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## CHAPTER TWO

### REFRAMING THE HARM: RELIGIOUS EXEMPTIONS AND THIRD-PARTY HARM AFTER *LITTLE SISTERS*

Free exercise is a constitutionally protected right that can support special accommodations or exemptions for religious adherents. But religious freedom does not operate in a vacuum; often it can bump up against other important rights and interests, thus creating thorny legal questions about the limits of conflicting aspects of liberty. For decades, the Supreme Court has resolved such conflicts by means of a “third-party harm” principle, embodying the idea that “[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties.”<sup>1</sup> As Professors Douglas NeJaime and Reva Siegel have described, “US law supports claims to religious accommodation, but imposes limits on such claims when the accommodation would inflict significant targeted harms on other citizens.”<sup>2</sup>

The third-party harm principle most often becomes relevant in cases where individuals demand personal exemptions to otherwise generally applicable laws on the basis that those laws, as applied to them, violate their free exercise or statutory rights. In this context, the application of the third-party harm principle has meant that the Court would generally grant a religious accommodation or exemption where it did not impose too heavy a burden on nonobjecting parties, such as the employees of religious employers<sup>3</sup> or the children of religious parents.<sup>4</sup> By contrast, the Court was historically wary of granting an accommodation or exemption where doing so would cause an injury or impose a cost on others.<sup>5</sup> Importantly, the Court applied the third-party harm principle in a

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 745 (2014) (Ginsburg, J., dissenting) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005)).

<sup>2</sup> 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>3</sup> See *United States v. Lee*, 455 U.S. 252, 261 (1982).

<sup>4</sup> See *Yoder*, 406 U.S. at 207, 222.

<sup>5</sup> See Nelson Tebbe et al., *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 215, 215 (Holly Fernandez Lynch et al. eds., 2017) (“In considering contemporary conflicts between the values of religious freedom and equality, a mediating principle has proved to be important — namely, the rule that when the government grants religious accommodations, it must avoid harm to others.”); 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) (“One consistent theme in [the Court’s] permissive accommodation decisions . . . is the impermissibility of cost shifting.”).

wide variety of cases, and did not attempt to categorically restrict the types of harms that warranted protection.

In recent years, as the Court moved toward a more expansive vision of religious liberty in its application of the Religious Freedom Restoration Act<sup>6</sup> (RFRA), the third-party harm principle still shaped the Court's approach to religious exemptions. This trend was on display even in banner cases for religious refusals, such as *Burwell v. Hobby Lobby Stores, Inc.*,<sup>7</sup> where the Court granted a religious accommodation to the contraceptive mandate only on the assumption that the accommodation sought would have “precisely zero” effect on employees.<sup>8</sup>

Support for the balanced, harm-oriented reasoning of *Hobby Lobby*, however, now appears to be waning. In its most recent religious exemption case, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,<sup>9</sup> the Court seemed to shrug off the third-party harm analysis altogether.<sup>10</sup> But even if the conservative majority on the Court is increasingly dismissive of third-party harms, rejecting the principle entirely would threaten longstanding precedents that held racially discriminatory exemptions to be impermissible on that basis — a change even the most avid conservatives on the Court have indicated a reluctance to undertake.<sup>11</sup> What emerges, then, is a narrowed third-party harm principle, couched in a compelling interest analysis. 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.

This Chapter charts the journey of the third-party harm principle across decades of Supreme Court religion jurisprudence to show that the Court remained committed to the principle as one of general applicability up until recently. It seeks to reveal the cracks that began to emerge in the consensus around the principle, and demonstrate how a much narrower view of third-party harm ascended following the retirement of Justice Kennedy. Finally, the Chapter maps out a plan for future litigants attempting to limit harmful religious refusals, particularly those aimed at undermining the contraceptive mandate. In short, for better or worse, third-party harm in the future must be precisely defined to fit within this conservative Court's narrow vision for what constitutes an impermissible burden.

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<sup>6</sup> 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>7</sup> 573 U.S. 682 (2014).

<sup>8</sup> *Id.* at 693.

<sup>9</sup> 140 S. Ct. 2367 (2020).

<sup>10</sup> See *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 565 (2020).

<sup>11</sup> See, e.g., *Hobby Lobby*, 573 U.S. at 733; Transcript of Oral Argument at 112, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. argued Nov. 4, 2020), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-123\\_0758.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-123_0758.pdf) [<https://perma.cc/K3QG-L2VC>] (Justice Barrett stated that “I think we would agree that there’s really not any circumstance we can think of in which racial discrimination would be permitted as a religious exemption.”).

*A. The Generally Applicable  
Third-Party Harm Principle*

By examining cases both before and after the enactment of RFRA, this section demonstrates how the third-party harm principle provided a basis for the Court's analysis of religious exemptions and accommodations. These cases show that the principle was generally applicable, rather than confined to a particular kind of harm. However, the post-RFRA cases also show that conservatives on the Court, particularly Justice Alito, began to grow weary of the analysis as a constraint on broad religious exemptions. In this sense, they provide a preview of how the Court's conservative majority might view the harm principle today: not as a framework of general applicability, but as an analysis that asks whether the harm is one that implicates a constitutionally protected interest.

*I. The Pre-RFRA Cases.* — Concern for third-party harm underlay the Court's treatment of religious exemptions across a diverse spectrum of cases for many years. Two cases that illustrate the principle particularly well are ones in which the Court actually *granted* an exemption: the 1963 case *Sherbert v. Verner*<sup>12</sup> and the 1972 case *Wisconsin v. Yoder*.<sup>13</sup> The Court in *Sherbert* held that under the Free Exercise Clause, South Carolina could not deny unemployment benefits to a Seventh-day Adventist who rejected jobs that would have required her to work on Saturday, her Sabbath — despite the fact that South Carolina law generally required applicants for unemployment benefits to accept offers for available, suitable work.<sup>14</sup> In so holding, the Court made sure to note that the exemption would not “serve to abridge any other person's religious liberties.”<sup>15</sup> Similarly, in *Yoder*, the Court held that Amish parents were entitled to an exemption from Wisconsin's compulsory education requirement, but only *after* determining that the exception would not cause harm to their children.<sup>16</sup> The Court emphasized that despite the parents' objection to conventional education beyond eighth grade, the Amish educational system was nonetheless adept at preparing the community's children to be “self-reliant and self-sufficient participants in society.”<sup>17</sup> The religious objectors in *Yoder* won

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<sup>12</sup> 374 U.S. 398 (1963).

<sup>13</sup> 406 U.S. 205 (1972).

<sup>14</sup> *Sherbert*, 374 U.S. at 398–402.

<sup>15</sup> *Id.* at 409.

<sup>16</sup> *Yoder*, 406 U.S. at 222–25.

<sup>17</sup> *Id.* at 221.

their desired exemption because their request caused no harm to children, or, as the Court put it, because the exemption “interfere[d] with no rights or interests of others.”<sup>18</sup>

By contrast, in *United States v. Lee*,<sup>19</sup> the Court declined to grant an exemption from the payment of social security taxes to an Amish employer.<sup>20</sup> The decision was again based on the third-party harm principle: “Granting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”<sup>21</sup> The third-party harm principle appeared again in the Establishment Clause case, *Estate of Thornton v. Caldor, Inc.*,<sup>22</sup> where the Court struck down a Connecticut statute that guaranteed religious employees the right not to work on their observed Sabbath.<sup>23</sup> The Court found that in enacting the statute, the state legislature had impermissibly disregarded the burdens such a policy would have on employers and other employees.<sup>24</sup>

The third-party harm principle was also at work in a series of civil rights-era cases in which religious adherents sought exemptions from laws geared toward eliminating racial discrimination. In one such case, *Newman v. Piggie Park Enterprises, Inc.*,<sup>25</sup> a segregationist restaurant owner challenged the constitutionality of the 1964 Civil Rights Act<sup>26</sup> on the grounds that the Act “‘contravene[d] the will of God’ and constitute[d] an interference with the ‘free exercise of [his] religion.’”<sup>27</sup> The Court treated the claim as barely even meriting discussion, dismissing it in a footnote as “patently frivolous.”<sup>28</sup> Similarly, in *Bob Jones University v. United States*,<sup>29</sup> two religious private schools challenged an Internal Revenue Service policy denying tax-exempt status to private schools that engaged in racial discrimination.<sup>30</sup> The Court once again rejected the idea that religious belief merited grounds for an exemption,

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<sup>18</sup> *Id.* at 224. Not every Justice on the Court agreed with the majority’s conclusion regarding the impact on Amish children. *See id.* at 245 (Douglas, J., dissenting in part) (voicing concern that the Court’s decision would “imperil[]” the futures of children whose religious parents opted out of state educational requirements).

<sup>19</sup> 455 U.S. 252 (1982).

<sup>20</sup> *Id.* at 254.

<sup>21</sup> *Id.* at 261.

<sup>22</sup> 472 U.S. 703 (1985).

<sup>23</sup> *Id.* at 710–11.

<sup>24</sup> *Id.* at 709–10 (“The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.” *Id.* at 710. (omission in original) (quoting *Otten v. Balt. & Ohio R.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953))).

<sup>25</sup> 390 U.S. 400 (1968) (per curiam).

<sup>26</sup> Pub. L. No. 88-352, 78 Stat. 241.

<sup>27</sup> *Id.* at 403 n.5 (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring specially)).

<sup>28</sup> *Id.* at 402 n.5.

<sup>29</sup> 461 U.S. 574 (1983).

<sup>30</sup> *Id.* at 579.

citing to *Lee* to hold that some limitations on religious liberty must be warranted.<sup>31</sup> The “governmental interest [in eradicating racial discrimination in education] substantially outweigh[ed] whatever burden denial of tax benefits place[d] on petitioners’ exercise of their religious beliefs.”<sup>32</sup>

If read in isolation, these civil rights cases might seem to demonstrate only that the Court saw a uniquely compelling governmental interest in rooting out racial discrimination, rather than being emblematic of any doctrinal approach to religious exemptions writ large. When viewed alongside cases such as *Sherbert*, *Yoder*, *Lee*, and *Caldor*, however, it becomes clear that the Court’s stance toward racially discriminatory religious exemptions was entirely consistent with its stance toward harmful exemptions more broadly. Taken together, these cases demonstrate that the third-party harm principle was a *general* principle, not one limited to preventing racial discrimination.

2. *Third-Party Harm Post-RFRA: Continuity and Slippage.* — In more recent years, the Court’s treatment of religious objections became markedly more expansive, thanks in large part to a generous interpretation of RFRA. RFRA was the direct result of the Court’s decision in *Employment Division v. Smith*,<sup>33</sup> where Justice Scalia, writing for the Court, held that religious exemptions to neutral, generally applicable laws that only incidentally burdened religion were not constitutionally required.<sup>34</sup> The law, which passed with broad, bipartisan support,<sup>35</sup> sought to undo the damage of *Smith* by restoring the Court’s previous strict-scrutiny-style balancing test from cases like *Sherbert* and *Yoder*.<sup>36</sup> Under RFRA, the federal government may not substantially burden religious exercise unless it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>37</sup>

Left in the hands of an increasingly conservative judiciary, RFRA didn’t just change the type of scrutiny applicable to religious refusal claims; it heralded in a new era of religion in public life and helped make religious freedom a primary tool of dismantling liberal social policies.<sup>38</sup>

<sup>31</sup> *Id.* at 603.

<sup>32</sup> *Id.* at 604.

<sup>33</sup> 494 U.S. 872 (1990).

<sup>34</sup> *See id.* at 878–79.

<sup>35</sup> *See* MARCIA A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* 24 (2d ed. 2014) (listing the wide range of religious and civil rights organizations that supported the enactment of RFRA); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 *YALE L.J.F.* 416, 416–17 (2016).

<sup>36</sup> 42 U.S.C. § 2000bb(b)(1), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>37</sup> *Id.* § 2000bb-1.

<sup>38</sup> *See* Lee Epstein & Eric Posner, Opinion, *How the Religious Right Has Transformed the Supreme Court*, *N.Y. TIMES* (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/supreme-court-religion.html> [<https://perma.cc/4RBM-GFPR>] (arguing that “[t]he conservative bloc on the

In two landmark cases, *Hobby Lobby* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>39</sup> the Supreme Court ruled in favor of religious objectors, sounding alarm bells throughout the progressive legal world.<sup>40</sup>

Yet, as several scholars noted, the Court’s reasoning in this period still reaffirmed the third-party harm principle, and thus placed meaningful limits on religious exemptions.<sup>41</sup> Indeed, even after the passage of RFRA and the subsequent shift in the Court’s treatment of religious exemptions, the majority of the Court still regularly invoked the third-party harm principle in its religious exemption cases. The principle was therefore entirely compatible with the post-RFRA state of affairs.<sup>42</sup> In *Cutter v. Wilkinson*,<sup>43</sup> for example, the Court reaffirmed that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>44</sup> In *Hobby Lobby*, the Court held that RFRA required the extension of the contraceptive mandate accommodation process to certain religious employers, but it did so on the presumption that “[t]he effect of the HHS-created accommodation on

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Supreme Court sees the promotion of religious rights as a legitimate way to push back on the socially liberal rulings of the [C]ourt”).

<sup>39</sup> 138 S. Ct. 1719 (2018).

<sup>40</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 769–72 (2014) (Ginsburg, J., dissenting) (raising concern that the Court’s “immoderate,” *id.* at 772, RFRA analysis would undermine important precedents, including *Piggie Park*, in which the Court had rejected religious exemption claims that would allow the objector to discriminate); Elizabeth Sepper, *Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 193–94 (2015) (describing *Hobby Lobby* as “a radical break with religious liberty doctrine”); Julia Raifman & Michael Ulrich, *What the Masterpiece Cakeshop Decision Means for Public Health and the Rule of Law*, WBUR (June 5, 2018), <https://www.wbur.org/cognoscenti/2018/06/05/supreme-court-colorado-baker-julia-raifman-and-michael-ulrich> [<https://perma.cc/L3MB-LDGA>] (“To permit the denial of services to same-sex couples fails to uphold equal rights for LGBT people; whether the discrimination is based on religion should be irrelevant.”).

<sup>41</sup> Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 175 (2015) (“If there is any silver lining to the cloud *Hobby Lobby* has cast over the liberty of employees to be free from paying for their bosses’ religion, it is that five Justices expressly recognized that RFRA does not authorize permissive religious exemptions that shift the costs of observing a religion from those who practice and believe it to those who do not. . . . Even the majority grudgingly acknowledged that the burdens that a RFRA accommodation might impose on nonbeneficiaries ‘will often inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.’” (footnote omitted) (quoting *Hobby Lobby*, 573 U.S. at 729 n.37)); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J.F. 201, 220 (2018) (“[T]he Court’s religious liberties decisions have consistently featured concern about the third-party harms of religious accommodation. *Masterpiece Cakeshop* carries forward this concern . . .”).

<sup>42</sup> See *infra* text accompanying notes 87–92 for a fuller discussion of how RFRA incorporated the third-party harm principle.

<sup>43</sup> 544 U.S. 709 (2005).

<sup>44</sup> *Id.* at 720. *Cutter* was a case concerning the Religious Land Use and Institutionalized Persons Act, rather than RFRA, but it has since been cited in RFRA cases. See, e.g., *Hobby Lobby*, 573 U.S. at 729 n.37.

the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”<sup>45</sup> And, finally, in *Masterpiece Cakeshop*, the Court granted an exemption to a state non-discrimination statute, but was also careful to reaffirm the third-party harm principle, this time framed in terms of the need to protect the “dignity and worth” of same-sex couples.<sup>46</sup>

Although the Court’s holdings in these cases reaffirmed the third-party harm principle, they simultaneously evinced the beginnings of a movement, driven by Justice Alito, to limit the application of the principle to instances in which specific types of harm are at play. A skepticism was visible just below the surface — and quite literally just below the line — of Justice Alito’s opinion for the Court in *Hobby Lobby*. In what some have called a “puzzling” footnote,<sup>47</sup> Justice Alito directly addressed the government’s argument that a religious exemption should not be permissible where it would operate to deny third parties government benefits.<sup>48</sup> To Justice Alito, it could not be true that *any* third-party harm would render an exemption impermissible:

Otherwise, . . . the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.<sup>49</sup>

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<sup>45</sup> *Hobby Lobby*, 573 U.S. at 693. Some have pointed out that the Court’s assumption about the effects on employees was likely erroneous. See Andrew Koppelman & Frederick M. Gedicks, *Is Hobby Lobby Worse for Religious Liberty than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 223, 234–39 (2015) (explaining why the assumption that the granted accommodation would have no negative impact on employees “is true only in theory, and probably false in fact,” *id.* at 234). But see NeJaime & Siegel, *supra* note 2, at 75 (“Even if the Court was incorrect in its assumption that the accommodation would have ‘precisely zero’ effect on Hobby Lobby’s employees, its reasoning demonstrates how third-party harm matters in analysis under RFRA.” (footnote omitted)).

<sup>46</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“[If religious exceptions] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”); see also NeJaime & Siegel, *supra* note 41, at 216 (“By addressing concerns about the third-party harms of religious accommodation, the *Masterpiece Cakeshop* Court reasons about religious accommodation in the tradition of earlier Free Exercise and Establishment Clause decisions.” (footnotes omitted)).

<sup>47</sup> Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 323, 323 (Micah Schwartzman et al. eds., 2016) (capitalization omitted).

<sup>48</sup> *Hobby Lobby*, 573 U.S. at 729 n.37.

<sup>49</sup> *Id.* Importantly, Justice Alito’s account greatly exaggerates the impact a broad third-party harm theory would have on religious exemption claims. While it is beyond the scope of this Chapter

By contrast, in concurrence, Justice Kennedy appeared eager to reaffirm a broader third-party harm principle, which would seem to protect against a large subset of interests, including insurance coverage for contraceptives. “Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion,” Justice Kennedy wrote.<sup>50</sup> “Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”<sup>51</sup>

Disagreement over the breadth of the third-party harm principle was also evidenced by how Justice Alito and Justice Kennedy respectively hearkened back to the racial antidiscrimination line of cases. Justice Alito, who seemed uncomfortable with third-party harm as a generally applicable framework, still expressly rejected as unfounded the *Hobby Lobby* dissent’s alarm “that discrimination in hiring, . . . on the basis of race, might be cloaked as religious practice to escape legal sanction.”<sup>52</sup> “Our decision today provides no such shield,” Justice Alito wrote, because “[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”<sup>53</sup> Although the Court’s holding in *Hobby Lobby*, with its emphasis on “precisely zero effect” on women, did ultimately reaffirm a broad third-party harm principle, Justice Alito’s singling out of racial discrimination as uniquely worthy of eradicating without tying this statement back to the broader harm principle seems to suggest that, in his view, certain harms were more deserving of prevention than others.

Conversely, Justice Kennedy’s majority opinion in *Masterpiece Cakeshop* again reaffirmed the Court’s commitment to shielding racial antidiscrimination statutes from religious exemptions.<sup>54</sup> But this time, it did so by citing to *Piggie Park* for an articulation of a *broader* third-

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to sketch the precise limits of the broad formulation, the breadth of the principle refers to the *types* of harms that it is willing to embrace. This does not mean that all harms of all magnitudes will always establish a compelling interest where central religious tenets are at stake. Thus, Justice Alito’s examples of the grocery store and the restaurant should be understood as mere bogeymen. In reality one could consistently support a very broad third-party harm theory that does not exclude certain harms categorically while still finding that exemptions are warranted in many situations.

<sup>50</sup> *Id.* at 739 (Kennedy, J., concurring).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 733 (majority opinion).

<sup>53</sup> *Id.*

<sup>54</sup> See NeJaime & Siegel, *supra* note 41, at 210 (“In *Masterpiece Cakeshop*, the Court emphasizes the importance of antidiscrimination protections in public accommodations and reaffirms precedent limiting religious exemptions from such laws. It stresses that exemptions must be limited in order to vindicate the government’s interest in securing equal opportunity, to afford protected classes equal access to goods and services, and to shield them from stigma.”).

party harm principle: “it is a general rule that [religious and philosophical objections] do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”<sup>55</sup> Justice Kennedy, unlike Justice Alito, framed the prohibition on racially discriminatory exemptions as stemming from a larger third-party harm principle that would encompass harms resulting from discrimination based on characteristics other than race alone.

Put together, these cases tell us that some recognizable version of a third-party harm principle still held sway over the Court until recently. Yet in subtle ways, it is possible to see a deep skepticism beginning to emerge on the part of Justice Alito. Though racial discrimination was a type of harm that would never be permissible, Justice Alito left open the possibility that other harms might not merit the same protection.

### B. *The Post-Kennedy Era*

During Justice Kennedy’s later years on the Court, he came to play an important role in shaping the institution’s religion jurisprudence and ensuring the continuation of the broadly construed third-party harm principle.<sup>56</sup> As the previous section details, Justice Kennedy’s opinions in *Hobby Lobby* and *Masterpiece Cakeshop* show his efforts to balance religious freedom against the rights of women and LGBTQ+ individuals, using third-party harm as a barometer with which to come to the optimal equilibrium. With Justice Kennedy’s retirement from the Court and the ascendance of conservative Justices Kavanaugh and Barrett, however, Justice Alito’s narrow conception of the third-party harm principle may ultimately win the day. This new dynamic was on full view in the Court’s most recent religious exemption case, *Little Sisters*, where the majority of the Court did not discuss third-party harm at all.<sup>57</sup> Still, though the disregard of third-party harm in *Little Sisters* is troubling, the Court’s new approach is arguably not an absolute abandonment of third-party harm, but rather a reformulation.

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<sup>55</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam)).

<sup>56</sup> See Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 187, 206 (Susanna Mancini & Michel Rosenfeld eds., 2018) (“[T]he majority opinion [in *Hobby Lobby*] recognized concerns about the potential third-party harm of accommodation, presumably to secure Justice Kennedy as a crucial fifth vote.”); NeJaime & Siegel, *supra* note 41, at 203 (observing that the majority opinion in *Masterpiece Cakeshop* “plainly resonate[s] with Justice Kennedy’s reasoning in [*Hobby Lobby*] and the gay rights cases” (footnote omitted)).

<sup>57</sup> See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

This section shows that even if *Little Sisters* could be read literally as jettisoning the third-party harm principle completely, conservative members of the Court and advocates for broad religious exemptions still seem to be committed to upholding the Court's civil rights line of cases.<sup>58</sup> Thus, third-party harm must still matter after *Little Sisters*. But rather than being a generalizable principle, third-party harm may now be limited by what the harm is and who it is coming to.

I. *Little Sisters and Third-Party Harm.* — *Little Sisters* was the Court's most recent foray into religious exemptions. At issue in the case were the Trump Administration's sweeping moral and religious exemptions to the contraceptive mandate, which allow nearly any employer with an objection to contraception to deny their employees comprehensive health insurance coverage.<sup>59</sup> The Court upheld the exemptions despite the fact that by the government's own estimate, up to 126,400 people would immediately lose insurance coverage for contraceptives.<sup>60</sup> In stark contrast to its holding in *Hobby Lobby*, where the Court stated that a permissible accommodation to the mandate would have "precisely zero" effect on employees, and in *Masterpiece Cakeshop*, where the Court reaffirmed a broader third-party harm principle, the Court's reasoning in *Little Sisters* indicated that third-party harm was not relevant to its analysis at all. Instead, in his opinion for the Court, Justice Thomas dismissed the harm question as a mere "policy concern" that would be more appropriately directed at Congress.<sup>61</sup>

Although its procedural posture gave the case the patina of a straightforward decision about agency rulemaking requirements, and the majority opinion ultimately declined to address the Trump Administration's argument that the exemptions were mandated by RFRA, the decision's disregard of third-party harm was still significant. First, the fact that the exemptions were created by the government rather than requested by a religious objector does not explain the disregard

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<sup>58</sup> Although the Court may be hesitant to grant racially discriminatory religious exemptions, it is crucial to note that the Court has found many other ways to undermine efforts toward racial justice, including by incapacitating the Fourteenth Amendment as a tool for remedying discrimination, economic dislocation, and political disenfranchisement against Black Americans. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781 (2012) ("Since the end of the civil rights era in the early 1970s, the emancipatory potential of the Fourteenth Amendment has been thoroughly undone. Today, its guarantee of 'equal protection' no longer promotes reform but rather protects the racial status quo."); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 172 (2016) ("[W]hen strict scrutiny appears in the Court's race jurisprudence today, it is almost invariably on behalf of white litigants such as Abigail Fisher, who wield it to dismantle affirmative action policies.").

<sup>59</sup> See 45 C.F.R. §§ 147.132 to .133 (2018).

<sup>60</sup> *Little Sisters*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

<sup>61</sup> *Id.* at 2381 (majority opinion).

of third-party harm, since the Court has in the past struck down exemptions on the grounds that they were impermissibly harmful.<sup>62</sup> Further, the majority did not respond to briefing that raised the third-party harm issue, even though it was explicitly referenced by Justice Ginsburg in dissent.<sup>63</sup>

Indeed, based on its total dismissal of the issue of third-party harm, the decision could be read to imply that *all* antidiscrimination laws are at risk of being undermined through religious exemptions.<sup>64</sup> Unlike in *Hobby Lobby* and *Masterpiece Cakeshop*, neither the majority opinion nor Justice Alito's concurrence gave any assurance that the outcome would have been different if the Trump Administration's regulations had been in regard to exemptions from racial antidiscrimination law.

Even so, *Little Sisters* probably does not put *Piggie Park* and the civil rights line of cases in danger. Justice Alito in *Hobby Lobby* explicitly stated that racially discriminatory religious exemptions would never be permissible, and the Court implicitly reaffirmed *Piggie Park* by citing to it in *Masterpiece Cakeshop*. 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. Nor do advocates for religious exemptions seem to believe the Court is ready to lower its shield over racial antidiscrimination law anytime soon.<sup>65</sup> Deep anxiety about this issue was very clearly on display in oral arguments for *Fulton v.*

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<sup>62</sup> Cf. NeJaime & Siegel, *supra* note 41, at 216 n.66 (cataloguing cases in which the Supreme Court invoked third-party harm as an establishment issue).

<sup>63</sup> *Little Sisters*, 140 S. Ct. at 2408 (Ginsburg, J., dissenting) (quoting Brief of Church-State Scholars as Amici Curiae in Support of Respondents at 3, *Little Sisters*, 140 S. Ct. 2367 (Nos. 19-431, 19-454) [hereinafter Brief of Church-State Scholars]).

<sup>64</sup> Cf. *id.* at 2400 ("Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree."); 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/X95D-DLHV>] ("[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.")

<sup>65</sup> See, e.g., Reply Brief for Petitioners at 22, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. argued Nov. 4, 2020) (calling the comparison between racial discrimination and discrimination against LGBTQ+ people "callous[]") and suggesting that the two types of discrimination should be subject to completely different legal treatment in the religious exemption context); Brief for Nebraska, Arizona, and Ohio as Amici Curiae in Support of Petitioners at 33-34, *Fulton*, No. 19-123 (arguing that the Court should treat racial discrimination as "sui generis," *id.* at 33, and that "any attempt to draw parallels between this case and racism misses the mark entirely [and] should not [be] indulged," *id.* at 34).

*City of Philadelphia*,<sup>66</sup> where discussion of how the Court might distinguish between racially discriminatory exemptions and exemptions harming other groups consumed much of the questioning.<sup>67</sup>

Since neither the Court nor those seeking exemptions seem willing to stretch religious exemption doctrine so far as to allow racially discriminatory exemptions, some types of harm must still matter. It would thus be more apt to read *Little Sisters* not as a complete rejection of the third-party harm principle, but rather as the first instance in which the conservatives on the Court did not need to give credence to the generally applicable third-party harm framework seemingly favored by Justice Kennedy.<sup>68</sup>

2. *Narrowing the Third-Party Harm Principle.* — If we assume that Justice Alito and other advocates for broad religious exemptions do in fact draw the line at racially discriminatory exemptions, how might the conservative-dominated Court broaden religious exemptions without undermining the civil rights cases *Piggie Park* and *Bob Jones*? The answer may be that some third-party harms still matter, thus saving the civil rights line of cases. But now it matters *whom* the harm is directed at and *what* the harm is. In the RFRA context, this means that the government will no longer be able to satisfy its compelling interest burden by citing the general need to prevent harm. Rather, it will need to point to a specific constitutionally grounded interest in preventing harm directed at a suspect class.

This is arguably the analytical framework demonstrated by Justice Alito in his *Little Sisters* concurrence. Unlike the majority opinion, which won over two of the Court's liberal Justices by declining to address the RFRA question head on, Justice Alito would have gladly found that RFRA demanded the Trump Administration's exemptions.<sup>69</sup> Crucially, without Justice Kennedy's tiebreaking vote, Justice Alito was finally able to reject the Government's compelling interest in upholding the mandate, which he had "assumed for the sake of argument" in *Hobby Lobby*.<sup>70</sup> From there, Justice Alito made two important maneuvers. First, he framed the government's compelling interest as that of "providing free contraceptives to all women."<sup>71</sup> Second, he proposed a fortified compelling interest test: for the government to establish a compelling interest, it "would have to show that it would commit one of 'the

<sup>66</sup> 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

<sup>67</sup> See Transcript of Oral Argument, *supra* note 11, at 31, 38–39, 42, 45–49, 112–13.

<sup>68</sup> Cf. NeJaime & Siegel, *supra* note 41, at 203 (predicting that Justice Kennedy's retirement from the Court might change how the Court treats the third-party harm principle).

<sup>69</sup> *Little Sisters*, 140 S. Ct. at 2387 (Alito, J., concurring).

<sup>70</sup> *Id.* at 2392; see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 762 n.23 (2014) (Ginsburg, J., dissenting) (noting that Justice Alito's opinion for the Court in *Hobby Lobby* assumed the government's compelling interest only "grudgingly").

<sup>71</sup> *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

gravest abuses' of its responsibilities if it did not furnish free contraceptives to all women."<sup>72</sup> According to Justice Alito, there was no compelling interest in restricting exemptions to the contraceptive mandate because there was no constitutional right at stake — while “[t]he Court has held that there is a constitutional right to purchase and use contraceptives[,] . . . [it] has never held that there is a constitutional right to *free* contraceptives.”<sup>73</sup>

Justice Alito ultimately tied the question of compelling interest into the question of harm. Because there was no constitutional right to “free contraceptives,” there was therefore “no . . . burden” on employees not covered by the mandate; these employees were “simply not the beneficiar[ies] of something that federal law does not provide.”<sup>74</sup> However, Justice Alito’s language — that there is “no burden” — is arguably a misnomer, as he simultaneously acknowledged that there were likely to be at least some employees for whom the exemptions would impose a burden.<sup>75</sup> Justice Alito’s concurrence is then more accurately read as stating a newly confined theory of third-party harm, under which the deprivation of “free” contraception is not a *sufficient* burden that would render the government’s interest compelling. In Justice Alito’s words, failing to provide free contraception to all women is simply not “one of ‘the gravest abuses’”<sup>76</sup> the government can commit because there is no affirmative right to free contraception in the first place.<sup>77</sup>

Notably, one legal observer, Kevin Russell, believed Justice Alito might have been suggesting this type of analysis even as early as in his opinion for the Court in *Hobby Lobby*.<sup>78</sup> Russell noted Justice Alito’s insistence that the decision would not operate to allow racially discriminatory religious exemptions, but rather than assume the same would be true for other types of discrimination, Russell believed that the question was “surely open to debate.”<sup>79</sup> Russell guessed that it might come down

<sup>72</sup> *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

<sup>73</sup> *Id.* at 2396 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* at 2393 (“It is undoubtedly convenient for employees to obtain all types of medical care and all pharmaceuticals under their general health insurance plans, and perhaps there are women whose personal situation is such that taking any additional steps to secure contraceptives would be a notable burden.”). Justice Alito’s confused analysis seems to stem from the erroneous idea that the baseline from which burdens should be measured is a hypothetical scenario in which the contraceptive mandate was never enacted, rather than the real world where it has been enacted. *See Gedicks & Van Tassel, supra* note 47, at 333.

<sup>76</sup> *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring) (quoting *Sherbert*, 374 U.S. at 406).

<sup>77</sup> *Id.* at 2396.

<sup>78</sup> *See* Kevin Russell, *Analysis: Hobby Lobby and Claims for Religious Exemptions from Anti-discrimination Laws?*, SCOTUSBLOG (June 30, 2014, 4:39 PM), <https://www.scotusblog.com/2014/06/analysis-hobby-lobby-and-claims-for-religious-exemptions-from-anti-discrimination-laws> [<https://perma.cc/QE3F-U6UG>].

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

to how the Court defined a compelling governmental interest — precisely how Justice Alito framed the issue in *Little Sisters*. “[T]he government may only have the ‘compelling’ interest required by RFRA in proscribing racial discrimination,” Russell predicted, “but not sex, disability, or sexual orientation discrimination.”<sup>80</sup> Russell likened this type of analysis to that applied in Eleventh Amendment cases, where the Court must decide whether Congress may abrogate state sovereign immunity for suits alleging civil rights violations.<sup>81</sup> In these cases, the Court evaluates “the scope of the constitutional right at issue” by looking to the degree of scrutiny afforded the affected class in “prior decisions under the Equal Protection Clause.”<sup>82</sup> Similar reasoning could apply in the religious objection context.<sup>83</sup>

It is worth highlighting that Justice Alito’s narrowing of the harm principle is deeply flawed for at least two reasons. First, by recognizing only certain constitutionally cognizable harms as relevant to the third-party harm analysis, Justice Alito failed to account for potential Establishment Clause violations caused by exemptions’ negative externalities.<sup>84</sup> As other scholars have compellingly demonstrated, the Court’s establishment jurisprudence clearly recognizes the “third-party harm principle, which provides that religious exemptions may not be structured in a manner that shifts substantial burdens to nonbeneficiaries without any consideration of their interests.”<sup>85</sup> And even exemptions created pursuant to RFRA are subject to the limits set out by the Establishment Clause.<sup>86</sup> In the context of the contraceptive mandate, for example, “by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exemptions from the Mandate violate an Establishment Clause constraint on permissive accommodation.”<sup>87</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *See id.*

<sup>82</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

<sup>83</sup> *See* Russell, *supra* note 78.

<sup>84</sup> *See* Brief of Church-State Scholars, *supra* note 62, at 3 (“The Establishment Clause prohibits the government from shifting substantial burdens to an identifiable class of third parties as the price of accommodating religious objectors.”); *see also* Laurence Tribe (@tribelaw), TWITTER (July 8, 2020, 1:01 PM), <https://twitter.com/tribelaw/status/1280909824746827777> [<https://perma.cc/EPZ6-VB5E>] (“I don’t see any effective response in the majority opinion or in either concurrence to Justice Ginsburg’s point . . . that the Trump position violates the Establishment Clause. Nor can I think of any adequate response.”).

<sup>85</sup> Brief of Church-State Scholars, *supra* note 62, at 5.

<sup>86</sup> *See id.* (“[I]t is beyond question that rules purporting to accommodate religion must comply with the Establishment Clause.”); Gedicks & Van Tassell, *supra* note 5, at 348 (“RFRA . . . must satisfy the various Establishment Clause limitations on permissive government accommodation of religion.”).

<sup>87</sup> Gedicks & Van Tassell, *supra* note 5, at 349.

Second, the language of RFRA supports a broad interpretation of “compelling interest,” not Justice Alito’s newly cramped view.<sup>88</sup> The reason is simple: RFRA was meant to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,”<sup>89</sup> cases that were themselves illustrative of the third-party harm principle and were decided in a period in which the generally applicable third-party harm principle reigned supreme.<sup>90</sup> The Court in that era did not seem to question the existence of a compelling interest; the real weight lay in the determination of whether a given exemption would burden third parties.<sup>91</sup> The Court during those years granted exemptions where they “interfere[d] with no rights or interests of others”<sup>92</sup> but denied them where they would “operate[] to impose the [claimant’s] religious faith” on others.<sup>93</sup>

Despite these flaws, given Justice Ginsburg’s untimely passing and Justice Barrett’s subsequent confirmation, it is likely that some version of Justice Alito’s narrowed conception of the third-party harm principle will have majority support on the Court for many years to come. Justice Alito’s concurrence could provide a roadmap for threading the needle on religious exemptions, allowing the Court to uphold *Piggie Park* and *Bob Jones* while also continuing to allow broad, discriminatory exemptions in the realms of LGBTQ+ rights, contraception, and abortion. From this perspective, not all harms are created equal — different classes are afforded different levels of constitutional protection that dictate the extent to which a particular harm will outweigh a religious objection.

### C. *Implications for the Contraceptive Mandate*

If the Court is indeed moving toward a narrowed conception of third-party harm, then it will be increasingly important to define with precision the harm caused and the rights infringed by religious exemptions. This is a more straightforward enterprise in some cases than in others. As Professors NeJaime and Siegel have shown, for example, the harm caused by discrimination against LGBTQ+ individuals in public

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<sup>88</sup> See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2580 (2015).

<sup>89</sup> 42 U.S.C. § 2000bb(b)(1) (citations omitted), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>90</sup> See Gedicks & Van Tassell, *supra* note 47, at 326 (“[T]he very decisions that grounded exemption rights in the Free Exercise Clause before *Employment Division v. Smith* were careful to note that the exemptions they validated did not impose costs on unwilling third parties.”).

<sup>91</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (seemingly taking at face value the state’s claimed compelling interest, but questioning whether the religious objection at issue would actually subvert that interest).

<sup>92</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972).

<sup>93</sup> *United States v. Lee*, 455 U.S. 252, 261 (1982).

accommodations is one that the Court in *Masterpiece Cakeshop* already recognized as sufficiently compelling to potentially outweigh a claim for a religious exemption.<sup>94</sup> The harm analysis for other types of discrimination is less straightforward, thus rendering certain groups more vulnerable to burdensome religious exemptions.

The contraceptive mandate is perhaps the best example of this vulnerability.<sup>95</sup> Justice Alito was technically correct when he wrote that the Court has never recognized an affirmative right to free contraception for all women. And, in past litigation, advocates for the contraceptive mandate have not successfully grounded their arguments in any constitutional rights framework.<sup>96</sup> This section shows why the framing of the third-party harm in the Court's contraceptive mandate cases has made the mandate especially vulnerable to undermining through religious refusals. If, however, litigators could reframe the harm as a form of sex discrimination, which the Court has recognized a compelling interest in rooting out, then religious exemptions would be harder to justify even under the Court's narrowed third-party harm analysis.

I. “*Free Contraceptives [for] All Women.*” — *Hobby Lobby* showed that so long as a broad, generally applicable third-party harm principle stood, it was not necessary for the government or the Court to grapple with what exactly the government's compelling interest was.<sup>97</sup> As several observers noted, the government and those opposed to religious exemptions did little in contraceptive mandate litigation to clarify what exactly was at stake if the Court were to grant a religious accommodation to the mandate for religious employers. Shortly before *Hobby Lobby*, some noted the difficulty that mandate supporters had in “articulat[ing] the precise constitutional liberty that RFRA exemptions . . . would burden: there is no constitutional right to have one's employer pay for contraceptives, and RFRA exemptions would not interfere with the reproductive privacy right of employees and their family

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<sup>94</sup> See NeJaime & Siegel, *supra* note 41, at 210. Of course, the Court today is more hostile to LGBTQ+ rights than it was when *Masterpiece Cakeshop* was decided, and so even this conclusion must be taken with a grain of salt.

<sup>95</sup> Professor Martha Minow has suggested that, to the extent judicial treatments of religious exemptions from laws pertaining to racial, gender, and sexual orientation discrimination differ, the difference in treatment can be explained by the respective successes of social movements. See Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 782 (2007) (“Neither logic nor principle explains this pattern as well as an assessment of social movements and their accomplishments.”). It seems undeniable that the immense successes of the movements for racial justice and LGBTQ+ equality, and the relative failure of the reproductive rights movement, would play a heavy, if unstated, role in the Court's analysis of religious exemptions.

<sup>96</sup> See Neil S. Siegel & Reva B. Siegel, Essay, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025, 1031 (2015) (“The opinions in *Hobby Lobby* . . . did not fully explicate the government's compelling interests in ensuring access to affordable contraception.”).

<sup>97</sup> See *id.*

members to purchase contraceptives with their own money.”<sup>98</sup> This struggle appeared to continue into the Supreme Court litigation itself, where commentators again characterized the government’s description of its interest as “incomplete.”<sup>99</sup> The government’s account “appropriately emphasized a compelling interest in ‘public health,’ but it did not develop what was at stake for women as a matter of individual autonomy and self-determination.”<sup>100</sup>

It is important to reiterate, though, that when the generally applicable third-party harm principle stood, it was not necessary to identify a precise constitutional liberty undergirding the government’s compelling interest — it was necessary only to identify the harm. Justice Kennedy, the swing vote in *Hobby Lobby*, underscored the continued salience of the general third-party harm principle in his concurrence when he stated that protecting “the health of female employees” was a compelling governmental interest, without attempting to ground access to contraception in any constitutional rights framework.<sup>101</sup>

In future litigation, it seems more likely that the conservative majority will instead apply a narrowly applicable third-party harm principle. In this view, Justice Alito’s framing of the harm in *Little Sisters* as that of “provid[ing] free contraceptives to all women” was strategic.<sup>102</sup> Of course, many would argue that providing free contraceptives to all women is, or at least should be, a very compelling governmental interest, one that implicates numerous benefits to public health and gender equality.<sup>103</sup> But if the analysis now turns on whether there is a *constitutionally cognizable* right at stake, then the harm — presumably the inability of many people to pay for contraception — would likely not be sufficient to outweigh the religious interest. While the Court has recognized a privacy-based liberty interest in abortion and contraception, it has never recognized “a constitutional entitlement to the financial resources to avail [oneself] of the full range of protected choices.”<sup>104</sup> That is, the Court recognizes a right to be free from government intrusion in making certain reproductive health decisions, but it does not recognize an affirmative right that would make those decisions accessible for all

<sup>98</sup> Gedicks & Van Tassell, *supra* note 5, at 346.

<sup>99</sup> Siegel & Siegel, *supra* note 96, at 1031.

<sup>100</sup> *Id.* (footnote omitted).

<sup>101</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring); see also Nelson Tebbe et al., *Update on the Establishment Clause and Third Party Harms: One Ongoing Violation and One Constitutional Accommodation*, BALKINIZATION (Oct. 16, 2014, 8:30 AM), <https://balkin.blogspot.com/2014/10/update-on-establishment-clause-and.html> [<https://perma.cc/CMB5-HPWH>] (counting Justice Kennedy’s concurrence along with the four dissenters as evidence that the generally applicable third-party harm principle still had “five votes on the Court”).

<sup>102</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring).

<sup>103</sup> See Siegel & Siegel, *supra* note 96, at 1042.

<sup>104</sup> *Harris v. McRae*, 448 U.S. 297, 316 (1980).

people regardless of economic status.<sup>105</sup> The challenge moving forward will be to find a different way to frame the harm at stake in contraceptive mandate litigation so that the Court cannot so easily dismiss a claimed governmental interest as unconvincing.

2. *Reframing the Harm: Sex Discrimination in Employment.* — Given the vulnerability of the current asserted governmental interest, it would behoove future litigants to redefine what is actually at stake. The central point is that Justice Alito’s framing mischaracterized the harm in *Little Sisters* and thus mischaracterized the governmental interest. The contraceptive mandate is not about providing “free contraceptives for all women,” but rather is about ensuring that if an employer offers health insurance to employees as a form of compensation, the employer-sponsored plan may not exclude from coverage a service that only women and non-cis male people use. When the government creates, or the Court mandates, an exemption that itself allows employers to discriminate on the basis of sex, that implicates serious equal protection concerns.

That the purpose of the contraceptive mandate was to combat sex discrimination is clear from the legislative history of the Women’s Health Amendment. After Senator Barbara Mikulski introduced the Women’s Health Amendment on the floor of the Senate in 2009, senator after senator spoke of their belief that the exclusion of cost-free coverage for services used exclusively by women constituted discrimination by insurance companies.<sup>106</sup> When employers themselves refuse to cover these services, it is equally discriminatory, but now implicates employment discrimination and a failure to pay women and non-cis male employees equally for equal work.

This is precisely the type of discrimination that Congress proscribed in enacting Title VII of the 1964 Civil Rights Act, which states that “[i]t 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.”<sup>107</sup> This bar on sex discrimination requires equality in “receipt of benefits under fringe benefits programs,” such as insurance

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<sup>105</sup> See *id.* at 317–18 (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”).

<sup>106</sup> See, e.g., 155 CONG. REC. 24,426 (2009) (statement of Sen. Barbara Boxer) (“[Women] are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform.”); *id.* at 24,427 (statement of Sen. Kirsten Gillibrand) (“Women must shoulder the worst of the health care crisis, including outrageous discriminatory practices in care and coverage.”).

<sup>107</sup> 42 U.S.C. § 2000e-2(a).

coverage.<sup>108</sup> The accommodation process extended to some religious employers in *Hobby Lobby* did not run afoul of Title VII's prohibition on compensation discrimination because, at least theoretically, under the accommodation employees did not lose out on seamless access to cost-free preventive services, including contraceptives. Those services were simply provided by the insurance company rather than the employer itself.<sup>109</sup> The same cannot be said of the Trump Administration's broad religious exemption, which took away completely a benefit employees previously received as part of their compensation, this time with no assurance that the insurance company or the government would step in to fill the void.<sup>110</sup>

To the extent that Justice Alito's narrowed principle would look for a specific constitutional claim, the reasoning applicable to a Title VII sex discrimination claim is arguably transferable to the equal protection context.<sup>111</sup> The exemptions upheld in *Little Sisters* thus implicate the government's interest not in providing "free contraceptives for all women," but rather in eradicating sex discrimination.<sup>112</sup> The Court treats sex discrimination as deeply constitutionally suspect, and it has long recognized a compelling governmental interest in eradicating such discrimination.<sup>113</sup>

Still, framing the denial of contraceptives as sex discrimination is not without its complications. First, there is not complete agreement about whether the exclusion of contraception from insurance plans constitutes sex discrimination. Prior to the passage of the Affordable Care Act, several federal district courts recognized that an employer's failure to

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<sup>108</sup> *Id.* § 2000e(k).

<sup>109</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698–99 (2014); Carole Okolowicz, *Pushback: Title VII Takes on Hobby Lobby*, 7 DEPAUL J. WOMEN GENDER & L. 97, 118 (2017) ("Without a material harm, there is no claim [under Title VII].").

<sup>110</sup> See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2403 (2020) (Ginsburg, J., dissenting) ("Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage.").

<sup>111</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting) (explaining how a decision in the Title VII context could "exert a gravitational pull in constitutional cases").

<sup>112</sup> See Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248, 254 (2013) ("[E]xcluding prescription contraception from insurance is about excluding a service only women need — and that most every woman uses at some point. It is, for that reason alone, sex discrimination." (footnote omitted)).

<sup>113</sup> See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (holding that the goal of eradicating sex discrimination "plainly serves compelling state interests of the highest order," *id.* at 624).

include birth control in its health insurance plan constituted sex discrimination in violation of Title VII.<sup>114</sup> In *Erickson v. Bartell Drug Co.*,<sup>115</sup> a district court held that “when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes.”<sup>116</sup> The court rejected the offending employer’s argument that its “exclusion of all ‘family planning’ drugs . . . [was] facially neutral,”<sup>117</sup> concluding instead that “the exclusion of prescription contraceptives . . . [was] in no way neutral or equal.”<sup>118</sup> In 2007, however, the Eighth Circuit reversed a similar lower court decision, holding instead that the exclusion of all contraceptives from health insurance plans did not constitute sex discrimination.<sup>119</sup> Still, the Eighth Circuit’s reasoning would be inapplicable in a case where, as in *Hobby Lobby*, an employer’s plan *included* coverage for male birth control — that is, vasectomies — but excluded coverage for female birth control.<sup>120</sup>

Second, even assuming the Court accepts that the government’s interest is in eradicating sex discrimination, which the Court has recognized as compelling, would the Court find it *as* compelling as the government’s interest in eradicating racial discrimination?<sup>121</sup> On the one

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<sup>114</sup> See, e.g., *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001); *EEOC v. United Parcel Serv., Inc.*, 141 F. Supp. 2d 1216, 1220 (D. Minn. 2001); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 986 (E.D. Mo. 2003). In 2000, the Equal Employment Opportunity Commission also ruled that the exclusion of prescription contraceptives from an otherwise comprehensive employer-sponsored plan violated Title VII’s prohibition on sex discrimination. See *Commission Decision on Coverage of Contraception*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 14, 2000), <https://www.eeoc.gov/commission-decision-coverage-contraception> [<https://perma.cc/K73A-3WTW>].

<sup>115</sup> 141 F. Supp. 2d 1266.

<sup>116</sup> *Id.* at 1272 (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983)).

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

<sup>118</sup> *Id.* at 1275.

<sup>119</sup> *In re Union Pac. R.R. Emp. Pracs. Litig.*, 479 F.3d 936, 944–45 (8th Cir. 2007) (reasoning that “the coverage provided to women is not less favorable than that provided to men”).

<sup>120</sup> See Okolowicz, *supra* note 109, at 98 (“Female employees should have a cause of action under Title VII to require their employers to cover birth control regardless of the employers’ religious views if the plan also covers the health needs of men.”).

<sup>121</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (“The Government has a compelling interest in providing an equal opportunity to participate in the work force without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”); see also Catherine Fisk, *Guest Post: Does Hobby Lobby Allow Gender Discrimination?*, ONLABOR (Nov. 7, 2014), <https://onlabor.org/guest-post-does-hobby-lobby-allow-gender-discrimination> [<https://perma.cc/BW4P-YPT3>] (“Is the reference to *race* discrimination in *Hobby Lobby* an implicit acknowledgement that RFRA grants employers the right to engage in gender discrimination that would otherwise violate Title VII?”).

hand, the Court treats sex discrimination as deeply suspect, and its analysis of sex discrimination has crept toward what one might see in the racial discrimination context. In *Roberts v. United States Jaycees*,<sup>122</sup> the Court noted that the “stigmatizing injury [from discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.”<sup>123</sup> This conclusion is similarly reflected in the Court’s equal protection jurisprudence. Although the Court technically applies only intermediate scrutiny to sex discrimination, that intermediate standard has become extremely heightened — so much so that many scholars have come to view the Court’s treatment of sex discrimination in equal protection cases as the embodiment of a “de facto” Equal Rights Amendment.<sup>124</sup> Even so, how close the scrutiny applicable to sex discrimination gets to the strict scrutiny of racial discrimination cases is a serious subject of debate in the legal academy, and it may turn out that the difference between strict and heightened intermediate scrutiny is a meaningful one in a religious exemption case.<sup>125</sup>

Even taking these complications into account, however, the strategy of framing the harm in contraceptive mandate litigation as the harm of sex discrimination in employment has several important benefits. First, in a case where an employer’s insurance plan excluded from coverage a service used exclusively by women and non-cis male people, it would be difficult for the Court to conclude that such an exclusion was not discriminatory. Second, again, the Court has recognized the eradication of sex discrimination to be a compelling interest and applies heightened scrutiny in its equal protection cases. Though this might not ultimately be enough to save the contraceptive mandate if the conservative majority is laser focused on limiting the harm principle to race, at the very least framing the harm in terms of discrimination would put employees and the general public on notice about what precisely is at stake. Rather than being about the revocation of a *free* benefit, exemptions to the mandate would be about employers taking away a portion of employees’

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<sup>122</sup> 468 U.S. 609 (1984).

<sup>123</sup> *Id.* at 625.

<sup>124</sup> See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1332–34 (2006); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476–77 (2001) (“Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted. For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender.” (footnote omitted)).

<sup>125</sup> See Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 244–45 (2006) (describing the debate over whether an Equal Rights Amendment to the Constitution is necessary, or if “decisions of the U.S. Supreme Court have largely fulfilled the amendment’s chief objectives,” *id.* at 245).

earned compensation.<sup>126</sup> Reframing the harm this way would make it more difficult for even a conservative-dominated court to ignore the third-party harm at issue.

### Conclusion

As this Chapter demonstrates, the third-party harm principle has historically offered a prudent way to balance the interests of religious objectors against other important societal interests.<sup>127</sup> In keeping with the principle, religious adherents were often granted religious accommodations and exemptions, but not where doing so would cause significant harm to other populations. With the passing of Justice Ginsburg and the confirmation of Justice Barrett, however, it seems nearly inevitable that the Court's trajectory on religion will be toward granting more and more extreme religious exemptions — even where they threaten the health and lives of fellow citizens.<sup>128</sup> The balance that once existed now seems ready to tip entirely to the side of religious objectors, largely at the expense of society's most marginalized populations.<sup>129</sup> Still, all hope should not be lost. Some harms must still matter if the Court is to uphold its civil rights line of cases, and this means there is room for tactful lawyering to make a real difference. Those concerned with protecting civil rights may win out if they can reframe the harm from religious objections as one the Court has previously treated as constitutionally suspect. If the Court does not accept these arguments, at the very least

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<sup>126</sup> The financial impact on employees who lose contraceptive coverage is significant. The birth control pill costs as much as \$50 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/D3YP-ZE9B>], and the cost of initiating a long-acting contraceptive method is over \$1,000, nearly one month's salary for an employee working full time at the federal minimum wage, see Adam Sonfield, *What Is at Stake with the Federal Contraceptive Coverage Guarantee?*, 20 GUTTMACHER POL'Y REV. 8, 9 (2017), [https://www.guttmacher.org/sites/default/files/article\\_files/gpr2000816\\_o.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr2000816_o.pdf) [<https://perma.cc/YK2M-EQB4>].

<sup>127</sup> See HOWARD GILLMAN & ERWIN CHEREMINSKY, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 136–37 (2020) (explaining that the third-party harm theory “is attractive if we are especially bothered by circumstances where accommodations appear to us to be harmless yet meaningful to the faithful,” *id.* at 136). As Professor Jack Rakove has argued, the third-party harm theory is also faithful to the Founders' understanding of religious freedom. See JACK N. RAKOVE, *BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION* 180–81 (2020) (“To the historian, it is puzzling to learn that the matter of third-party harms has not gained full recognition.” *Id.* at 180.).

<sup>128</sup> See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, No. 20A87, slip op. at 5–7 (U.S. Nov. 25, 2020) (per curiam) (granting injunctive relief against New York's occupancy limits on religious services during the COVID-19 pandemic); see also Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html> [<https://perma.cc/JU8N-MF6M>] (describing the “decisive role” Justice Barrett played in the decision).

<sup>129</sup> See Leslie Griffin, *Symposium: Religions' Wins Are Losses*, SCOTUSBLOG (Aug. 4, 2020, 1:43 PM), <https://www.scotusblog.com/2020/08/symposium-religions-wins-are-losses> [<https://perma.cc/6KLR-4ST9>] (“Religion's victories are bad for civil rights, especially for rights of women, LGBTQ individuals and people of color.”).

litigators can work to reveal what is really at stake in these more sinister religious exemption cases: the right to be free from discrimination and the tyranny of others' religious beliefs.