

Taking Matters Into Their Own Hands: A Critique of the Supreme Court's Holding in *Little Sisters of the Poor v. Pennsylvania*

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**NOTE — TAKING MATTERS INTO
THEIR OWN HANDS: A CRITIQUE OF
THE SUPREME COURT’S HOLDING IN
*LITTLE SISTERS OF THE POOR V.
PENNSYLVANIA***

JOEL HOULETTE*

Abstract

Access to affordable contraceptive coverage for those who need it is critical. Before full implementation of the Affordable Care Act in 2014, contraceptive care made up upwards of 44% of out of pocket health care spending for women. Taking Matters into Their Own Hands critiques the United States Supreme Court’s ruling in Little Sisters of the Poor v. Pennsylvania, which provides an exemption for employers with moral or religious objections to providing contraceptive coverage to their employees as a part of their employer-sponsored health plans. This Article will criticize the Supreme Court for failing to properly consider the Women’s Health Amendment to the Affordable Care Act, argue that permitting employers to exclude these services is allowing them to illegally discriminate on the basis of sex, and propose that the Court’s decision should have more substantially relied on policy considerations.

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INTRODUCTION

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,¹ the Supreme Court held that the Patient Protection and Affordable Care Act (“ACA”)² gave authority to the Health Resources and Services Administration (“HRSA”) to create exemptions and accommodations for employers’ religious or moral objections to providing contraceptive coverage as part of their employee-sponsored health care plans.³ The Court held that the Internal Revenue Service, Employee Benefits Security Administration, and the Centers for Medicare and Medicaid Services⁴ also had the authority to craft these exemptions and the exemptions they created were free from procedural defects.⁵ This holding allowed the appellant-employers, who objected to providing contraceptive coverage on either a religious or moral basis, to file an accommodation form requesting an exemption.⁶ The exemption allowed those employers to not pay for contraceptive coverage as part of their employer-sponsored health care plans and also barred the insurance companies providing those plans from paying for contraceptive coverage on their own.⁷ Thus, those that need contraceptive care⁸ and get their health insurance through these employers must go elsewhere to cover contraceptive care and often must pay out of pocket.⁹

The Court made the incorrect decision for three reasons. First, the Court failed to fully consider the purpose and intent of the Women’s Health Amendment (“WHA”)¹⁰ as it moved away from its holdings in *Hobby Lobby* and

1. 140 S. Ct. 2367 (2020).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010).

3. *Little Sisters of the Poor*, 140 S. Ct. at 2373.

4. The Court collectively referred to these agencies and their parent federal Departments (Departments of the Treasury, Labor, and Health and Human Services, respectively) as “the Departments” throughout the case. *Id.* at 2372.

5. *Id.* at 2373.

6. *Id.* at 2378.

7. *Id.*

8. Those needing contraceptive care includes women, trans people, non-binary people, and people of many different gender identities, as women are not the only people who need or use contraceptive care. See generally Heidi Moseson et al., *The Imperative for Transgender and Gender Nonbinary Inclusion: Beyond Women’s Health*, 135 OBSTETRICS & GYNECOLOGY 1059 (2020). In this Article, “those needing/using contraceptive care” will reference all people who use contraceptive care, as it is the most inclusive phrasing. However, most legislation and Court opinions utilize the term “women” when referring to those who use contraceptive care.

9. *Little Sisters of the Poor*, 140 S. Ct. at 2400.

10. “A group . . . shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . 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 . . .” with respect to women. 42 U.S.C. § 300gg-13(a)(4). In her speech to the Senate floor about the Amendment, Senator Barbara Mikulski of Maryland laid out her exact reasons for proposing the WHA. She believed that, in passing the ACA, Congress had an opportunity to do more to enhance and improve women’s health care, which she attested her Amendment would do. This Amendment would ensure access

Zubik. These cases held in balance the purpose of the WHA and the need to not burden the free exercise of religion of employers who objected to falling into a complicit role in providing contraceptive care.¹¹ Second, by allowing certain employers to exclude from their benefit coverage services that only certain people use—here, excluding contraceptive services only to those who use contraceptive coverage¹²—the government is allowing employers to discriminate on the basis of sex, in violation of Title VII of the 1964 Civil Rights Act.¹³ Lastly, from a policy perspective, the majority both set a dangerous precedent concerning how religious and moral objections affect the implementation of policies, as well as failed to consider additional concerns about third party harm.¹⁴ Ultimately, the Court pre-determined the desirable outcome and reasoned its way to supporting that decision.

This Article will first discuss the origins of the *Little Sisters of the Poor* case and the fight over whether employer health care plans must include access to contraceptive care.¹⁵ After establishing a basis of understanding, this Article will dive more deeply into the cases, other relevant legal doctrine, and legislation that came before *Little Sisters of the Poor*.¹⁶ Next, this Article will provide a brief summary of how the Court came to its conclusion in the case at hand.¹⁷ Lastly, this Article will tackle the reasons why the Court incorrectly decided this case, building on some of the issues Justice Ginsburg outlined in her dissent.¹⁸

I. THE CASE

This lawsuit concerns the ACA, a source of contentious litigation since its codification in 2010.¹⁹ Much of the litigation concerned the contraceptive mandate that is part of the ACA, as religious and otherwise morally opposed

to critical preventative services for women at a minimal cost, allowing thousands of women to get the care they need to better avoid diseases like breast and cervical cancer. 155 CONG. REC. 28801 (2009). In speaking about the Amendment, Senators Merkley and Franken both spoke to its importance, in part because the Amendment would laudably cover contraceptive care to those who have never had the opportunity to have it before. *See id.* at 28868, 29083.

11. *See infra* Section IV.A.

12. *See supra* note 8 and accompanying text.

13. *See infra* Section IV.B.

14. *See infra* Section IV.C.

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719–20 (2014) (holding that RFRA applied to private companies, allowing those companies to deny their employees contraceptive care based on companies' religious objections); *Zubik v. Burwell*, 578 U.S. 403, 409–10 (2016) (declining to reach merits of case and instead, remanding to lower courts to ensure that employees would receive contraceptive care, if they desired, and that employers' religious exercise was simultaneously respected).

employers expressed major objections to providing contraception as part of the required components of health care plans they provide to employees.²⁰ The contraceptive mandate came from a set of Interim Final Rules (“IFRs”) promulgated by the HRSA and the Department of Labor (“DOL”), “which required health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration as well as related education and counseling.”²¹ In creating this mandate, HRSA and DOL recognized the effect on religious employers and created an exemption, which consisted of a four part test that applied only if the employer is a church or substantially related to religious activity.²² Additionally, right before putting the guidelines into effect, the departments promulgated a final rule that also prevented the guidelines from applying to certain religious nonprofits.²³ The exemption ensured that religious organizations did not pay for contraception, while still ensuring that the insurance companies complied with the contraceptive mandate.²⁴ This solution still proved too burdensome for certain groups, including the Little Sisters of the Poor Saints Peter and Paul Home, as they argued that completing the self-certification process forced them to violate their religious beliefs by taking actions that directly caused others to supply contraception.²⁵

“The Departments” (the Internal Revenue Service, Employee Benefits Services Administration, and Centers for Medicare and Medicaid Services)²⁶ promulgated two IFRs in 2017 in an attempt to comply with the developments after the Supreme Court’s ruling in *Zubik v. Burwell*.²⁷ These IFRs: (1) broadened the definition of a religiously exempt employer to include any employer who objected to providing contraceptive care because of their religious beliefs (including both for profit and publicly traded entities), and (2) created a “moral exemption” for companies with “sincerely held moral objections” to providing contraceptive coverage.²⁸ The Commonwealth of Pennsylvania sued, alleging the IFRs’ procedural and substantive invalidity under the Administrative Procedures Act (“APA”).²⁹ The Commonwealth claimed that the IFRs were

20. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

21. *Id.* at 2374 (citing 77 Fed. Reg. 8725 (2012)).

22. *Id.*

23. *Id.*

24. *Id.* at 2375.

25. *Id.* at 2376.

26. Notably not HRSA; in fact, none of these agencies or their parent agencies are referenced in the relevant text of the ACA. *Little Sisters of the Poor*, 140 S. Ct. at 2406 (Ginsburg, J., dissenting).

27. 578 U.S. 403, 409–10 (2016). *See supra* note 19.

28. *Little Sisters of the Poor*, 140 S. Ct. at 2377 (majority opinion).

29. *Id.* at 2378.

substantively invalid because the Departments lacked statutory authority under the Religious Freedom Restoration Act (“RFRA”) and the ACA to promulgate the exemptions.³⁰ Additionally, the Commonwealth asserted that good cause did not adequately justify the IFRs, claiming that the Departments abused the IFR procedure to avoid going through the typical APA notice and comment process.³¹ When the District Court issued a nationwide preliminary injunction to stop implementation of the final rules based on the IFRs, the federal government appealed, as did the Little Sisters of the Poor Home, who intervened in the suit in an attempt to defend their religious exemption.³²

The Third Circuit affirmed that the Departments lacked the authority to promulgate the IFRs and ruled that the self-certification process did not impose a substantial burden on appellants’ free exercise of their religion.³³ The Third Circuit further held that the Departments lacked good cause to bypass the notice and comment process and noted that because the IFRs and final rules were identical, there the Departments failed to exhibit “open-mindedness” when crafting the final rules after the public comment period.³⁴ The Supreme Court granted certiorari to address the contraceptive mandate and the regulations that followed.³⁵

II. LEGAL BACKGROUND

In 2010, President Barack Obama signed the ACA into law, providing health care for over 8 million people who lacked access to affordable health care coverage before passage.³⁶ During the legislative process for the ACA, former Senator Mikulski and others worked to include in the bill’s language the WHA.³⁷ In part, the WHA sought “to afford gainfully employed women comprehensive, seamless no-cost” contraceptive coverage.³⁸ Senator Barbara Mikulski spoke to the Senate floor in an effort to get the WHA added to the ACA, laying out her exact reasons for proposing the amendment.³⁹ She believed that the ACA should expand to enhance and improve women’s health care, specifically, through

30. *Id.*

31. *Id.*

32. *Id.* at 2378–79.

33. *Id.* at 2379.

34. *Id.*

35. *Id.*

36. Off. of the Press Sec’y, *Fact Sheet: Affordable Care Act by the Numbers*, OBAMA WHITE HOUSE (Apr. 17, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/17/fact-sheet-affordable-care-act-numbers>.

37. *See supra* note 10.

38. *Little Sisters of the Poor*, 140 S. Ct. at 2400 (Ginsburg, J., dissenting).

39. 155 CONG. REC. 28801 (2009).

ensuring women access to critical preventative services for a minimal cost.⁴⁰ The purpose and intent of passing the WHA attached to the ACA was to give women low cost, or no cost, access to services that are preventative in nature (inclusive of contraceptive care).⁴¹

Upon the passage of the ACA, HRSA promulgated interim final rules giving guidance to employers on how to proceed with the new laws relating to employee health care coverage under the ACA.⁴² These rules forced all employers who provided health care, without exception, to ensure that their health care plans included contraceptive coverage.⁴³ This proved an issue for many groups, especially religious employers, who claimed that forcing their health care plans to provide contraceptive coverage was in turn forcing them to violate their religious beliefs.⁴⁴

Several of these religious employers brought law suits and eventually one made it to the Supreme Court.⁴⁵ In *Burwell v. Hobby Lobby Stores, Inc.*, the plaintiffs were families (the Hahns and the Greens) who ran their businesses in accordance with their religious beliefs and moral principles.⁴⁶ They believe life begins at conception and that facilitating access to contraceptive drugs or devices that could hinder this life constituted a violation of their religion.⁴⁷ The families in their individual capacities, along with their businesses, sued the Department of Health and Human Services (“HHS”), other federal agencies, and officials, challenging the contraceptive mandate for alleged violations of RFRA and the Free Exercise Clause of the First Amendment.⁴⁸ The Hahns and their companies initially brought their case in the Eastern District of Pennsylvania, which denied an injunction on application of the ACA as to require their company to provide specific types of contraceptive care.⁴⁹ On appeal, the Third Circuit also rejected the claims because (a) “for-profit secular corporations cannot engage in religious exercise” under RFRA or the First Amendment, and (b) the mandate did not affect the Hahns in their individual capacity.⁵⁰ The Greens and their companies brought suit in the Western District of Oklahoma, challenging the contraceptive

40. *See supra* note 10.

41. *See supra* note 10.

42. *Little Sisters of the Poor*, 140 S. Ct. at 2374 (majority opinion).

43. *Id.*

44. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014) (holding that RFRA applied to private companies, which allowed those companies to deny their employees contraceptive care based on companies’ religious objections).

45. *Id.* at 683.

46. *Id.* at 700–03.

47. *Id.* at 703.

48. *Id.* at 701–03.

49. *Id.* at 701–02.

50. *Id.* at 702.

mandate in a very similar manner as the Hahns.⁵¹ While the District Court denied the injunction, the Tenth Circuit reversed, holding in part that the Greens' for profit businesses were "persons" within the meaning of RFRA and could bring suit under RFRA.⁵² The Supreme Court granted certiorari to settle the disagreement between appellate courts on a matter which affects employers across the country.⁵³

The Court sought to answer whether RFRA allowed a for profit company to deny its employees health care coverage, based on the religious objections of the company's owners, for contraception which the HRSA rules otherwise entitled the employees to receive.⁵⁴ Writing for a 5-4 majority, Justice Alito held that Congress intended RFRA to apply to corporations.⁵⁵ Because the plaintiff companies believed that the contraceptive requirement forced them and other companies with similar beliefs to fund what they believe to qualify as "abortions," the Court ruled that this created a substantial burden that was not the least restrictive method of reaching the government's goals.⁵⁶ The effect of *Hobby Lobby* was essentially a win-win: the Court protected the religious rights of corporate owners and the ability of employees to receive full access to health care.⁵⁷

Many employers found this solution unacceptable, still feeling required to violate their religious beliefs because of the requirement to facilitate the provision of insurance that included contraceptive services.⁵⁸ Several nonprofit religious employers brought legal action against the Secretary of HHS and other government officials, using RFRA to challenge regulations that offered accommodation for religious objections to providing contraceptive coverage through their employer-sponsored health care plans.⁵⁹ The Court sought to answer whether these federal regulations requiring petitioners to submit a form

51. *Id.* at 703–04.

52. *Id.* at 704.

53. *Id.* at 704–05.

54. *Id.* at 688–91.

55. *Id.* at 691.

56. *See id.* at 726. The Court held that requiring the plaintiffs to pay an enormous sum of money to comply with the contraceptive mandate (i.e., almost \$500 million for Hobby Lobby) qualified as a substantial burden on the companies, especially when paying that money violated their religious beliefs. *Id.*

57. Mark Goldfeder, *The Effects of Hobby Lobby*, AM. BAR ASS'N: GPSOLO REP. (July 22, 2019), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2019/july-2019/effects-hobby-lobby/.

58. *See, e.g.,* *Zubik v. Burwell*, 578 U.S. 403, 405-07 (2016) (noting petitioners alleged that act of submitting notice of their religious objection to providing contraceptive coverage substantially burdened their exercise of religion).

59. *Id.* at 405 (holding that Court would not reach a decision on case, instead remanding to lower courts to ensure that employees would receive desired contraceptive care and that employers' religious exercise was respected).

to either their insurer or the federal government—stating their objection to providing contraceptive coverage on religious grounds—substantially burdened the exercise of petitioners’ religion in violation of RFRA.⁶⁰

After oral arguments and supplemental briefing, petitioners and the Government both confirmed it is feasible to provide contraceptive coverage to employees, through petitioners’ insurance companies without notice from petitioners.⁶¹ Petitioners confirmed this did not infringe on their religious exercise; the Government confirmed that the regulations could be modified to this end.⁶² Thus, the Court unanimously vacated the judgments of the circuit courts (all reversing injunctions of the contraceptive mandate) and remanded the cases to allow the parties to arrive at an approach that both accommodated petitioners’ religious exercise and also ensured that women received contraceptive coverage.⁶³ The Court held that through litigation, the petitioners gave adequate notice that they met the requirements for exemption from the contraceptive coverage requirement.⁶⁴ Additionally, the Court made a point to note that the opinion expressed no view on the merits of the cases and in no way affected the Government’s ability to continue ensuring contraceptive coverage.⁶⁵ In Justice Sotomayor’s concurrence, she emphasized this point, calling out lower courts for previously ignoring similar disclaimers that the Court’s opinions expressed no views on the merits and warning that these courts should not make the same mistake of thinking that Court orders signaled certain views for lower courts to follow.⁶⁶

This decision guided the Departments as they issued their 2017 IFRs, which attempted to strike a balance between ensuring religious employers avoided violating their religious beliefs and ensuring access to needed contraceptive care without out of pocket payments for employees.⁶⁷ *Hobby Lobby*, *Zubik*, and the related litigation set the stage for *Little Sisters of the Poor*.⁶⁸ Both cases included preliminary challenges to aspects of the mandate, attempting to carve out more of an exemption in an attempt to make the process less burdensome for employers who believed the contraceptive mandate violated their religious

60. *Id.* at 405–07.

61. *Id.* at 407.

62. *Id.* at 407–08.

63. *Id.* at 408.

64. *Id.* at 409.

65. *Id.*

66. *Id.* at 410.

67. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47811–12 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147).

68. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2370 (2020).

beliefs.⁶⁹ *Little Sisters of the Poor* took the next step when the petitioners argued that even the 2017 IFRs self-certification process (that seemed to resolve the issues from *Zubik*) caused employers to violate their religious beliefs.⁷⁰ In taking the case, the Court sought to determine the required amount of notice and whether the Government violated RFRA by mandating that health insurance companies must provide contraceptive coverage, even when the insurance companies did not share any of the cost of coverage with the religiously opposed employers.⁷¹

III. THE COURT'S REASONING

Writing for a 7-2 majority in *Little Sisters of the Poor*, Justice Thomas reversed the judgement of the Third Circuit and held that the ACA gave authority to the Departments to craft exemptions and accommodations for employers with religious or moral objections to providing contraceptive coverage to employees as a part of their employer-sponsored health plans.⁷² The Court took a few steps in getting to this decision.

First, the Court looked to refute the respondents' argument that the Departments lacked the statutory authority to promulgate the contended regulations.⁷³ Respondents first contended that the relevant sections of the ACA permitted HRSA to determine only which preventative care and screenings, inclusive of contraception, that insurance companies shall provide, but may not exempt entities from covering those identified services.⁷⁴ The majority disagreed, finding that policy concerns cannot overrule the text's plain meaning.⁷⁵ While the majority agreed with respondents on the first point, that HRSA could define covered services, the majority disagreed with the second half of the argument, ruling that the "capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own guidelines."⁷⁶ Essentially, Justice Thomas and the majority ruled that because Congress *could* have limited HRSA's discretion in passing the ACA, but chose

69. See *supra* text accompanying notes 45–66.

70. *Little Sisters of the Poor*, 140 S. Ct. at 2379.

71. *Id.* at 2379–80.

72. *Id.* at 2372.

73. *Id.* at 2379.

74. *Id.*

75. The majority cites *Gitlitz v. Commissioner* to say that policy concerns cannot supplant the text's plain meaning. *Id.* at 2381 (citing *Gitlitz v. Commissioner*, 531 U.S. 206, 220 (2001)). The language of *Gitlitz*, however, suggests otherwise: "Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern." *Gitlitz*, 531 U.S. at 220.

76. *Little Sisters of the Poor*, 140 S. Ct. at 2380.

not to do so, HRSA may create these exemptions.⁷⁷ Thus, the Court found that the Departments can also craft rules and exemptions, not just HRSA, and consequently, there are no procedural issues with the Departments creating the exemptions at question here.⁷⁸

The respondents alternatively argued that the Departments should not even consider RFRA as they formulate the religious and moral exemption.⁷⁹ The Court built on the *Hobby Lobby* holding and *Zubik* guidance, finding that an important aspect of the problem are the concerns about violating RFRA. If overlooked, these issues would make the Departments' implementation of the rules arbitrary and capricious.⁸⁰

The Court next illustrated the procedural validity of the 2018 final rules.⁸¹ Respondents first argued that because a document titled "Interim Final Rules with Request for Comments," not "General Notice of Proposed Rulemaking," preceded the final rules, the Departments violated the APA's rulemaking procedure.⁸² The Court found the process valid because even though the titles lacked exactness, the process of the Departments contained all necessary elements⁸³ and satisfied the APA notice requirements.⁸⁴ Respondents alternatively contended that the 2018 final rules were procedurally invalid because the Departments failed to maintain an open mind throughout the process of promulgating the final rules after receiving comments through the APA's required notice and public comment process.⁸⁵ The Court refuted that the APA requires any sort of "open-mindedness test," holding that agencies need only follow the procedural requirements laid out in the APA and that agency

77. *Id.* at 2382.

78. *Id.* The majority only clarifies that Congress intended to give HRSA broad discretion on how to craft the coverage and exemptions, based on the Court's plain reading of the statute, but fails to explain how it comes to that understanding. *Id.*

79. *Id.* at 2382–83.

80. *Id.* at 2383–84. If, hypothetically, the Departments did fail to consider RFRA when crafting the rules and exemptions, this would also fail to consider an important aspect of the problem, as required. *Id.* Otherwise, courts could overturn the rule as an arbitrary and capricious promulgation. *Capricious*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/capricious> (last visited April 5, 2024).

81. *Little Sisters of the Poor*, 140 S. Ct. at 2384.

82. *Id.* at 2384.

83. For a department or agency to promulgate a regulation or rule based on a congressional directive, the agency must go through a notice and public comment process. 5. U.S.C. § 533. This process consists of providing notice to the public of the proposed rule, allowing a period of time for the public to make comments on whether they think the agency should make any changes to the rule, and providing notice of the final rule once solidified, with the comments taken into consideration. *Id.*; see also OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

84. *Little Sisters of the Poor*, 140 S. Ct. at 2384–85.

85. *Id.* at 2385.

promulgated rules are not subject to any judge-made procedures.⁸⁶ Because the Court found that the Departments satisfied the baseline of the APA's objective criteria and properly completed the notice and public comment procedure, the majority determined the final rules are procedurally valid.⁸⁷ The Court reversed the Third Circuit's holding and rejected both of respondent's argument about the final rules.⁸⁸

Justice Ginsburg, joined by Justice Sotomayor, authored a dissent in which she scorned the majority for accommodating religious rights in order to completely set aside the rights and interests of individuals who use contraception.⁸⁹ In short, the dissent argued that the ACA does not authorize the majority-endorsed exemptions.⁹⁰ The dissent provided textualist support for not allowing these exemptions,⁹¹ noting that the relevant sections of the ACA do not designate any power to these Departments to craft such exemptions.⁹² The dissent also carefully broke down why the Government's accommodation of religious beliefs is wrongfully at the expense of third parties.⁹³

IV. ANALYSIS

The Court's holding is incorrect for three major reasons. First, the Court did not give proper consideration to the text and intent of the WHA,⁹⁴ and in disregarding its more compromising holdings in *Hobby Lobby* and *Zubik*, failed to balance the purpose of the WHA and the rights of those who, for religious or moral reasons, object to involvement in providing contraceptive care in any capacity.⁹⁵ Secondly, by allowing an exemption that permits employers to exclude a service from health insurance coverage that only certain people use, the Court allows those employers to discriminate on the basis of sex in their provision of benefits.⁹⁶ Lastly, the majority not only created concerning precedent allowing religious and moral objections to policies to drastically affect the implementation of policies, but also failed to consider additional concerns about third party harm, which should have impacted the ruling.⁹⁷

86. *Id.*

87. *Id.* at 2385–86.

88. *Id.* at 2386.

89. *Id.* at 2400 (Ginsburg, J., dissenting).

90. *Id.* at 2404–05.

91. *Id.* at 2405.

92. *Id.* at 2406.

93. *Id.* at 2408.

94. *See supra* note 10 and accompanying text.

95. *See infra* Section IV.A.

96. *See infra* Section IV.B.

97. *See infra* Section IV.C.

A. *The Court Failed to Give Proper Weight to the Women's Health Amendment in its Departure from Hobby Lobby and Zubik*

The Court failed to give proper weight to the purpose and intent of the WHA⁹⁸ when the majority departed from the *Hobby Lobby* and *Zubik* holdings, which recognized that, despite the existence of a free exercise interest in exempting employers from providing certain types of contraceptive care, there is still a need to ensure women are not without coverage.⁹⁹ The Court considered congressional intent and purpose of statutes in previous holdings; the Court should have done the same here.¹⁰⁰ For example, the *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹⁰¹ case is used to critique the *Little Sisters of the Poor*, illustrating how the Court's evaluation of congressional intent in the Fair Housing Act ("FHA") can shed light on the proper outcome in this case.¹⁰² In *Inclusive Communities Project*,¹⁰³ the Court relied on the text and purpose of the FHA to determine that disparate impact claims are in fact recognized.¹⁰⁴ The Court determined that the purpose of the FHA was in fact to "eradicate discriminatory practices" in housing decisions, and thus, eradicate discrimination in a sector of the nation's economy, indicating the Court's partial but direct reliance on the purpose and intent of a statute in their holding.¹⁰⁵

In the case at hand, the Court failed to fully consider the purpose of the WHA, which Congress expressly added to the ACA to improve women's health and eradicate disparities in access to health care.¹⁰⁶ Before the promulgation of the IFRs and final rules, the Departments did not dispute HRSA's earlier finding that the contraceptive mandate was "necessary for women's health and well-

98. See *supra* note 10 and accompanying text.

99. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–32 (2014) (concluding that other, less restrictive means existed to ensure that all female employees could access certain cost-free contraceptives without cost sharing, as HHS "already established an accommodation for nonprofit organizations with religious objections" and "[u]nder that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services"). *But cf.* *Zubik v. Burwell*, 578 U.S. 403, 409 (2016) (holding that "nothing in this opinion" should affect government's ability to ensure that women are covered by health care plans, including obtaining, without cost, contraceptives).

100. See *infra* notes 102–10 and accompanying text.

101. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 532 (2015).

102. Sabrina Rubis, *Little Sisters of the Poor v. Pennsylvania: The Not So Little Effect of Interfering with the ACA's Contraceptive Mandate*, 21 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 338, 369–72 (2021).

103. 576 U.S. 519 (2015).

104. *Id.* at 534.

105. *Id.* at 539.

106. See Brief for the National Women's Law Center et al. as Amici Curiae Supporting Respondents, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454).

being.”¹⁰⁷ This suggests that the Departments considered this mandate a critical part of the ACA and chose to ignore it when creating these exemptions, forcing many employers to keep their employees from access to contraceptive care.¹⁰⁸ The Departments disregarded this purpose and intent when creating the exemption and the Court failed to recognize this ignorance.¹⁰⁹ The Court set precedent in *Inclusive Communities Project* that they are willing to look to congressional intent when ruling on a case that is rooted in a statute.¹¹⁰ Thus, by failing to recognize the purpose and intent in their ruling, the Court failed to follow their own precedent.¹¹¹

B. Allowing Employers to Exclude from Coverage a Service That Only Is Used by People Who Are Not Cisgender Males Permits Discrimination on the Basis of Sex

When the Court upheld the exemption, it allowed religiously and morally opposed employers to discriminate on the basis of sex in their provision of health care. In RFRA, Congress provided that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless “it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling government interest.”¹¹² In *Little Sisters of the Poor*, the appellants argued that their exercise of religion is substantially burdened and that even if there is a compelling government interest, the former self-certification process is not the least restrictive means of furthering that interest.¹¹³ However, while there is no question that the appellants believe they are substantially burdened, there is a compelling government interest that is overlooked by the Court: ensuring that employers provide health care coverage and do not discriminate on the basis of sex.¹¹⁴

There is a well recognized compelling government interest in preventing discrimination on the basis of sex, established by Title VII of the 1964 Civil

107. *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring) (quoting *Women’s Preventive Services Guidelines*, HEALTH RES. SERVS. ADMIN. (2019), <https://www.hrsa.gov/womens-guidelines-2019>).

108. *Id.*

109. *Id.*

110. See *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 535–38 (2015) (holding that disparate impact claims are cognizable under FHA in part because Congress, in crafting FHA, showed intent for such claims to be cognizable; thus, majority held that congressional intent is a crucial aspect in determining cases where outcome is based on statutory interpretation).

111. *Little Sisters of the Poor*, 140 S. Ct. at 2381 (majority opinion).

112. *Id.* at 2383 (quoting 42 U.S.C. § 2000bb-1(a)–(b)).

113. *Id.* at 2376.

114. *Id.* at 2403 (Ginsburg, J., dissenting).

Rights Act.¹¹⁵ This goal of preventing sex discrimination requires equality in benefits, such as health insurance coverage.¹¹⁶ For example, when the government allows certain employers to exclude from coverage a service that are only used by those who are not a cisgender male, they are allowing these employers to discriminate on the basis of sex.¹¹⁷ Thus, if looking at the government's interest in the exemptions upheld in *Little Sisters of the Poor* not as providing "free contraceptives for all women," as Justice Alito categorizes it,¹¹⁸ but as taking away aspects of specific employees' compensation in a discriminatory way, there is clearly a harm present that the government has a substantial interest in eradicating.¹¹⁹ Combating discrimination was part of the purpose of the contraceptive mandate and the WHA as a whole. This is evidenced by several senators who, in advocating on the floor of the Senate for the WHA, spoke to the fact that excluding cost-fee coverage for services only utilized by women is discrimination by the insurance companies.¹²⁰

The majority conceded that the exemptions thwart Congress' intent.¹²¹ Yet, the Court brushed aside these concerns by suggesting that they do not overcome the plain text meaning of the statute and thus, do not truly matter.¹²² Justice Ginsburg's textual analysis in the dissent is a much clearer, more thorough reading of the statutory text.¹²³ In laying out the entirety of the preventative care provision, Justice Ginsburg rightly notes that the majority's textualist reading fails to look at the provision as a whole.¹²⁴ The provision only discusses that health insurance issuers "shall" cover services and makes no mention of exemptions or the ability of HRSA to grant them.¹²⁵ As such, the Court should have followed their ruling in *Rotkiske v. Klemm*,¹²⁶ which said courts cannot supply absent provisions in their rulings.¹²⁷ By reading the relevant statute as saying that HRSA is able to create exemptions, this is exactly what the majority

115. See 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.").

116. *Id.* § 2000e(k).

117. *Developments in the Law—Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2203–06 (2021) [hereinafter *Reframing the Harm*].

118. *Little Sisters of the Poor*, 140 S. Ct. at 2392 (Alito, J., concurring).

119. *Reframing the Harm*, *supra* note 117, at 2203.

120. See 155 CONG. REC. 24426 (2009).

121. *Little Sisters of the Poor*, 140 S. Ct. at 2381 (majority opinion).

122. *Id.*

123. *Id.* at 2404–05 (Ginsburg, J., dissenting).

124. *Id.* at 2405.

125. *Id.* at 2404.

126. 140 S. Ct 355 (2019).

127. *Id.* at 361.

did in *Little Sisters of the Poor*¹²⁸—regardless of the fact that this not in their job description.¹²⁹ In doing so, the majority not only ignores precedent holding that it is “especially unlikely” that Congress would choose to delegate this responsibility to the HRSA—who lacks expertise in delineating religious and moral exemptions¹³⁰—but they also ignore that the Departments, not HRSA, created these rules.¹³¹ The slight-of-hand that the Court does to both read-in to the statute that HRSA can create exemptions and ignore that it is not HRSA who created the exemption suggests that their textualist reading is, at the very least, a flawed understanding of the text’s plain meaning.¹³²

Given that combating discrimination is a main purpose of the WHA, the Departments should be required to consider this interest when crafting exemptions.¹³³ In her dissent, Justice Ginsburg makes an important note that, by the Government’s estimates, between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services due to the Court’s newfound exemptions.¹³⁴ The Department suggests that over 100,000 people losing contraception access is a minimal issue; this fails to consider how impactful losing contraceptive coverage is on women’s finances and health.¹³⁵ When the Departments failed to provide any alternative for women to receive contraceptive care without out of pocket costs or a complete job shift, they failed to follow the RFRA standard reiterated by the majority in *Little Sisters of the Poor*. This standard requires compliance with a compelling government interest in the least restrictive manner. The majority in *Little Sisters of the Poor* recognized no compelling government interest and as such, did not comply with the RFRA standard.

128. *Little Sisters of the Poor*, 140 S. Ct. at 2405 (Ginsburg, J., dissenting).

129. *Id.* at 2406 (citing *King v. Burwell*, 576 U.S., 473, 486 (2015)).

130. *Id.*

131. *Id.* Justice Ginsburg notes that the Departments, who are not named anywhere in the relevant statute, created the blanket exemption. Only HRSA is named, a fact that the majority, the concurrence, and the Government seem to overlook and not explain. *Id.*

132. *Id.*

133. See *supra* note 107 and accompanying text.

134. *Little Sisters of the Poor*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

135. See LAURIE SOBEL ET AL., KAISER FAM. FOUND., THE FUTURE OF CONTRACEPTIVE COVERAGE 4 (Jan. 9, 2017), <https://files.kff.org/attachment/Issue-Brief-The-Future-of-Contraceptive-Coverage>. Before the ACA was implemented, contraceptives made up upwards of 44% of the out of pocket health care spending for women; as of 2013, most women have no out of pocket costs, thus, the women who will lose coverage will likely see their health care costs rise. Additionally, the increase in cost can cause women to change their method of contraceptive to cheaper, less effective methods that can lead to enormous costs related to unintended pregnancy, childbirth, and child raising. *Id.*

C. Policy Considerations Should Have More Substantially Affected the Ruling

Policy considerations add to the previous arguments against the Court's decision. Namely, neither the Free Exercise Clause of the First Amendment, nor RFRA, call for imbalanced results in legal decisions where third parties are harmed by the protections given to religious adherents.¹³⁶ Yet, that is exactly what is happening here: as many as hundreds of thousands of women will lose coverage because of this ruling, which allows employers to deny their employees a specific aspect of their health care coverage because of their religious or moral objection.¹³⁷

The Court held in past cases that certain exemptions or accommodations are not permitted due to overruling others' interests, showing that the Court recognizes limits to religious exemptions when they go too far.¹³⁸ Even here, the Little Sisters admitted that they do not have qualms with registering their objections; they only take issue with the use of the act of registering an objection as part of the process to provide women with contraceptive care.¹³⁹ This sets an incredibly dangerous precedent to allow religious and moral objections on the basis of the objecting entity's actions, down the line, being utilized by others—a precedent validated by the majority in *Little Sisters of the Poor*.

V. CONCLUSION

The Court incorrectly decided *Little Sisters of the Poor*. The majority should not have moved away from a process which allowed people who use contraception to keep their contraceptive care.¹⁴⁰ In considering whether the Departments properly crafted the exemptions allowing employers providing health insurance to exclude contraceptive care, the Court failed to give proper weight to the purpose of the Women's Health Amendment.¹⁴¹ Additionally, the Court neglected to consider the compelling government interest of keeping employers from discriminating on the basis of sex through their disparate provision of health insurance¹⁴² and thus, failed to recognize that fully exempting certain employers from complying with the contraceptive mandate was not the least restrictive means of furthering the compelling interest.¹⁴³ Lastly, the Court

136. See *Little Sisters of the Poor*, 140 S. Ct. at 2400–01, 2408 (Ginsburg, J., dissenting).

137. *Id.* at 2404.

138. *Id.* at 2407 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Estate of Thornton v. Caldor*, 472 U.S. 703, 708–10 (1985)).

139. *Little Sisters of the Poor*, 140 S. Ct. at 2411.

140. See *supra* Part IV.

141. See *supra* Section IV.A.

142. In this case, by failing to provide people who use contraceptive care with their desired care, but only if they work for certain employers. *Little Sisters of the Poor*, 140 S. Ct. at 2404.

143. See *supra* Section IV.B.

sets dangerous precedent in this case by permitting the religious claims of a few to determine how policies function for the rest of the country, which in this case allowed these religious groups to dictate whether hundreds of thousands of people maintained access to a major aspect of health care.¹⁴⁴

Though the possibility of overturning this case is slim and likely only possible with a change in the ideological makeup of the Supreme Court, progressive politicians, administrators, and advocates are still working towards other ways to expand access to contraceptive care.¹⁴⁵ In June of 2023, President Biden issued an Executive Order that sought to strengthen access to affordable, high-quality contraceptive care.¹⁴⁶ In January of 2024, the Secretary of Health and Human Services announced a series of new actions that will protect and expand access to contraception.¹⁴⁷ Rest assured, the fight to ensure access to contraceptive care to those who need it is not without hope.

144. See *supra* Section IV.C.

145. See, e.g., . MD. CODE ANN., EDUC. § 15-136 (West 2023) (requiring public senior higher education institutions in Maryland to provide reproductive health services to students, including “24-hour access to over-the-counter contraception through the student health center, retail establishments on campus, or vending machines,” starting August 1, 2024); Pam Belluck, *F.D.A. Approves First U.S. Over-the-Counter Birth Control Pill*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/health/otc-birth-control-pill.html> (discussing FDA’s recent approval of Opill, first over-the-counter contraceptive pill in the United States).

146. Exec. Order No. 14,101, 88 C.F.R. § 41815 (2023).

147. See U.S. DEP’T OF HEALTH AND HUM. SERVS., *HHS Secretary Xavier Becerra Announces New Actions to Increase Contraceptive Care Coverage on 51st Anniversary of Roe v. Wade* (Jan. 22, 2024), <https://www.hhs.gov/about/news/2024/01/22/hhs-secretary-xavier-becerra-announces-new-actions-increase-contraceptive-care-coverage-51st-anniversary-roe-v-wade.html>.