FEDERAL STATUTES AND TREATIES

Affordable Care Act — Contraceptive Mandate — Religious Exemptions — Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania

A century ago, legal scholar Zechariah Chafee, Jr., summed up his view of the First Amendment's limits, writing that "[y]our right to swing your arms ends just where the other man's nose begins."[1] For decades, such has been the Supreme Court's approach to religious accommodations. Accommodations would be upheld or granted, but only insofar as they did not impose too heavy a burden on unwitting third parties.[2] Last Term, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[3] the Supreme Court signaled its departure from this approach and upheld the Trump Administration's sweeping exemptions to the Affordable Care Act's[4] (ACA) contraceptive mandate without discussing third-party harms. In doing so, the Court reneged on its earlier assurances that contraceptive coverage would not be jeopardized by religious accommodations and, more broadly, signaled that harm to third parties will no longer serve as a check on those accommodations at all. Without third-party harm as a restraint, it is not clear what limiting principle remains to curb exemptions to any antidiscrimination protection.

The Women's Health Amendment to the ACA[5] authorizes the Health Resources and Services Administration (HRSA), an agency of the Department of Health and Human Services (HHS),[6] to specify what preventative health services group health insurance plans must provide to women without copays or deductibles.[7] In 2011, HRSA determined that these plans must include the full range of FDA-approved contraceptive methods.[8] HHS, the Department of Labor, and the Department

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[1] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

[2] *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 128 YALE L.J.F. 201, 216 (2018); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 349 (2014).

[3] 140 S. Ct. 2367 (2020).

[4] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[5] *See* David M. Herszenhorn & Robert Pear, *Senate Passes Women's Health Amendment*, N.Y. TIMES: PRESCRIPTIONS (Dec. 3, 2009, 12:32 PM), https://nyti.ms/3i3yazE [https://perma.cc/QV7U-J5CF].

[6] *About HRSA*, HEALTH RES. & SERVS. ADMIN. (Oct. 2019), https://www.hrsa.gov/about [https://perma.cc/EWH9-BAAP].

[7] *See* 42 U.S.C. § 300gg-13(a)(4).

[8] *See Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN. (Dec. 2019), https://www.hrsa.gov/womens-guidelines [https://perma.cc/RU5Z-A9W8]; Pennsylvania v. Trump, 351 F. Supp. 3d 791, 798 (E.D. Pa. 2019).

of the Treasury soon promulgated a rule exempting houses of worship from the contraceptive mandate and creating an accommodation process for certain religious nonprofits.[9] Under this process, an eligible nonprofit[10] could "self-certify" their religious objections to contraceptive coverage to their health insurance provider, which would direct the insurer to exclude contraceptive coverage from the organization's plan and provide such coverage through separate channels.[11]

However, some religious organizations objected to the accommodation process on grounds that submitting a self-certification burdened their religious exercise by making them "complicit" in practices they considered immoral.[12] A spate of litigation later,[13] and after attempts to revise the accommodations process failed, the Trump Administration issued two interim final rules (IFRs) in 2017 that allowed any employer with a religious or moral objection to contraceptives to claim an exemption and thus not provide contraceptive coverage for its employees.[14]

The Commonwealth of Pennsylvania sued and sought an injunction against the rules, alleging that the agencies' promulgations of the IFRs violated the Administrative Procedure Act's[15] (APA) procedural and substantive requirements for informal rulemaking.[16] On the procedural front, Pennsylvania argued that the agencies impermissibly forwent the APA's notice-and-comment requirements,[17] which the government sought to justify by invoking the "good cause exception."[18] On the substantive front, the Commonwealth claimed that the IFRs were arbitrary, capricious, and in violation of the ACA.[19] The district court granted Pennsylvania's request for a preliminary injunction,[20] finding that the

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[9] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

[10] The agencies extended the accommodation to closely held for-profit corporations in 2015 following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,323 (July 14, 2015).

[11] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,876.

[12] *E.g.*, Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting); *see, e.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (per curiam).

[13] For an overview of legal challenges to the self-certification accommodation, see *Little Sisters*, 140 S. Ct. at 2375–76.

[14] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

[15] 5 U.S.C. §§ 551, 553–559, 701–706.

[16] Pennsylvania v. Trump, 281 F. Supp. 3d 553, 563–64 (E.D. Pa. 2017); *see* 5 U.S.C. § 553(b).

[17] *Trump*, 281 F. Supp. 3d at 563.

[18] *Id.* at 571; *see* 5 U.S.C. § 553(b)(B).

[19] *See Trump*, 281 F. Supp. 3d at 563–64.

[20] *Id.* at 585.

agencies had not demonstrated "good cause" to bypass the APA's notice-and-comment requirement[21] and that they lacked statutory authority to carve out exemptions to the ACA's coverage requirement in the first place because the ACA authorized the agencies to define only what types of services are covered, not which employees receive coverage.[22] In November 2018, the agencies issued new rules finalizing the IFRs,[23] which the district court also enjoined on similar grounds.[24] The federal government and Little Sisters of the Poor Saints Peter and Paul Home, a religious nonprofit that had intervened on its behalf, filed a consolidated appeal.[25]

The Third Circuit affirmed.[26] Writing for the unanimous panel, Judge Shwartz[27] found that the states were likely to succeed on their claim that the rules violated the APA.[28] First, the court found the IFRs procedurally deficient because the agencies did not have statutory authority to forgo notice and comment, nor did they have "good cause" to do so.[29] The court determined that the subsequent notice-and-comment period that preceded the issuing of the final rules did not cure those procedural defects because the final rules were "virtually identical"[30] to the IFRs and thus did not demonstrate that the agencies considered public comments with an "open mind."[31] The panel also found that the final rules suffered from substantive defects, as neither the ACA nor the Religious Freedom Restoration Act[32] (RFRA) authorized their promulgation.[33] The federal government and Little Sisters appealed.[34]

The Supreme Court reversed and remanded.[35] Writing for the Court, Justice Thomas[36] held that the final rules were substantively and

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[21] *Id.* at 576.

[22] *Id.* at 578–79.

[23] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018).

[24] Pennsylvania v. Trump, 351 F. Supp. 3d 791, 798 (E.D. Pa. 2019); *see id.* at 816 (citing procedural defects); *id.* at 821 (citing substantive defects). New Jersey joined Pennsylvania in challenging the final rules. *Id.* at 803.

[25] *Little Sisters*, 140 S. Ct. at 2379.

[26] Pennsylvania v. President U.S., 930 F.3d 543, 556 (3d Cir. 2019).

[27] Judge Shwartz was joined by Judges McKee and Fuentes.

[28] *See President U.S.*, 930 F.3d at 556.

[29] *Id.* at 565–68.

[30] *Id.* at 569.

[31] *Id.* at 568 (quoting United States v. Reynolds, 710 F.3d 498, 519 (3d Cir. 2013)); *see id.* at 568–69.

[32] 42 U.S.C. §§ 2000bb to 2000bb-4.

[33] *President U.S.*, 930 F.3d at 569.

[34] *Little Sisters*, 140 S. Ct. at 2379.

[35] *Id.* at 2373.

[36] Justice Thomas was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh.

procedurally valid.[37] First, the Court held that the plain language of the ACA "gives HRSA broad discretion to define preventive care . . . and to create the religious and moral exemptions."[38] Justice Thomas dismissed the dissent's concerns that the exemptions would harm women, finding that the determination of whether women would be adversely impacted was a "policy concern," which "cannot justify supplanting the text's plain meaning."[39]

Having already found that the ACA authorized both exemptions, the majority declined to address the agencies' alternative argument that RFRA compelled, or at least authorized, the rules.[40] Justice Thomas did, however, reject the states' argument that the agencies "could not even consider RFRA as they formulated the religious exemption."[41] RFRA "applies to all Federal law"[42] unless Congress has explicitly excluded a statute from RFRA's purview,[43] which it did not do for the ACA.[44] Further, the Court deemed that its previous decisions regarding the legality of the contraceptive mandate "all but instructed the Departments to consider RFRA going forward."[45]

Finally, Justice Thomas held that the exemptions were procedurally valid.[46] He repudiated the Third Circuit's "open-mindedness test"[47] as having "no basis in the APA,"[48] and instead applied "the APA's objective criteria"[49] — that agencies provide notice and the opportunity for comments, include a "concise general statement of [a final rule's] basis and purpose,"[50] and publish the final rules thirty days prior to them becoming effective.[51] The Court found that the agencies complied with each of these requirements in issuing the rules.[52]

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[37] *See Little Sisters*, 140 S. Ct. at 2386.

[38] *Id.* at 2381. The relevant text states that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a).

[39] *Little Sisters*, 140 S. Ct. at 2381.

[40] *Id.* at 2382.

[41] *Id.* at 2382–83.

[42] *Id.* at 2383 (quoting 42 U.S.C. § 2000bb-3(a)).

[43] *Id.* (citing 42 U.S.C. § 2000bb-3(b)).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2384.

[47] *Id.* at 2385.

[48] *Id.* (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990)).

[49] *Id.* at 2386.

[50] *Id.* (quoting 5 U.S.C. § 553(c)).

[51] *Id.*

[52] *Id.*

Justice Alito[53] concurred, writing separately to lament the Court's narrow decision. He would have held that RFRA compelled the creation of a religious exemption, which was therefore not arbitrary and capricious in violation of the APA.[54] According to Justice Alito, the contraceptive mandate, as applied to religious employers, violated RFRA. He found that the mandate imposed a substantial burden, in that compliance required employers to violate their "sincere religious belief that utilizing the accommodation would make them complicit" in the use of contraceptives,[55] and because "providing free contraceptives to all women" was not a compelling government interest.[56] And even if the mandate served a compelling interest, Justice Alito found it was not the least restrictive means of doing so — the government could simply assume the costs of providing contraceptive coverage itself.[57]

Justice Kagan[58] concurred in the judgment. She disagreed that the statutory language provided clarity but invoked *Chevron*[59] to conclude that she would defer to the agencies' "longstanding and reasonable interpretation" of the statute.[60] However, she also found that the exemptions were likely arbitrary and capricious as they did not evince "reasoned decisionmaking."[61] Justice Kagan found that the agencies acted unreasonably because they left in place the determination that "the mandate is 'necessary for women's health and well-being,'" but then acted to provide overly broad exemptions without regard to their impact on women's health and well-being.[62]

Justice Ginsburg[63] dissented. She found that in upholding the exemptions, the Court "for the first time . . . cast[] totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree."[64] As a threshold matter, Justice Ginsburg found the exemptions were not authorized by the ACA's plain text, which, on her read, only left up to HRSA the determination of *what* services must be covered.[65] Nor did she find the exemptions authorized by RFRA.[66] While agencies "may craft accommodations and exemptions to cure violations of RFRA," they must also consider the burden such accommodations and

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53 Justice Alito was joined by Justice Gorsuch.
54 *Little Sisters*, 140 S. Ct. at 2387 (Alito, J., concurring).
55 *Id.* at 2390; *see id.* at 2389–90.
56 *Id.* at 2392; *see id.* at 2392–94.
57 *Id.* at 2394–95.
58 Justice Kagan was joined by Justice Breyer.
59 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
60 *Little Sisters*, 140 S. Ct. at 2398 (Kagan, J., concurring in the judgment); *see id.* at 2397–98.
61 *Id.* at 2398 (quoting Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015)).
62 *Id.* at 2399 (quoting *Women's Preventive Services Guidelines*, *supra* note 8); *see id.* at 2398–99.
63 Justice Ginsburg was joined by Justice Sotomayor.
64 *Little Sisters*, 140 S. Ct. at 2400 (Ginsburg, J., dissenting).
65 *Id.* at 2404.
66 *Id.* at 2409.

exemptions impose on nonbeneficiaries.[67] "In this light," Justice Ginsburg continued, "the Court has repeatedly assumed that any religious accommodation to the contraceptive-coverage requirement would preserve women's continued access to seamless, no-cost contraceptive coverage."[68] To hold otherwise, she concluded, "would endorse 'the regulatory equivalent of taxing non-adherents to support the faithful.'"[69]

With *Little Sisters*, the Supreme Court dealt a serious blow to the contraceptive mandate, once a landmark victory for gender equality.[70] Although the decision purported to be a narrow one, based on a run-of-the-mill application of APA rulemaking requirements, the outcome in fact portends a massive shift in how the Court treats religious accommodations. By allowing the exemptions to stand without even a discussion of negative externalities, the Court retreated from the understanding, crucial to its earlier decisions, that religious accommodations would not endanger access to contraceptives, and implicitly undermined a doctrine of third-party harms that has long provided a limiting principle in cases where religious freedom and other rights clash. If the Court is no longer required to consider the harm done to third parties by religious exemptions, then numerous civil rights protections may be under threat.

For decades, the Court's approach to religious accommodations has been to balance the interests on both sides, rather than "defer entirely to [objectors'] religious beliefs."[71] During the Civil Rights era, for example, in keeping with the third-party harm principle, the Court roundly rejected attempts to undermine antidiscrimination law through religious exemptions.[72] Later, in the 1982 case *United States v. Lee*,[73] the Court

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[67] *Id.* at 2407.

[68] *Id.*; *see id.* at 2407–08 (citing Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam); Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014)).

[69] *Id.* at 2408 (quoting Brief of Church-State Scholars as Amici Curiae in Support of Respondents at 3, *Little Sisters*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454)).

[70] *Cf.* 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.").

[71] *Little Sisters*, 140 S. Ct. at 2404 (Ginsburg, J., dissenting); *cf.* Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376 (2016) ("The general principle . . . that burdens on third parties matter . . . is well established.").

[72] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam). In fact, the religious objections being raised today bear disturbing resemblance to those raised in response to integration efforts. *See* NeJaime & Siegel, *supra* note 2, at 213; William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 710–11 (2011); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 931–32 (2015) ("If [the arguments made by religious objectors today] had been accepted in 1964, then we might still have segregated restaurants, hotels, movie theaters, and pools in the South." *Id.* at 931.).

[73] 455 U.S. 252 (1982).

held that an Amish employer was not entitled to an exemption from social security taxes because of the negative financial impact on employees.[74] And, in 1985, in *Estate of Thornton v. Caldor, Inc.*,[75] the Court invalidated a Connecticut statute granting religious employees the right not to work on their observed Sabbath because the state failed to take into account "[the] burden or inconvenience this imposes on the employer or fellow workers."[76] Even in the post-RFRA era, as the Court's view of religious freedom rapidly expanded,[77] it has still made sure to reiterate this central point about third-party harms.[78] In *Cutter v. Wilkinson*,[79] for example, the Court reaffirmed that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[80] The Court repeated this principle in its most recent religious exemption case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[81]

The need to balance religious accommodations against harms to third parties also played a key role in each of the Court's previous cases dealing with the contraceptive mandate. In *Burwell v. Hobby Lobby Stores, Inc.*,[82] the Court extended the contraceptive mandate accommodation to closely held corporations but also wrote to underscore the limits of its decision — that the accommodations were permissible *because* "[t]he effect of the . . . accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero."[83] This compromise undergirded its two subsequent

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[74] *Id.* at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

[75] 472 U.S. 703 (1985).

[76] *Id.* at 708–09.

[77] *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 1–2 (2d ed. 2014). Notably, however, the Court's newly expansive vision of religious freedom seems to exclude members of minority religions in at least some cases. *See, e.g.*, Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.) (granting Alabama's application to vacate the stay of execution for a Muslim death row inmate who was not allowed the presence of an imam at his death, despite the fact that Christian inmates were allowed the presence of a Christian chaplain).

[78] *See* Gedicks & Van Tassell, *supra* note 2, at 349 ("One consistent theme in [the Court's] permissive accommodation decisions . . . is the impermissibility of cost shifting.").

[79] 544 U.S. 709 (2005).

[80] *Id.* at 720.

[81] 138 S. Ct. 1719 (2018); *see id.* at 1727; *see also* NeJaime & Siegel, *supra* note 2, at 202 (observing that *Masterpiece* "affirm[ed] an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector's beliefs").

[82] 134 S. Ct. 2751 (2014).

[83] *Id.* at 2760; *see also id.* ("[W]e certainly do not hold or suggest that 'RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.'" (omission in original) (quoting *id.* at 2787 (Ginsburg, J., dissenting))); 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, 75 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) ("Even if the Court was incorrect in its assumption that the accommodation would have

contraceptive mandate cases, *Wheaton College v. Burwell*[84] and *Zubik v. Burwell*,[85] both of which were premised on the understanding that additional religious accommodations would not restrict seamless access to cost-free contraceptives.[86]

In *Little Sisters*, however, the 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. The new exemptions will certainly have far from "precisely zero"[87] effect on employees. By the government's own estimation, the exemptions will cause up to 126,400 people to lose insurance coverage for crucial medications, but the real number could be much higher.[88] Without insurance coverage, the cost of contraceptives can put an enormous, sometimes prohibitive, burden on women and people of all gender identities who utilize contraceptives.[89] The new exemptions are likely to have a particularly devastating effect on Black women and people of color and exacerbate existing health and economic disparities.[90]

Yet Justice Thomas treated this harm as an irrelevant — and even inappropriate — consideration for the Court, dismissing it as a mere "policy concern," better directed at Congress.[91] Although it is worth noting that the Court's refusal to acknowledge these consequences came in the context of a challenge to the agencies' statutory authority to issue the rules, rather than a free exercise challenge to the mandate itself, its effect was to sanction a religious exemption that will cause over one hundred thousand employees, at the very least, to lose contraceptive

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'precisely zero' effect on Hobby Lobby's employees, its reasoning demonstrates how third-party harm matters in analysis under RFRA." (quoting *Hobby Lobby*, 134 S. Ct. at 2760)).

84 134 S. Ct. 2806 (2014).

85 136 S. Ct. 1557 (2016).

86 *See Zubik*, 136 S. Ct. at 1560–61; *Wheaton Coll.*, 134 S. Ct. at 2807.

87 *Hobby Lobby*, 134 S. Ct. at 2760.

88 *See Little Sisters*, 140 S. Ct. at 2408 & n.18 (Ginsburg, J., dissenting).

89 Birth control pills can cost up to fifty dollars per month without insurance, *see How Do I Get Birth Control Pills?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/birth-control/birth-control-pill/how-do-i-get-birth-control-pills [https://perma.cc/Y2GQ-54WE], and long-acting methods of contraception, such as IUDs, can cost more than $1,000, *see Insurance Coverage of Contraception*, GUTTMACHER INST. (Jan. 2020), https://www.guttmacher.org/evidence-you-can-use/insurance-coverage-contraception [https://perma.cc/XWU3-MJPE]. Studies show that "even seemingly small copayments and other cost-sharing requirements can dramatically reduce preventive health care use, particularly among low-income Americans." *Id.*

90 *See* Brief of Howard University School of Law, Civil & Human Rights Clinic in Support of the Respondents at 22, *Little Sisters*, 140 S. Ct. 2367 (2020) (Nos. 19-454, 19-431).

91 *Little Sisters*, 140 S. Ct. at 2381; *see also* Marci A. Hamilton, *Religious Entities Flex Their Muscles Through the Roberts Court, Playing Both Sides of the Discrimination Coin*, JUSTIA: VERDICT (Aug. 4, 2020), https://verdict.justia.com/2020/08/04/religious-entities-flex-their-muscles-through-the-roberts-court-playing-both-sides-of-the-discrimination-coin [https://perma.cc/HE2D-YSRT] ("[In *Little Sisters*], the spotlight was trained on the religious actors while their victims essentially sat in the dark, off to the side, ignored by the justices who were busy constructing a separate world for fellow believers without the bothersome Lockean obligations of a shared society.").

coverage — exactly the type of consequence that recognizing third-party harms was intended to guard against.[92] Thus, it is hard to imagine the Court's disregard of third-party harms would have — or will — come out differently in a more typical RFRA case, or in future litigation arguing that the government's failure to consider third-party harms rendered the religious exemption arbitrary and capricious.[93] This about-face is striking, not only because of *Hobby Lobby*, but also because of what it signals in a larger sense — that the Court is moving away from its longstanding commitment to balancing religious accommodation against resulting harm to third parties.[94]

Beyond its implications for reproductive freedom, other civil rights protections may be at risk if *Little Sisters*' rejection of third-party harms carries the day.[95] In most immediate danger are recent wins by the LGBTQ+ community, such as protection against employment discrimination.[96] Discrimination against women, religious minorities,[97] and others on the basis of sincerely held religious beliefs may, in the near future, also be legally authorized through exemptions.[98] Indeed, the other shoe

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[92] Nor is it possible to distinguish this case on the grounds that the intervenor-defendants were seeking to *uphold* a government exemption, rather than seeking an exemption contrary to the apparent will of the legislature. *Cf., e.g.*, Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 708–09 (1985) (striking down a state-created religious accommodation due to its impact on third parties).

[93] The majority went out of its way to argue that it was appropriate, indeed necessary, for the government to consider RFRA when crafting the exemptions. *See Little Sisters*, 140 S. Ct. at 2383–84. It read *Zubik* as a command to "'accommodat[e]' the free exercise rights of those with complicity-based objections to the self-certification accommodation," *id.* at 2383 (alteration in original) (quoting Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016)), conspicuously omitting any reference to *Zubik*'s basic premise: that such an accommodation could be made without denying women access to cost-free contraceptive coverage, *see Zubik*, 136 S. Ct. at 1560–61.

[94] Equally troubling is the Trump Administration's moral exemption. What is the government interest furthered by shielding a *moral* objection to contraception, aside from the interest in warding off a potential Establishment Clause challenge? This question was not addressed by the Court, though briefing on the subject argued that the moral exemption did not cure the religious exemption's Establishment Clause violation. *See* Brief of Religious & Civil-Rights Organizations as Amici Curiae in Support of Respondents [Corrected] at 29–31, *Little Sisters*, 140 S. Ct. 2367 (2020) (Nos. 19-431, 19-454).

[95] Prohibitions on racial discrimination are likely safe from religious exemptions. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014). *But cf.* sources cited *supra* note 72 (discussing parallels between arguments made by religious objectors today and those made during desegregation).

[96] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII prohibits discrimination on the basis of sexual orientation or gender identity). In fact, the *Bostock* Court itself hinted that religious exemptions to Title VII might be required under RFRA. *See id.* at 1754.

[97] *Cf.* Daniel Greenberg et al., *Increasing Support for Religiously Based Service Refusals*, PRRI (June 25, 2019), https://www.prri.org/research/increasing-support-for-religiously-based-service-refusals [https://perma.cc/DD9C-TJ6K] (showing that a sizable — and growing — percentage of Americans believe small business owners should be permitted to deny service to Jews, Muslims, and atheists if serving those groups would violate their religious beliefs).

[98] *See* Emily Brill, *Civil Rights Attys Fear Religious Turn at High Court*, LAW360 (July 9, 2020, 10:14 PM), https://www.law360.com/articles/1290342/civil-rights-attys-fear-religious-turn-at-high-court [https://perma.cc/LJ4T-82AD]; Chase Strangio (@chasestrangio), TWITTER (July 8, 2020,

may drop as soon as next Term, when the newly constituted Court, seemingly freed from the restraint of third-party harm analysis, faces the question of religious accommodations to antidiscrimination law head on.[99]

The absence of third-party harm analysis in *Little Sisters* leaves us with a predicament: if not third-party harm, what limiting principle exists to curb religious accommodations? And what does the Establishment Clause stand for if not the notion that regulations should not benefit religious objectors at the expense of nonadherents? Clear answers to these pressing questions have yet to emanate from the Supreme Court, and the consequences are dire. A pluralistic society depends for its survival on balancing competing interests.[100] Until recently, the Court had at least claimed to respect this need for compromise, even as it granted more extreme accommodations and exemptions.[101] What matters about *Little Sisters* is that the government and religious objectors flatly rejected compromise, instead asking the Court to bow entirely to religious interests at the expense of employees.[102] In yielding to this position, the Court shook the balanced approach that has long undergirded American pluralism, deepening the cracks in the foundation of America's religious settlement.[103]

10:17 AM), https://twitter.com/chasestrangio/status/1280868556490649602 [https://perma.cc/Y5JH-XHB2] (writing of *Little Sisters* that "civil rights protections of all kinds are on the road to being eviscerated through religious exemptions").

99 *See* Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.); *see also* Erwin Chemerinsky & Howard Gillman, *Symposium: The Unfolding Revolution in the Jurisprudence of the Religion Clauses*, SCOTUSBLOG (Aug. 6, 2020, 10:36 AM), https://www.scotusblog.com/2020/08/symposium-the-unfolding-revolution-in-the-jurisprudence-of-the-religion-clauses [https://perma.cc/5594-KWWX] (predicting, based on the outcome in *Little Sisters* and other religion cases this term, that *Fulton* will be decided so as to sanction discrimination against women and members of the LGBTQ+ community).

100 *See* United States v. Lee, 455 U.S. 252, 259 (1982) (explaining that while the government is free to accommodate religious beliefs, the competing needs of a pluralistic society "require[] that some religious practices yield to the common good").

101 *See* NeJaime & Siegel, *supra* note 2, at 202.

102 *Cf.* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015) (explaining that complicity claims, such as the one raised by the Little Sisters, are "explicitly oriented toward third parties" and thus "present special concerns about third-party harm").

103 *See* HAMILTON, *supra* note 77, at 1 (arguing that the United States' longstanding approach to religious accommodations, which balanced religious freedom against third-party harms, has prevented "religious civil war"); NeJaime & Siegel, *supra* note 83, at 79 ("Exemption regimes that exhibit indifference to the impact of widespread exemptions on others do not promote pluralism; they sanction and promote the objectors' commitments.").