sup>188</sup> *Reframing the Harm*, *supra* note 154, at 2200 (citing Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2580 (2015) (“[T]he language of RFRA supports a broad interpretation of ‘compelling interest,’ not Justice Alito’s newly cramped view. The reason is simple: RFRA was meant to ‘restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*’ . . . . The Court in that era did not seem to question the existence of a

test “is more workable for ‘striking sensible balances between religious liberty and competing prior governmental interests.’”<sup>189</sup> The Court failed to strike this balance when weighing competing governmental interests in *Little Sisters*. This is exemplified in the outcome of the overly broad exemptions, which would no longer ensure that women employees have access to the same contraceptive services they had access to after the *Hobby Lobby* decision.<sup>190</sup>

The next question then becomes whether there are other means of achieving the compelling interest of affording women continued access to contraception while accommodating the rights of religious objectors. In *Holt v. Hobbs*, the Court held that: “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.”<sup>191</sup> The *Hobby Lobby* Court held that the Departments had not met RFRA’s least restrictive means requirement because other organizations and entities were offered alternative options which the employers in the case were not offered.<sup>192</sup> The broad exemptions in *Little Sisters*, however, were not the “least restrictive means” of achieving a compelling governmental interest, as there were other workable alternatives the Departments could have implemented, which is further explored in Section IV.C.<sup>193</sup>

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compelling interest.”)). *But see* Wesley A. Prichard, *Compelling Interest Cacodoxy: Why the Contraception Mandate Fails RFRA’s Compelling Interest Analysis*, 78 U. PITTSBURGH L. REV. 245, 258 (2016) (citing Brief for Petitioners at 38-51, 134 S. Ct. 2751 (2014) (No. 13-354) (using the *Hobby Lobby* decision to argue that “RFRA requires a ‘more focused inquiry’ whereby the government must consider the harms posed by the particular exemption at issue . . .”).

<sup>189</sup> CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER 1 (2020).

<sup>190</sup> The difference between *Hobby Lobby* and *Little Sisters* is that in *Hobby Lobby*, the Court allowed all employers, including for-profits, to utilize the accommodation process to exempt themselves from the mandate, but women would still have seamless access to contraceptives at the end of the day. *See Hobby Lobby*, 573 U.S. at 693.

<sup>191</sup> 574 U.S. 352, 265 (2015) (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000)).

<sup>192</sup> *Hobby Lobby*, 573 U.S. at 738. *See generally* Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL’Y REV. 63, 65 (2015) (stating that the *Hobby Lobby* Court gave very little deference to the Departments “on the question of whether there were less restrictive alternatives for fulfilling the interests supporting the regulations at issue”).

<sup>193</sup> *See infra* Section IV.C.

ii. *The Court Did Not Adequately Consider the Significance of the ACA's Women's Health Amendment and Public Policy Concerns in Determining Congress' Intent*

The *Little Sisters* majority opined that contraceptive coverage is not mentioned in the ACA and that the statute does not suggest that Congress intended contraception to be covered.<sup>194</sup> Justice Alito specifically listed the different exceptions within the ACA that disqualified some women from obtaining contraception.<sup>195</sup> Yet, his stance ignores the fact that many women nevertheless qualified under the contraceptive mandate, casting aside the many efforts behind the Women's Health Amendment and gender-based legislation over the last ten years. Moreover, it does not make sense "for Congress to have given the Departments authority to create [the broad] exemptions because they reintroduce the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA."<sup>196</sup>

The history of birth control and contraception policy is extensive,<sup>197</sup> especially at the federal level, and the role of women's voices has mattered, and continues to matter, in shaping these policies. Women in politics, such as Maryland's Democratic Former Senator, Barbara Mikulski, who introduced the Women's Health Amendment, are in a unique position to write, reform, and pass legislation that take into account the health needs of women.<sup>198</sup> But the Court should have

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<sup>194</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2382 (2020).

<sup>195</sup> *Id.* at 2392 (Alito, J., concurring).

<sup>196</sup> Brief for Nat'l Women's L. Ctr., *supra* note 170, at 5 (citing Brief for Members of Congress as Amici Curiae Supporting Respondents, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-432)).

<sup>197</sup> The Court has invalidated restrictions as burdens on reproductive freedom in the past. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding that a Connecticut law forbidding married couples from using contraceptives unconstitutionally intruded on the right of marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down restrictions on contraception for unmarried people, stating that there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 634, 646 (1974) (holding that a Cleveland School Board rule forcing pregnant women to go on unpaid maternity leave was violative of the Due Process Clause); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) ("It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's rights to interfere with a person's most basic decisions about family and parenthood.").

<sup>198</sup> *See VANSICKLE-WARD & WALLSTEN*, *supra* note 173, at 8 (citing CHRISTOPHER F.

amply considered the work of women and the history of the Women's Health Amendment to make a unique difference in women's lives. This is further demonstrated by the fact that the Departments never disputed HRSA's prior finding that the contraceptive mandate is "necessary for women's health and well-being," suggesting that the Departments were aware that this mandate was critical to women's health concerns from the beginning when the mandate was first created.<sup>199</sup>

To correct the fact that the ACA had left out preventive care specific to women, Former Senator Mikulski, who worked with women's health advocates and various medical professionals, introduced the Women's Health Amendment (WHA), which added to the ACA's coverage requirements.<sup>200</sup> In 2009, the Senate, in a vote of 61-39, passed the WHA, which "would expand coverage of women's health care, allowing the government to require insurers to cover preventive care and screenings for women at little or [no] cost to them."<sup>201</sup> The WHA "is directed at eradicating gender-based disparities in access to preventive care,"<sup>202</sup> and was specifically passed in order to address women's health coverage.<sup>203</sup> The new amendment was carefully "designed 'to promote equality in women's access to health care,'

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KARPOWITZ & TALİ MENDELBERG, *SILENT SEX: GENDER, DELIBERATION, & INSTITUTIONS* (2014)); *see also* DEBORAH L. RHODE, *THE DIFFERENCE "DIFFERENCE" MAKES*, 110-13 (2003) ("[W]omen in elected office carry unique responsibilities for women . . . who depend disproportionately on the leadership of women who hold public office because such women are most likely to give priority to women's concerns," and when women lead "they will bring to the effort the experience of being a woman and often a special sensitivity to the needs of other women.").

<sup>199</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring). *See also* Hobby Lobby, 573 U.S. 682, 741 (2014) ("Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the [(HHS)], in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the [(FDA)]. The genesis of this coverage should enlighten the Court's resolution of these cases.").

<sup>200</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting). This health care bill won against Republican Senator Murkowski's amendment, which opposed the Women's Health Amendment. David M. Herszenhorn & Robert Pear, *Senate Passes Women's Health Amendment*, N.Y. TIMES (Dec. 3, 2009), <https://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/>.

<sup>201</sup> Maggie Mertens, *Senate Passes Mikulski's Overhaul Amendment on Women's Health*, NPR (Dec. 3, 2009), [https://www.npr.org/sections/health-shots/2009/12/senate\\_passes\\_womens\\_health\\_am.html](https://www.npr.org/sections/health-shots/2009/12/senate_passes_womens_health_am.html). *See also* Adam Sonfield, *The Women's Health Amendment Is Getting an Update. What Should It Include?*, HEALTH AFFS., (Sept. 14, 2016), <https://www.healthaffairs.org/doi/10.1377/hblog20160914.056558/full/> (demonstrating the evidence-based efforts to improve women's health care).

<sup>202</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting).

<sup>203</sup> *Id.* at 2405.

countering gender-based discrimination and disparities in such access.”<sup>204</sup> The contraceptive mandate significantly shaped women’s lives<sup>205</sup> and was used by millions of women.<sup>206</sup>

Women have come a long way in overcoming gender disparity and stereotypes, but these achievements are often set back by court decisions that do not fully take into account women’s issues.<sup>207</sup> There is no denying “that our Nation has had a long and unfortunate history of sex discrimination,”<sup>208</sup> and while the Court has been reluctant to remedy past discrimination or compensate for past adverse treatment on gender, the Court here should, at the very least, have considered issues of gender equality when making its decision.<sup>209</sup>

As the dissent pointed out, access to contraception “enables women to chart their own life’s course,” and contraception improves

<sup>204</sup> *Id.* at 2401 (citing Brief for Members of Congress, *supra* note 196). *See also* 155 CONG. REC. 2019, 2028 (2009); RHODE, *supra* note 198, at 114 (“Elected women have the power to help bring larger changes by pressing a bill with comprehensive objectives in keeping with the needs of children, women, and families.”).

<sup>205</sup> VANSICKLE-WARD & WALLSTEN, *supra* note 173, at 4 (explaining that contraception improved the overall quality of women’s lives, expanded access to, and insurance coverage of, contraception, all of which is directly associated to women’s economic success, political empowerment, and health and well-being).

<sup>206</sup> *See* Kaiser Fam. Found., *Health Insurance Coverage of the Total Population*, STATE HEALTH FACTS, <https://www.kff.org/other/state-indicator/health-insurance-coverage-of-the-total-population-cps/> (last visited Oct. 27, 2021) (stating that about fifty percent of the country’s population receive employer-sponsored health insurance); *Women’s Health Insurance Coverage*, KAISER FAM. FOUND. (Nov. 8, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage/> (finding that of the 98 million women ages 19-64 in 2020, about 60 million women, or sixty-one percent, received health coverage from their employer-sponsored insurance); *see also Little Sisters of the Poor*, 140 S. Ct. at 2402 (Ginsburg, J., dissenting).

<sup>207</sup> *See, e.g., United States v. Virginia*, 518 U.S. 515, 550 (1996) (demonstrating that the crux of Justice Ginsburg’s argument is how impactful and harmful the use of gender stereotypes is and what that means for a woman’s place in society).

<sup>208</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion). Historically, society had tried to keep women out of the work force, and labor laws had been designed to remove women from marketplace or preserve them for lower paying jobs. *See id.* at 685.

<sup>209</sup> The Court has shied away from correcting past wrongs. *See Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (concluding “that government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction”); Michael Selmi, *Remedying Societal Discrimination Through Government’s Spending Power*, 80 N.C. L. REV. 1575, 1576 (2002) (“[T]he Supreme Court has consistently held that a desire to remedy societal discrimination provides a constitutionally inadequate basis for race-conscious affirmative action plans”). *But see* Nadine Taub, *The Relevance of Disparate Impact Analysis in Reaching for Gender Equality*, 6 SETON HALL CONST. L.J. 941, 941 (1996) (“[I]t is necessary to look closely at policies and practices that have a disproportionate effect on one sex.”); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VANDERBILT L. REV. 51, 66 (2014).

women's overall social and economic status by allowing them to "invest in higher education and a career with far less risk of an unplanned pregnancy."<sup>210</sup> There is no arguing that "women remain underrepresented at the top and overrepresented at the bottom in both the public and private sectors;"<sup>211</sup> women do a disproportionate share of childcare and elder care, and women are often times forced to choose between their careers and families. The Court's ruling in upholding the exemptions may effectively exacerbate these policy concerns. Thus, the Court should have considered that limiting women's ability to make an informed choice may have drastic consequences on their overall well-being.

Lastly, the Supreme Court has considered the goals and objectives behind a certain law or statute when deciding cases. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, which found that disparate impact claims are recognized under the Fair Housing Act (FHA), the Court relied on the statute's text as well as the statute's purpose in coming to its conclusion.<sup>212</sup> The Court found that in addition to the statute's language, FHA's purpose was "to eradicate discriminatory practices" in housing decisions.<sup>213</sup> Similarly, the Court should have given weight to the purpose behind the WHA, which was enacted to improve women's health, eradicate gender-based discrimination and disparities in access to health care, and lower the costs for many women, who have historically paid more for preventive services than men.<sup>214</sup>

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<sup>210</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2402 (Ginsburg, J., dissenting). See also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *The Affordable Care Act's Birth Control Benefit*, *supra* note 152 (explaining that the "decision of whether or when to have children is one of the most important economic decisions a woman will make in her lifetime"); PERRYUNDEM, *supra* note 152 (explaining that polls show that among voters, nearly three-quarters believe that "access to affordable birth control affects a family's financial situation and is an important part of equality for women."). See generally Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q.J. ECON. 289, 318 (2006) (explaining that the overall large increase in women's labor force participation between 1970 and 1990 was largely attributed to the birth control pill).

<sup>211</sup> RHODE, *supra* note 198, at 54.

<sup>212</sup> 576 U.S. 519, 532 (2015).

<sup>213</sup> *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 539 (first citing 42 U.S.C. § 3601; and then citing H.R. REP. NO. 100-711, at 15 (1988)) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," and FHA "provides a clear national policy against discrimination in housing.").

<sup>214</sup> See Brief for Members of Congress, *supra* note 196 (citing 156 CONG. REC. 3978 (2010) (statement of Rep. Woosley)) ("Today, women are forced to settle for less health care at a higher price. We pay as much as 50 percent more than men, a practice of discrimination that is legal in 38 states."); see also Gedicks & Koppleman, *supra* note 209, at 53.

*C. The Court Should Have Applied the APA's Arbitrary and Capricious Standard to the Exemptions Because They Were Overly Broad*

One of the overarching issues in *Little Sisters* deals with administrative law and whether the Departments met the procedural requirements of providing notice to create the final exemptions under the APA.<sup>215</sup> However, even if the Departments were statutorily and procedurally permitted to create the exemptions, the Court should have struck down the exemptions based on the APA's arbitrary and capricious standard, which is a standard of review utilized by judicial courts when reviewing decisions made by administrative bodies.<sup>216</sup>

The arbitrary and capricious standard is utilized to ensure that an agency is acting with "reasoned [decision making]."<sup>217</sup> Section 706(2)(A) of the APA "instructs courts reviewing regulations to invalidate any agency action found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"<sup>218</sup> Ultimately, courts can assess whether the agency has promulgated an arbitrary and capricious rule if the agency failed "to consider an important aspect of the problem [or] offe[r] an explanation for its decision that runs counter to the evidence before [it]."<sup>219</sup>

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<sup>215</sup> While this case note does not discuss the APA notice requirements and the APA claims brought by both parties, the Court ultimately held that the government had satisfied APA requirements. *See supra* Part III; *Pennsylvania v. President U.S.*, 930 F.3d 543, 555-56 (3d Cir. 2019) (holding that because the HHS and DOL promulgated regulations contrary to the ACA and Congress' intent, the APA was violated). *But see* Kristin E. Hickman, *Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?*, YALE J. REGUL. (July 9, 2020), <https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/> (explaining that "Justice Thomas's opinion for the Court turns APA notice-and-comment rulemaking procedures into a pro forma exercise of procedural box-checking that will allow agencies to curtail meaningful public participation in the agency rulemaking process").

<sup>216</sup> *See* 5 U.S.C. § 706(2)(A).

<sup>217</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2398 (2020) (Kagan, J., concurring) (citing *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). *See also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (holding that agencies need to provide a reason for their actions); *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)) ("Agency action is lawful only if it rests 'on a consideration of the relevant factors.'").

<sup>218</sup> *See* § 706(2)(A); *see also* *Little Sisters*, 140 S. Ct. at 2383 (quoting *Motor Vehicles Mfrs. Assn.*, 463 U.S. at 43) (explaining that an agency can fail this test when it has not given "a satisfactory explanation for its action").

<sup>219</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2383-84. *See also* *APA: Informal Rulemaking, Arbitrary and Capricious Standard*, L. UNIV. HOUSTON, <https://www.law.uh.edu/faculty/jmantel/health-regulatory-process/ArbitraryandCapriciousStandard.pdf> (last visited Feb 4, 2021) (stating that some other

The exemptions HRSA and the Departments issued give “every appearance of coming up short” on the APA standard.<sup>220</sup> And while protecting one’s religious rights as well as ensuring women affordable birth control coverage are two values that have consistently clashed, as demonstrated in this case, the government could have better accommodated the needs of employers and women employees through means other than the broad blanket exemptions.

First, the Departments failed to adequately take into account the impact of the exemptions on women.<sup>221</sup> While the Departments never disputed “HRSA’s prior finding that the mandate is ‘necessary for women’s health and well-being,’”<sup>222</sup> the Departments later disputed the fact “that women will be adversely impacted by the 2018 exemptions,” despite all the evidence pointing to the contrary.<sup>223</sup> The Departments also erroneously assume that women could obtain seamless access to contraception through other means, thus downplaying the harm the broad exemptions will cause to women employees, students, and dependents on these health plans.<sup>224</sup> Therefore, “the government’s

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factors courts consider are whether the agency examined relevant data when making its decision; whether the agency articulated a satisfactory explanation that connects facts or conclusions to the policy choice; whether the agency considered important aspects of the problem; and whether the agency considered all regulatory alternatives).

<sup>220</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2398 (Kagan, J., concurring).

<sup>221</sup> See *infra* Sections IV.A & IV.B.

<sup>222</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring) (citing *Women’s Preventive Services Guidelines*, *supra* note 49; Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,537 (Jan. 14, 2019) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)).

<sup>223</sup> *Id.* at 2381 (majority opinion) (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,805 (Oct. 6, 2017) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)). See *e.g.*, Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. at 47,803 (“[T]he Mandate as applied to objecting employers appears to encompass a relatively small percentage of the number of women impacted by the Mandate overall, since most employers do not appear to have conscientious objections to the Mandate.”).

<sup>224</sup> See Brief for Nat’l Women’s L. Ctr., *supra* note 170, at 15-16 (“The Departments also incorrectly assume that those who lose contraceptive coverage can alternatively access contraception through existing government-sponsored programs, such as Title X, Medicaid, and state-run programs.”); *The Affordable Care Act’s Birth Control Benefit*, *supra* note 152 (explaining that the Title X family planning system is overburdened and underfunded, Planned Parenthood clinics are facing increasing threats from federal and state policymakers, and many of these public programs only provide free contraception “to those that meet certain income thresholds”). Moreover, the contraceptive mandate allowed women access to contraceptive services that was not dependent on their income, the state in which they live, or the health plan they chose. Thus, the blanket exemptions would create an undue burden by leaving women to look elsewhere for these services. *Id.* See Usha Ranji, Yali Bair & Alina Salganicoff, *Medicaid and Family Planning: Background and Implications of the ACA*, KAISER FAM. FOUND. (Feb. 3,

failure [in *Little Sisters*] to consider third-party harms rendered the religious exemption arbitrary and capricious.”<sup>225</sup>

Moreover, courts have held that policies are arbitrary and capricious when they hurt more people than they help and thus, are not a product of reasoned judgment.<sup>226</sup> For example, in the case of *Department of Homeland Security v. Regents of the University of California*, the Court found that the Department of Homeland Security’s order to rescind the DACA program was arbitrary and capricious, holding that “the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the *hardship* to DACA recipients.”<sup>227</sup> The Court did not utilize this approach in *Little Sisters*. As Justice Kagan pointed out, the exemptions’ “overbreadth causes serious harm, by the Departments’ own lights,” and while the Departments committed “themselves to minimizing the impact on contraceptive coverage” on religious employers,” they “failed to fulfill that commitment to women.”<sup>228</sup>

Next, the Departments did not consider workable alternatives to the exemptions.<sup>229</sup> The self-certification accommodation process was specifically created to accommodate religious employers while continuing to provide working women with coverage. In *Hobby Lobby*, the Court noted that the Departments worked with other alternatives, deciding that extending the accommodation process to for-profit corporations was the less burdensome alternative.<sup>230</sup> But the Departments admitted that after *Zubik*, they could find no workable alternative to satisfy both the needs of religious employers and female

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2016), <https://www.kff.org/report-section/medicaid-and-family-planning-appendix-1-women-with-full-medicaid-benefits-and-share-that-are-reproductive-age-by-state/view/print/>.

<sup>225</sup> *Affordable Care Act—Contraceptive Mandate*, *supra* note 120, at 568.

<sup>226</sup> *See, e.g., Michigan v. EPA*, 576 U.S. 743, 752 (2015) (“No regulation is ‘appropriate’ if it does significantly more harm than good.”); *see also Little Sisters of the Poor*, 140 S. Ct. at 2408, n.18 (Ginsburg, J., dissenting) (citing Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,577-78 (Nov. 15, 2018) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147)) (stating that the number of women affected by the exemptions may be even higher depending if more plans use the exemptions over the accommodation process).

<sup>227</sup> 140 S. Ct. 1891, 1916 (2020) (holding that the rescission of DACA was arbitrary and capricious because it failed to consider important aspects of the problem).

<sup>228</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring).

<sup>229</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014) (“There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.”).

<sup>230</sup> 140 S. Ct. at 2377 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. at 730-31 (2014)).

employees.<sup>231</sup> However, the Departments could have extended the broad exemptions to only churches and religious non-profits, while keeping the accommodations process intact for all other entities. The Obama administration presumed that employees of churches or houses of worship were more likely to share in the religious beliefs of their employers, and thus, the effect on third parties would be smaller.<sup>232</sup> This presumption may even be extended to some non-profits, such as the Little Sisters, a group of nuns engaged in non-profit work.<sup>233</sup> To extend this presumption to virtually *any* employer is unreasonable.<sup>234</sup>

Another option the Departments could have explored was to start out by only fully exempting those employers who had issues with the accommodation process, such as the Little Sisters. There is a chance that the broad exemptions could invite a whole range of people who otherwise would have been fine using the accommodation process.<sup>235</sup> Thus, as Justice Kagan notes, the exemptions “went beyond what the

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<sup>231</sup> *Id.* (quoting DEP’T OF LAB., FAQs ABOUT AFFORDABLE CARE ACT IMPLEMENTATION (PART XXVI) 4 (2017), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/aca-part-xxvi.pdf>).

<sup>232</sup> Brief for Respondents at 44, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 & 19-454) (“Unlike the church exemption, the agencies present no evidence that all employees, students, and female beneficiaries share their employer’s faith or religious views on contraception.”).

<sup>233</sup> *But see* Dorothy Guerrero, *Nonprofit Leadership: Is There a Gender Gap?*, MISSION BOX GLOB. NETWORK (June 20, 2020), <https://www.missionbox.com/article/127/nonprofit-leadership-is-there-a-gender-gap> (“majority of the nonprofit workforce – more than 75 percent in some U.S. sectors – is female.”); RHODE, *supra* note 198, at 54 (explaining that while women are overrepresented in the public and non-profit sectors, they are nevertheless underrepresented in leadership positions within the public realm). The exemptions are likely to affect mostly non-profit and public entities, which is a significant concern considering women remain overrepresented in the non-profit world. *Id.*

<sup>234</sup> Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War: Little Sisters of the Poor v. Pennsylvania*, CATO S. CT. REV. 229, 230-31 (2020) (citing *Very Few Americans See Contraception as Morally Wrong*, PEW RSCH. CTR. (Sept. 28, 2016) (finding that of “Catholics who attend Mass weekly, just 13% say contraception is morally wrong, while 45% say it is morally acceptable and 42% say it is not a moral issue”); Beldon Russonello, *2016 Survey of Catholic Likely Voters*, CATHS. FOR CHOICE (2021) (finding that nearly eight in ten Catholics agree that “health insurance companies should be required to offer health plans that include birth control”); Brief for Nat’l Women’s L. Ctr., *supra* note 170, at 15-16 (citing RACHEL K. JONES & JOERG DREWEKE, COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE, GUTTMACHER INST. 4 (2011) (“Among all women who have had sex, 99% have ever used a contraceptive method other than natural family planning. This figure is virtually the same, 98%, among sexually experienced Catholic women.”)).

<sup>235</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring) (“So the Departments . . . should have exempted only employers who had religious objections to the accommodation – not those who viewed it as a religiously acceptable device for complying with the mandate.”).

Departments' justification supported."<sup>236</sup> Additionally, the Departments themselves realized the possibility that employers without a religious objection to the accommodation process could now simply switch to the new exemptions.<sup>237</sup>

Moreover, the Departments could have minimized the exemptions' impact on women by not extending the blanket exemptions to closely held, for-profit companies. While Justice Alito does not agree with this view,<sup>238</sup> many courts agree that the norm for for-profit companies is to maximize shareholder value and the corporation's overall value.<sup>239</sup> Thus, the first and foremost purpose of any corporation is not to pursue religious objectives, which is the case for organizations like the Little Sisters, but nevertheless may be one aspect of the business purpose.<sup>240</sup> Furthermore, as Justice Kagan noted, it is rare for publicly traded corporations to assert RFRA rights, calling into question

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<sup>236</sup> *Id.* (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>237</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2399, n.3 (Kagan, J., concurring). See also Brief for Nat'l Women's L. Ctr., *supra* note 170, at 8 (stating that the Departments "provide no basis for the assumption that any entities will voluntarily continue to comply with the 'accommodation' if given the opportunity to exempt themselves.>").

<sup>238</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014) ("If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.>").

<sup>239</sup> Milton Friedman, *A Friedman doctrine – The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 30, 1970, at SM17, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> ("[T]here is one and only one social responsibility of business: to . . . engage in activities designed to increase its profits . . ."). See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919) (standing for the proposition that corporate directors cannot pursue actions that do not increase profits or shareholder wealth and the objective of directors' duties is to maximize this wealth); *A.P. Smith Mfg. Co. v. Barlow*, 13 N. J. 145 (1953) (disbursing funds to philanthropic or other public causes must benefit or advance the interests of the corporation).

<sup>240</sup> See Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 3, *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Nos. 13-154 & 13-356) (stating that attributing to a corporation the religious identity of its controlling shareholder is contrary to corporate law); Caroline Mala Corbin, *Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions*, AM. CONST. SOC'Y L. & POL'Y 1, 6 (explaining that a for-profit corporation's primary purpose is to make money, while a church's main goal is to practice and promulgate religion). But see Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 274 (2014), <https://harvardlawreview.org/2014/05/hobby-lobby-corporate-law-and-the-theory-of-the-firm/> ("In the real world, shareholders impose religiously motivated policies on corporations all the time.>").

“whether the Departments adequately supported their choice” to allow publicly traded companies to claim the religious exemption.<sup>241</sup>

Lastly, similarly to the accommodation process, the Departments could have required those employers who wished to opt out of including contraception in their health plans to send a list of their employees to their insurer or TPA, who could then reach out to those employees to determine if they would like continued no-cost contraceptive services, and the insurer or TPA could then provide payments for it. Some religious employers may find that sending a list of their employees may still go against their religious beliefs. In such cases, another option is for employees who no longer have access to contraception in their employee health plans because their employer utilized the exemption to have the opportunity to then reach out to the insurer or TPA themselves and fill out a form expressing that they would like to continue obtaining cost-free contraception apart from their employee health plans, which would essentially have the same outcome as the accommodation process under the old regime. This would circumvent the Little Sisters’ complicity argument since Little Sisters would take no affirmative steps in notifying their insurance issuer themselves.<sup>242</sup>

#### *D. The Court Failed to Address Important Constitutional Law Questions*

The majority of the Court, as it was then constituted, was reluctant to delve deeper into the Constitutional law issues in this case,

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<sup>241</sup> See *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring). Compare *Hobby Lobby*, 573 U.S. at 710-12 (“Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law . . . . While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”), with *Hobby Lobby*, 573 U.S. at 739-40 (Ginsburg, J., dissenting) (“In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”).

<sup>242</sup> See *Little Sisters of the Poor*, 140 S. Ct. at 2391 (Alito, J., concurring). Justice Alito states that the Little Sisters’ religious rights “would not be ‘infringed’ if they did not have to do anything ‘more than contract for a plan that does not include coverage for some or all forms of contraception,’ even if their employee receive[d] cost-free contraceptive coverage from the same insurance company.” *Id.* (emphasis added). The Little Sisters have also expressed that they have no convictions against their employees who utilize contraception; they just want no part in it. See *id.* at 2410 (Ginsburg, J., dissenting) (“Counsel for the Little Sisters acknowledged as much when he conceded that religious ‘employers could [not] object at all’ to a ‘government obligation’ to provide contraceptive coverage ‘imposed directly on the insurers.’”)

creating a difficult road ahead around questions regarding women's reproductive rights and the way the Court sees these rights in conflict with religious free exercise rights. *Little Sisters* is the intersection point of many big, hot button issues—issues the Court appears not yet ready to act on.

For instance, Justice Kagan and Justice Breyer strategically structured the concurrence around the *Chevron* Doctrine, perhaps due to the fact that there have been rumblings around the Court about moving away from *Chevron*.<sup>243</sup> While their concurrence was not an outcome that favored the provision of contraceptive care for women, it may have been their attempt at preserving *Chevron*. On the other hand, Justice Alito seems worried about the question of limiting the government's ability to make reproductive health decisions.<sup>244</sup>

This case upholds the broad exemptions without making any new law, and the Court appears to be writing for the future on adjacent issues they see coming up again in the next couple of terms. Hanging in the balance of the Court's decision are a myriad of issues, including Free

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<sup>243</sup> See Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. REG.: NOTICE & COMMENT (March 24, 2020), <https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/>; James Goodwin, *Will Confirming Judge Barrett be the Death of Chevron Deference?*, THE EQUATION (Oct. 15, 2020), <https://blog.ucsusa.org/guest-commentary/will-confirming-judge-barrett-be-the-death-of-chevron-deference/> (“A key item on that agenda is overturning something called *Chevron* deference . . .”). Many conservative justices on the Court are overall distrustful of the administrative state. See Robert F. Nagel, *Conservatives and the Court*, NAT'L AFFS., <https://www.nationalaffairs.com/publications/detail/conservatives-and-the-court> (last visited Oct. 28, 2021) (explaining that the administrative state overturning precedent conflicts with some of the tenets of conservatism). It is hard to say whether this deference will continue on the Court's majority, which likely depends on the Administration at the given point in time. Perhaps the Court may have enough counter leverage with the developing interest in the Free Exercise Clause. See Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/> (explaining that conservative justices have been attempting to weaponize the Free Exercise Clause to privilege the beliefs of religious employers over federal nondiscrimination laws). Justices on the Court may also choose to accord deference to agencies insofar as they do not trench on religious freedoms. See Erin Morrow Hawley, *Symposium: Administrative Law Lessons from King v. Burwell*, SCOTUSBLOG (Dec. 15, 2015), <https://www.scotusblog.com/2015/12/symposium-administrative-law-lessons-from-king-v-burwell/>. Either way, the Court was significantly deferential to the then Trump administration when deciding this case and may have to deal with the fall out of that in the upcoming years under the new administration.

<sup>244</sup> Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and Cheney in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 4-5 (2008).

Exercise, agency deference, delegation issues,<sup>245</sup> Fourteenth Amendment Due Process, rights surrounding privacy and abortion, religious freedom, and how much it will all impact government decision making. Ultimately, this is a case that poses more questions than it answers. And while the Court has an obligation to equally balance weighty constitutional values, the Court does not go there in *Little Sisters*. The Court created a foundation for upcoming issues while avoiding the broader constitutional law questions. This direction may be predictive of the Court majority strengthening the First Amendment and weakening privacy cases over the upcoming terms, which could have serious implications for reproductive rights and other civil rights protections.<sup>246</sup> One thing appears to be certain, however – that the fight in *Little Sisters* is not over.<sup>247</sup>

## V. CONCLUSION

The Court incorrectly decided *Little Sisters*, and it should not have upheld the broad religious and moral exemptions. Both the contraceptive mandate accommodation and the blanket exemptions fell short of protecting women's rights to affordable health care and contraceptive coverage. The Court should have taken a more balanced approach – one that respects the religious beliefs of objecting employers without overwhelming the rights of those who do not share in those beliefs. Ultimately, the Court failed to adequately weigh the exemptions' detrimental impact on women.<sup>248</sup> The Court should have given greater weight to the history of the Women's Health Amendment, the role of gender in shaping policy, and legal precedent.<sup>249</sup> The Court should have also utilized the Administrative Procedure Act's arbitrary and capricious standard when analyzing the exemptions.<sup>250</sup> Lastly, the Court's decision leaves many legal questions unanswered, which may have broader implications in the areas of constitutional law, civil rights law, and women's rights issues.<sup>251</sup>

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<sup>245</sup> This was addressed by Justice Thomas in the majority opinion. *Little Sisters*, 140 S. Ct. at 2382 (“No party has pressed a constitutional challenge to the breadth of the delegation involved here.”).

<sup>246</sup> *Affordable Care Act — Contraceptive Mandate*, *supra* note 120 at 560.

<sup>247</sup> Smith, et al., *supra* note 178.

<sup>248</sup> See *supra* Section IV.A.

<sup>249</sup> See *supra* Section IV.B.

<sup>250</sup> See *supra* Section IV.C.

<sup>251</sup> See *supra* Section IV.D.