The Administrative State as a New Front in the Culture War: *Little Sisters of the Poor v. Pennsylvania*

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Culture-war clashes are now routinely decided by the United States Supreme Court. In the past decade, the Court has considered access of same-sex couples to civil marriage,[1] government funding of religious organizations,[2] the intersection of religious freedom with laws protecting LGBTQ persons from discrimination,[3] the propriety of religious symbols in the public square,[4] and religious organizations' autonomy to employ only those who share and inculcate their faith notwithstanding civil-rights protections,[5] to name a few. Despite the clear need for lawmaking that puts these predictable culture-war fights to rest,[6]

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[1] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[2] Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), cert. granted, 140 S. Ct. 1104 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[3] Bostock v. Clayton County, 140 S. Ct. 1731 (2020); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018); State v. Arlene's Flowers, Inc., 193 Wn.2d 469 (Wash. 2019), pet. for cert. filed (No. 19-333).

[4] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[5] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[6] See Tanner Bean & Robin Fretwell Wilson, Common Sense Case for Common Ground Lawmaking: Three Cheers for Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act, J. Legis. Online Supp. (July 23, 2020), https://bit.ly/3ksjYlj; Robin Fretwell Wilson, Common Ground Lawmaking: Lessons of Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise, 51 Conn. L. Rev. 3 (2019); Tanner Bean, "Fairness for All Act Seeks to Balance LGBTQ, Religious Rights," Idaho Statesman, Dec. 17, 2019, https://bit.ly/3gImd1N.

"Congress has proven useless in reaching any kind of resolution," punting "the most contentious questions."[7] Americans are fed up.

Into the legislative vacuum left by Congress comes the administrative state. As government increases its footprint, agencies are asked to grapple with values questions—over the meaning of nondiscrimination, access to services, the importance of gender equity, protection of vulnerable minorities, the needs of religious and other communities, and how these different values are in tension. Nowhere is this more apparent than in the series of decisions made by agencies and subagencies over what drugs women are entitled to under the terms of the Patient Protection and Affordable Care Act (ACA). The ACA guaranteed all covered employees that they would receive "essential health benefits," including "preventive and wellness services," under their employer's plan.[8]

Through regulations, the Obama administration directed covered (nongrandfathered) employers to pay for all FDA-approved contraceptives (coverage mandate), citing "compelling health and gender equity goals."[9] The required drugs included four that objectors see as cutting off a life,[10] as if no thought was given to the deep divisions around abortion that have riven Americans since *Roe v. Wade*. Churches were exempted at this early step because regulators believed that any church employee would share the church's values, so nobody would be denied something they desire.[11] Whether this supposition holds is questionable—a 2016 study found that of "Catholics who attend Mass weekly, just 13% say contraception is

[7] David French, "The Supreme Court Tries to Settle the Religious Liberty Culture War," Time, July 14, 2020, https://bit.ly/2F8zm6o. Michael McConnell observes that the Court "seems to reach results that very likely would carry the day in Congress on many of these issues, if Republicans and Democrats were inclined to talk to one another and compromise." Michael W. McConnell, "On Religion, the Supreme Court Protects the Right to Be Different," N.Y. Times, July 9, 2020, https://nyti.ms/2DEktbB.

[8] ACA §§ 1302, 2713; 42 U.S.C. § 18022; 42 U.S.C. § 300gg-13.

[9] Coverage of Preventive Services under the ACA, 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012) (citing Institute of Medicine, Clinical Preventive Services for Women 16 (2011)).

[10] Burwell v. Hobby Lobby, 573 U.S. 682, 701 (2014); Robin Fretwell Wilson, The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State, B.C. L. Rev. 1417, 1454–60 (2012).

[11] 76 Fed. Reg. 46621 (Aug. 3, 2011) ("Specifically, the Departments seek to provide for a religious accommodation that respects the unique relationship between a house of worship and its employees in ministerial positions.").

morally wrong, while 45% say it is morally acceptable and 42% say it is not a moral issue."[12]

The coverage mandate ran headlong into the religious conscience of faith groups that operate outside the four walls of the church, as well as countless other objectors.[13] Some objected to paying for drugs that act before conception, removing the potential for life; others to four drugs that have the potential to disrupt a life in being, a fact stipulated to in litigation. Providing coverage for the latter, objectors contended, was tantamount to being complicit in "murder because it is the killing of an innocent person."[14] Just as Americans believe that Congress has walked away from charting common ground, it seemed that agency personnel had, too.

Religious objectors vehemently opposed the coverage mandate. To his credit, President Barack Obama took the pushback seriously. He directed his administration to fashion an accommodation for nonprofit religious groups that did not sacrifice coverage for women, but took some religious objectors (although not all) out of the position of providing those drugs.

Extended litigation followed over whether the set of objectors who could be accommodated should extend to closely held corporations. In *Burwell v. Hobby Lobby Stores, Inc*., the Supreme Court decided that the Religious Freedom Restoration Act (RFRA) required the administration to respond to the substantial burden it was imposing on religious practice.[15] The Obama administration's accommodation for some objectors showed that there was a less restrictive means of accomplishing the administration's goals.[16]

Less visible than who qualified for the accommodation was the claim made in *Little Sisters of the Poor Saints Peter and Paul Home v.*

[12] "Very Few Americans See Contraception as Morally Wrong," Pew Research Center, Sept. 28, 2016, https://pewrsr.ch/2XJMtl3.

[13] See Helen Alvare, "The Endless War on the Little Sisters of the Poor," Wall St. J., May 5, 2020, https://on.wsj.com/3abmLef; HHS Case Database, Becket, https://bit.ly/3kqu06x.

[14] See Complaint, The QC Group, Inc. v. Sebelius, No. 13-1726, (D. Minn. July 2, 2013), https://bit.ly/2PHf1Hm.

[15] Hobby Lobby, 573 U.S. at 701.

[16] Robin Fretwell Wilson, Demystifying Hobby Lobby, 2015 Int'l Surv. of Fam. L. 343, 361–68 (2015).

Pennsylvania.[17] The Little Sisters of the Poor Saints Peter and Paul Home (Little Sisters) are Roman Catholic nuns who have cared for the elderly poor since 1869 and employ roughly 2,719 workers. They qualified for the accommodation but rejected its mechanics. For them, filing the needed forms would initiate a causal chain ultimately resulting in the provision of drugs used to both end life and prevent life.[18] Many, including administration officials, saw the Little Sisters' objection as premised on too little. How could merely executing a form that requires others to pay for an objected-to drug be objectionable?[19]

This culture-war claim, too, got a hearing in the Supreme Court in *Zubik v. Burwell*.[20] Sensing room to remove objectors from the equation without sacrificing needed access, the Court issued an overarching instruction to the parties: agree on how religious organizations can "do nothing more than contract for a plan that does not include coverage for some or all forms of contraception," while women still receive seamless "cost-free contraceptive coverage" from the same insurer.[21] Until *Zubik*'s per curiam opinion, the protracted litigation over whether the government had accommodated religious objectors *enough* had taken on a winner-takes-all quality.[22] As we have

[17] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

[18] Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1167 (10th Cir. 2015) ("The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral."). In *Hobby Lobby*, Justice Ruth Bader Ginsburg in dissent stressed that decisions "whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but the covered employees and dependents, in consultation with their health care providers," implying that the employers' objections were too attenuated to be cognizable. Hobby Lobby, 573 U.S. at 760–61.

[19] "Obama to Little Sisters: It's Just a Piece of Paper," Denver Catholic, Jan. 3, 2014, https://bit.ly/2DRrNQF.

[20] Zubik v. Burwell, 136 S. Ct. 1557 (2016).

[21] *Id*. at 1560.

[22] The Court envisioned one possible compromise: whether "contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, [without] involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." Order Requesting Supplemental Briefing in Zubik v. Burwell. Burwell (14-1418), Sup. Ct. Order List (Mar. 29, 2016).

said elsewhere,[23] in a pluralistic society, we should embrace creative fixes that preserve as much religious freedom as possible while enabling government to do its important work. But in the Obama administration's waning hours, the Court's challenge to the parties to solve this morass proved too much.

Enter the Trump administration. Just four months after taking office, President Donald Trump, speaking in the Rose Garden, congratulated the Little Sisters for having "just won a lawsuit" and that their "long ordeal w[ould] soon be over."[24] In one of its first actions, his administration issued interim final rules, later finalized, that kept the coverage mandate, but exempted not only all religious objectors but also moral objectors (exempted employers). Unlike the accommodation, this approach allows employers to step aside with no provision for women's access to the objected-to drugs (wholesale exemption). In effect, every objector can now elect to be treated like churches, with no duty to anyone.

The Trump administration's fix precipitated its own legal challenge, resolved, *for now*, in the Court's decision in *Little Sisters of the Poor*. Two states, Pennsylvania and New Jersey, balked at shouldering the financial burden of providing contraceptives to women working for exempted employers.[25] The Court upheld the wholesale exemption. In just three words out of the ACA's more than 400,000 words—"as provided for"—Congress had delegated ample discretion to agencies to not only decide what should be covered under the coverage mandate, but who was required to abide by its terms, the majority concluded. Those three little words allowed both presidential administrations to inflame Americans' perennial culture war over abortion.

The Court's decision upholding the authority of agencies under both administrations to shape the contours of the law ensures that agencies will remain a locus of culture-war fights. From administration to

[23] Robin Fretwell Wilson & Tanner Bean, "Why Jack Phillips Still Cannot Make Wedding Cakes: Deciding Competing Claims under Old Laws," Berkeley Center for Religion, Peace & World Affairs, June 29, 2018, https://bit.ly/2CdG5e5.

[24] Michael J. O'Loughlin, "White House Signing Ceremonies Showcase Two Styles of U.S. Catholicism," America: The Jesuit Review, May 9, 2017, https://bit.ly/2PAFRRv.

[25] Pennsylvania v. President of the U.S., 930 F.3d 543, 560–61 (3d Cir. 2019). The states argued that if employers did not provide needed drugs through the coverage mandate, they would incur additional costs under their state-funded family planning and contraceptives services programs. *Id*.

administration, political appointments are reaching farther into the apparatus of agencies that interpret and administer our laws. This means that political appointees are supplying more of the substance of the law when Congress delegates its decisionmaking. Agencies, which have been lauded for bringing technical, apolitical expertise, also may be agents in the culture wars.[26] Unless Congress changes its practice of broad delegation of authority, or regulations are no longer seen as up for grabs by each changing administration, Americans should expect to see more decade-long disputes over the questions that divide us.

In Part I, we place *Little Sisters of the Poor* in a longer arc of laws about abortion and legislative accommodations that have walled objectors off from being compelled to violate their faith or conscience. Part I details why the initial coverage mandate—by exempting only churches while covering drugs that implicate life—was destined to be seen as a fundamental breach of trust by the Obama administration regarding abortion. In one sense, the wholesale exemption returned America to the *status quo ante* before the coverage mandate.

Part II reviews the Court's decision in *Little Sisters of the Poor*, including why the Court rejected the states' procedural attack on the wholesale exemption. It recaps the reading of the ACA that seven members of the Court found justified the actions of both administrations. Part II also flags Justice Elena Kagan's prediction that the wholesale exemption may be attacked as arbitrary and capricious—one state has already said it will file suit again. It also discusses opinions from both wings of the Court urging the justices to finally weigh in on whether RFRA demands a concession that walls off religious objectors from the coverage mandate.

Part III observes that Congress could call an armistice in this specific culture-war clash, just as Congress set it in motion in the ACA. Congress could finally give the Little Sisters the certainty that they seek—that they will not be made to be complicit in the provision to their employees of drugs they see as ending a life or preventing one. Congress could amend the Employee Retirement Income Security Act (ERISA) to mirror the accommodation: codifying an *organizational* exemption for all religious employers while providing *individual* employees of all objecting employers, including churches, coverage under a stand-alone contraceptive plan. Like

[26] Clyde Wayne Crews, The Administrative State Lacks Its Own Justification: Expertise, Cato Unbound, June 2, 2016, https://bit.ly/2Ds8hL6.

the accommodation, the cost of this stand-alone coverage would be funded by the insurers who run ACA exchanges. Carrying forward the Obama administration's clever financing of the accommodation is crucial because, as explained in Part I, the Hyde amendment prevents federal dollars from being used to fund abortion, including the four drugs stipulated to work on the implantation site. This congressional enactment would provide contraceptive coverage to the employees of more employers than either the Trump-era rule or the Obama-era rule. It also disconnects entirely religious and moral objectors from the provision of drugs that implicate their most deeply held commitments.

Part IV looks forward from *Little Sisters of the Poor*. We argue that culture-war battles will continue to be waged inside agencies whose workings are opaque to most Americans. Part IV highlights the costs of seesawing regulation. Administrative whiplash is bad for the nation. Momentous decisions should command respect from more than just the plurality or bare majority of Americans who voted for the last administration.

I. The Makings of a Culture-War Battle over Abortion

The Court's opinion in *Little Sisters of the Poor* picks up the controversy over the coverage mandate late in a still-unfolding story.

As we chronicle below, a core commitment about the handling of abortion was made to Americans to secure the ACA's passage in 2010.[27] Long before then, Americans reached an uneasy détente over, on the one hand, access to abortion and, on the other, whether Americans would be asked to support abortion by their actions or their tax dollars.

Shortly after the Supreme Court's 1973 decision in *Roe v. Wade*,[28] Congress clarified that receiving federal hospital construction funds did not compel objecting institutions to provide abortions, in what has become known as the "Church amendment."[29] Three years later,

[27] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[28] 410 U.S. 113 (1973).

[29] 42 U.S.C. § 300a-7(c)(1); see also Robin Fretwell Wilson, Unpacking the Relationship between Conscience and Access, in Law, Religion, and Health in the United States (2017). Congress also protected individual physicians from losing staff privileges or suffering other "discrimination" for doing abortions or refusing to do them. Jody Feder, Cong. Res. Serv., The History and Effect of Abortion Conscience Clause Laws, 5 (2005). This equal opportunity conscience protection reveals that conscience protections need not imperil access.

Congress passed the Hyde amendment. First included as a rider to the Departments of Labor and Health, Education, and Welfare Appropriations Act, the effect of the Hyde amendment is to, generally, prohibit federal funds from being used to perform abortions except in cases of incest or rape, or where the failure to perform an abortion would "place the woman in danger of death," "as certified by a physician."[30] The amendment has endured because, decades after *Roe v. Wade*, many Americans still believe that abortion is wrong, both within faith communities and outside them.

These guarantees, made in the Church amendment and the Hyde amendment, long appeared unassailable. Indeed, far from being under constant retreat, Congress expanded conscience guarantees in successive pieces of legislation since 1973—acts that received bipartisan support and were signed into law by presidents from both parties.[31]

In 2009–2010, as Congress debated whether to enact the ACA, the question of what the bill meant for our decades long détente over abortion played a central role. Pro-life Democrats, whose linchpin votes were vital to passage, tied their support for the ACA to leaving these guarantees untouched.[32] A half-dozen members of Congress withheld support until President Obama "agreed to issue [an executive] order to placate [the] group."[33] This executive order, issued the

[30] Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011). The Hyde amendment allows states to choose to fund abortions through Medicaid, a federal- and state-supported program, that do not meet its restrictions. States must fund Hyde-ineligible abortions exclusively with state funds. To comply with the Hyde amendment, the ACA does not require coverage for any abortion. ACA, § 1303(b)(1). Although health plans may elect to provide coverage for abortions in cases of incest, rape, or to preserve the mother's life. ACA, § 1303(b)(2)(B).

[31] Congress has attached these funding restrictions to appropriations every year since 1976, with strong bipartisan support, until 2019. See Pub. L. No. 94–439 (H.R. 14232), Pub. L. No. 94-439, 90 Stat. 1418 (1976). The Hyde amendment enjoyed overwhelming support. For example, when the Hyde amendment was renewed in 2007, it passed 76-17 in the Senate and 272-142 in the House. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 131 Stat. 1844 (2007). But in the lead up to the 2020 election, Democrats are increasingly calling for the end of the Hyde amendment. Emma Green, "Why Democrats Ditched the Hyde Amendment," The Atlantic, June 14, 2019, https://bit.ly/31xK0eA.

[32] See "Pro-Life Democrats Expect the Obama Administration to Issue Final Rule That Will Allow Religious Exemption," ChristianNewsWire, Nov. 21, 2011, https://perma.cc/K6X3-2RDW.

[33] Mimi Hall, "Both Sides of Abortion Issue Quick to Dismiss Order," USA Today, Mar. 25, 2010, https://bit.ly/2XJSpdP.

day after the ACA's passage, largely reflected provisions in the ACA itself, which bans "the use of federal funds" for certain abortions in the health exchanges.[34] After the president made these additional assurances, the bill passed the House 219-212.[35]

For groups like the Catholic Health Association, these assurances were crucial to their eventual support of the ACA. In effect, President Obama promised that the ACA would not upend years of consensus about whether the federal government will fund abortions and whether private individuals can stay out of the abortion business. Afterward, critics on both sides would label President Obama's executive order as "basically meaningless."[36]

But the members of Congress who changed their votes in reliance on the executive order believed it meant something—and that abortion restrictions in the ACA meant something, too. Rep. Joe Stupak said of the coverage mandate, "I am perplexed and disappointed that, having negotiated the Executive Order with the President, not only does the HHS mandate violate the Executive Order but it also violates statutory law."[37] He explained elsewhere that "it violates the Hyde law [amendment] that's been statutory for 40-some years."[38] Former Rep. Kathy Dahlkemper—who also voted for the ACA, only to lose her seat—echoed Stupak's sentiment: "We worked hard to prevent abortion funding in health care and to include clear conscience protections for those with moral objections to abortion and contraceptive devices that cause abortion. I trust that the President will honor the commitment he made to those of us who supported final passage."[39] Imagine the surprise or even betrayal that these

[34] ACA § 1303(b)(2).

[35] See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2010).

[36] Hall, *supra* note 33. The National Right to Life Committee called it "[a] transparent political fig leaf," while Planned Parenthood said it was "[a] symbolic gesture." "Obama's Closed-Door Signing of Executive Order on Abortion Funding Raises Objections," Kaiser Health News, Mar. 25, 2010, https://bit.ly/3amq9mF.

[37] See, e.g., Tabitha Hale, "Stupak: HHS Mandate Violates My Obamacare Compromise," Breitbart, Sept. 4, 2012, https://bit.ly/3kvld3t.

[38] Fred Lucas, "Stupak: 'No Regrets' on Obamacare; But Contraception Mandate 'Violates Freedom of Religion,'" CNSNews, Sept. 4, 2012, https://bit.ly/2DMRBOp.

[39] John McCormack, "Kathy Dahlkemper: I Wouldn't Have Voted for Obamacare If I'd Known about HHS Rule," Wash. Exam'r, Feb. 7, 2012, https://washex.am/2E31S8L.

measured supporters of the ACA felt when the Obama administration issued its guidelines.

The ACA, in a late-added portion of text known as the Women's Health Amendment, fleshed out what preventive health services that covered health plans and insurers must provide:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum, provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.[40]

Importantly, Congress nowhere mentioned abortion, abortion-inducing drugs, or drugs that would act after conception. Congress nowhere defined "preventative care and screenings." It nowhere provided the Health Resources and Services Administration (HRSA), a subagency of the Department of Health and Human Services (HHS), guidance on how to arrive at these "comprehensive guidelines." Instead, Congress left that responsibility and vast discretion to HRSA with three little words commonly used in statutes: "as provided for."

To fulfill this responsibility, HRSA turned to the National Academy of Medicine, a nonprofit group of medical advisers, to make recommendations. The departments' first statement on developing guidelines failed to mention contraceptives or religious exemptions or accommodations.[41] The resulting guidelines, to the great consternation of religious organizations,[42] grafted onto the requirement for preventive care and screenings that employers cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[43]

[40] ACA § 2713(a)(4); 42 U.S.C. § 300gg-13(a)(4).

[41] 75 Fed. Reg. at 41728 (July 19, 2010).

[42] Matthew Larotonda, "Catholic Churches Distribute Letter Opposing Obama Healthcare Rule," ABC News, Jan. 30, 2012, https://abcn.ws/3fHIlYR; Thomas Cloud, "Cardinal George: Catholic Hospitals Will Be Gone in 'Two Lents' under Obamacare Regulation," CNSNews, Feb. 28, 2012, https://bit.ly/2DEro4z.

[43] 77 Fed. Reg. 8725 (Feb. 15, 2012); Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being, HRSA, https://bit.ly/2PGYW4k.

Relying on the HRSA guidelines, the Obama administration finalized rules requiring coverage of "preventive care . . . provided for in the comprehensive guidelines supported" by HRSA.[44] The same day, the Obama administration finalized an exemption for churches from the coverage mandate (church exemption),[45] flagging that the administration understood the religious commitments implicated by the set of drugs being mandated. Unlike churches, other employers that might object to subsidizing the full complement of drugs faced massive fines.[46]

This tone-deaf agency action shattered the uneasy peace around abortion animating the ACA. Religious organizations expressed sharp dissent. The Catholic Health Association said, "[t]he impact of being told we do not fit the new definition of a religious employer and therefore cannot operate our ministries following our consciences has jolted us. . . . From President Thomas Jefferson to President Barack Obama, we have been promised a respect for appropriate religious freedom."[47] Religious leaders said the coverage mandate treated them as "second-class citizens."[48] At the same time, women's rights groups like the National Women's Law Center praised the Obama administration

[44] Notice of Guidelines Development: July 19, 2010, 75 Fed. Reg. 41726 (July 19, 2010); Amendment to the interim final rule: August 3, 2011, by the Departments of HHS, Labor and Treasury, 76 Fed. Reg. 46621 (Aug. 3, 2011); Final rule: February 15, 2012, by the Departments of HHS, Labor, and Treasury, 77 Fed. Reg. 8725 (Feb. 15, 2012).

[45] 76 Fed. Reg. 46621 (Aug. 3, 2011) ("[T]he Departments are amending the interim final rules to provide HRSA additional discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned."); *id.* ("[A] religious employer is one that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order."); 77 Fed. Reg. 8725 (Feb. 15, 2012) (maintaining definition). This definition was later simplified to require only the fourth prong. See 78 Fed. Reg. 8456 (Feb. 6, 2013) (proposed rule); 78 Fed. Reg. 39870 (July 2, 2013) (final rule).

[46] In *Hobby Lobby*, by the Court's calculation, if Hobby Lobby refused to provide mandated coverage, it would be taxed $100 per day per individual, amounting to $1.3 million a day or $475 million per year. 573 U.S. at 691.

[47] Carol Keehan, "Something Has to Be Fixed," Catholic Health Ass'n of the United States, Feb. 15, 2012, https://bit.ly/2Z3APSp.

[48] Letter from Thomas J. Olmsted, Catholic Bishop of Phx., to Brothers and Sisters in Christ (Jan. 25, 2012).

for establishing "a major milestone in protecting women's health [because] . . . [c]ontraception is critical preventive health care."[49]

President Obama attempted to mitigate the fallout. He directed the departments entrusted with administering the ACA to fashion an accommodation that would allow women to receive "contraceptive care free of charge without co-pays, without hassle" but also not compel religious nonprofits to pay for that coverage.[50]

The Obama administration signaled its intent to effect the president's directive in a notice of proposed rulemaking published on March 21, 2012.[51] Importantly, the administration asked for comments on which organizations should be eligible for the accommodation.[52] At that point, "not even Jesus and the apostles would qualify for" the church exemption, as one commentator quipped.[53]

The resulting accommodation extended to faith-based organizations recognized by the IRS and attempted to separate them from payment of contraceptives by shifting the financial burden elsewhere. For objecting employers that purchase insurance through the marketplace, the accommodation directed the employer's insurer to provide add-on contraceptive coverage to women and "assume sole responsibility" for its cost.[54] The insurer is made whole for providing the add-on coverage by the savings it reaps from "lower costs from improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies."[55] In theory, the add-on coverage comes at no cost to the employer.

[49] National Women's Law Center, "HHS Decision on Contraceptive Coverage a Major Milestone," Jan. 20, 2012, https://bit.ly/2XWFK79.

[50] Richard Wolf, "Obama Tweaks Birth Control Rule," USA Today, Feb. 10, 2012, https://bit.ly/2EgDtwJ.

[51] 77 Fed. Reg. 16501 (Mar. 21, 2012).

[52] *Id*.

[53] Robin Fretwell Wilson, The Erupting Clash between Religion and the State over Contraception, Sterilization, and Abortion, in Religious Freedom in America: Constitutional Traditions and New Horizons 135, 138 (Allen Hertzke ed., 2014).

[54] 78 Fed. Reg. 39870 (July 2, 2013); 78 Fed. Reg. 8456 (Feb. 6, 2013). For objecting employers who self-insure, there is no insurer providing coverage. As a result, the third-party administrator for the objecting employer's plan would arrange for coverage through the FFE insurer or provide that coverage directly itself.

[55] 80 Fed. Reg. 41318, 41335 (July 14, 2015).

For objecting employers who self-fund, the accommodation directs the entity administering the ACA's federally facilitated exchange (FFE insurer) to provide add-on contraceptive coverage for employees at no cost to the objecting employer or the employees. The FFE insurer is reimbursed for these costs through a convoluted mechanism: what the insurer owes the U.S. government for running the exchanges is reduced dollar for dollar by what it shelled out for the add-on contraceptive coverage for employees.[56]

When crafting the accommodation, President Obama faced a hard limit in trying to honor all his commitments. He promised in his executive order that no federal funds "will be used to pay for abortions in health insurance exchanges to be set up by the government."[57] The Hyde amendment itself gets tripped when dollars hit the federal fisc, specifically HHS,[58] and are used for ineligible abortions.[59] The contractual discount, although convoluted, technically skirts the Hyde amendment and became the Obama administration's workaround. Federal taxpayer dollars would not pay for what some viewed as abortifacients.

In order to avail themselves of the accommodation, religious nonprofits were required to provide written notice to their insurer or, if self-funded as nearly all plans are, the third-party administrator (TPA) for their health-insurance plan.[60] That notice not only triggers someone else to provide the objected-to coverage,[61] it effected any needed plan changes. For example, the TPA became an ERISA plan administrator solely for the purpose of contraceptive coverage by operation of law, and the objecting nonprofit was "considered to comply with" the coverage mandate.[62]

[56] 80 Fed. Reg. 41318.

[57] Hall, *supra* note 33.

[58] The Hyde amendment actually is a restriction on specific streams of money—namely those funds being appropriated to the departments funded by the appropriations bill and any trust funds those monies go into.

[59] Four drugs were stipulated to be abortifacient, that is acting on the implantation site. We recognize that not all people would see the objected-to drugs as abortion-inducing. See Wilson, Calculus, *supra* note 10, at 1454–60.

[60] ERISA-exempt "church plans" also had to file notice. 45 C.F.R. § 147.131(c)(1); 26 C.F.R. § 54.9815-2713A(b)(1).

[61] 45 C.F.R. § 147.131(d).

[62] 78 Fed. Reg. at 39879 (July 2, 2013); 29 C.F.R. § 2510.3-16(b); 29 U.S.C. § 1002(16) (defining plan administrator); 45 C.F.R. § 147.131(c)(1); 26 C.F.R. § 54.9815-2713A(b)(1); 29 C.F.R. § 2590.715-2713A(b)(1).

Even as the accommodation hijacks insurers and TPAs to do the work, the add-on contraceptive coverage nonetheless was appended to the religious employer's health plan.[63] Thus, religious employers believed they maintained some connection to objected-to coverage, making them complicit. Put differently, although they did not have to pay for it, include it in their plans, or administer coverage, the existence of their health plan infrastructure made the provision of objected-to drugs possible.

This accommodation provided much needed relief for many objectors, but not all were interested. Catholic Cardinal Timothy Dolan, Archbishop of New York and president of the U.S. Council of Bishops, together with more than 500 scholars, university presidents, and religious leaders, wrote a letter labeling the accommodation "unacceptable" and as hiding a "grave violation" of religious liberty behind a "cheap accounting trick."[64]

The Little Sisters challenged the accommodation. As a religious nonprofit ineligible for the church exemption, they faced an impossible choice: provide objected-to coverage and be complicit in a sin; accept the accommodation's terms and be complicit in a sin; or face heavy fines under the ACA. As Yuval Levin cleverly noted, "somehow these religious employers are supposed to imagine that they're not giving their workers access to abortive and contraceptive coverage. If religious people thought about their religious obligations the way HHS lawyers think about the law, this might just work. But they don't."[65]

According to the Little Sisters' most recent tax filings as a nonprofit, the Little Sisters employ at least 2,719 people across their 31 locations nationwide.[66] As with the hefty fines facing Hobby Lobby,[67]

[63] 78 Fed. Reg. at 39876 (July 13, 2013) ("[P]lan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy).").

[64] Letter from Timothy Dolan et al., Unacceptable (Feb. 27, 2012), https://perma.cc/CS57-ZXVT ("It is no answer to respond that the religious employers are not 'paying' for this aspect of the insurance coverage.").

[65] Yuval Levin, "A New Round of Intolerance," Nat'l Rev. Online, Feb. 1, 2013, https://bit.ly/33H4lAz.

[66] U.S. Homes, Little Sisters of the Poor, https://bit.ly/2PC5zEW; *infra* note 117.

[67] Hobby Lobby, 573 U.S. at 686.

the Little Sisters would pay $99,243,500 a year if ultimately made to pay the ACA's $100-a-day penalty for each employee covered by a noncompliant plan.[68]

Numerous religious organizations shared the Little Sisters' concerns and filed similar lawsuits, eventually resulting in *Zubik v. Burwell*.[69] The key issue in *Zubik* was whether the accommodation violated RFRA. RFRA tests government-imposed burdens on religion against the necessity of imposing those burdens.[70]

The *Zubik* Court never reached the merits. Rather, after supplemental briefing, the departments confirmed that they could separate the Little Sisters' plan entirely from the causal chain of contraceptive coverage for the Little Sisters' employees. "[C]ontraceptive coverage could be provided to [Little Sisters'] employees, through [their] insurance companies, without any . . . notice from [them]."[71] And the Little Sisters agreed that their complicity concern would be met by an accommodation where they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception, even if their employees receive cost-free contraceptive coverage from the same insurance company."[72] The Court remanded, directing the departments to accommodate the Little Sisters' "religious exercise while at the same time ensuring that women covered by [their] health plans receive full and equal health coverage, including contraceptive coverage."[73] It seemed that the litigation had finally yielded a way to resolve the conflict without giving up on religious liberty or the access needs of women.

In parallel, religious objectors eligible for neither the church exemption nor the accommodation challenged the coverage mandate as encroaching on their religious practice without sufficient reason, in violation of RFRA. In *Burwell v. Hobby Lobby Stores, Inc*., the Court consolidated the appeals of three for-profit, closely held corporations.

[68] 26 U.S.C. §§ 4980D(a)–(b).

[69] Zubik, 136 S. Ct. 1557.

[70] Robin Fretwell Wilson, When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach about Specific Exemptions, U.C. Davis L. Rev. 704, 710 (2014).

[71] Zubik, 136 S. Ct. at 1559.

[72] *Id*. at 1560.

[73] *Id*.

The owners "have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients."[74] By complying with the coverage mandate, they believed they would be facilitating abortions.[75] During the litigation, the departments stipulated that the drugs acted after conception.[76]

The *Hobby Lobby* Court held that the coverage mandate did violate RFRA as to these closely held corporations, pointing to the accommodation as one less restrictive means to accomplish the departments' goals of gender equity through contraceptive coverage.[77] The holding in *Hobby Lobby*, combined with the Court's direction in *Zubik*, challenged the departments to extend and revise the accommodation.

Ultimately, the departments under President Obama concluded there was "no feasible approach" to solve the problem.[78] In the last days of the Obama administration, on January 9, 2017, the departments instead insisted that the accommodation was consistent with RFRA, reassuming their initial position in *Zubik*. Before any further litigation ensued, President Trump took office.

Under President Trump, the departments did a 180-degree shift. Less than a year into the Trump administration, the departments issued the wholesale exemption carving out religious organizations from the coverage mandate entirely—and nobody stepped into the void to pay for the missing coverage.[79] This wholesale exemption could be triggered by religious beliefs of nonprofit and for-profit religious employers alike.

[74] Hobby Lobby, 573 U.S. at 691.

[75] *Id*.

[76] "HHS acknowledge[d] that the objected-to drugs and devices may result in the destruction of an embryo." Hobby Lobby, 573 U.S. at 720. This was done despite the departments' statements that no covered drug or device under the ACA is an "abortifacient[] within the meaning of federal law." See 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997); 45 C.F.R. § 46.202(f).

[77] Hobby Lobby, 573 U.S. at 730.

[78] Dept. of Labor, FAQs about Affordable Care Act Implementation, Part 36 at 4 (Jan. 9, 2017).

[79] 82 Fed. Reg. 47792, 47812 (Oct. 13, 2017) ("[E]xemptions for objecting entities will apply to the extent that an entity described in § 147.132(a)(1) objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs.").

In a parallel rule, the Trump administration also exempted any employer that could not provide coverage for moral reasons (moral exemption).[80] The departments left in place the accommodation for those organizations that wanted to step aside from providing coverage under their plan but *also* wanted their employees to have the mandated coverage.[81] In other words, employers that wanted to say "not me, but glad for others to pay" could avail themselves of the accommodation.

It is stunning that, after all the culture-war machinations over *Hobby Lobby*, the Trump administration's 180-degree turn garnered far less public attention. Media mentions of *Hobby Lobby* dwarf that of *Little Sisters of the Poor*.[82] Surely, a change this big—carving out of the coverage mandate a whole category of additional employers—should have prompted outrage and debate on the same scale as *Hobby Lobby*. But no. Apparently inundated with other dramas of the Trump administration, the media and the nation simply blanked on the size of the culture-war move being made by the departments.

The departments justified the wholesale and moral exemptions, pointing to multiple sources of authority. First, they stated that the ACA itself, through its broad delegation of power to HRSA, granted them authority to exempt entities from the coverage mandate—the Supreme Court would ultimately agree. Second, they explained that the wholesale exemption was directly responsive to the Court's holdings in *Zubik* and *Hobby Lobby*. Third, they reasoned that RFRA compelled the wholesale exemption or, at the very least, authorized

[80] *Id*. at 47838.

[81] *Id*. at 47812 ("The Departments now believe it is appropriate to modify the scope of the discretion afforded to HRSA in the July 2015 final regulations to direct HRSA to provide the expanded exemptions and change the accommodation to an optional process if HRSA continues to otherwise provide for contraceptive coverage in the Guidelines.").

[82] As one gauge, we examined media coverage of Hobby Lobby and Little Sisters of the Poor during their litigation timelines. Between April 1, 2012, and December 30, 2014, Hobby Lobby was mentioned over 10,000 times. In contrast, from March 1, 2013 to July 20, 2020, Little Sisters of the Poor garnered 6,000 mentions. A Lexis search for ("Little Sisters" or "Zubik") and contracept! and ("case" or "Supreme Court" or "SCOTUS") between the dates Mar. 1, 2013 and July 20, 2020, yielded 6,336 results. A Lexis search for ("Hobby Lobby" or "Mardel") and contracept! and ("case" or "Supreme Court" or "SCOTUS") between the dates Apr. 1, 2012, and Dec. 30, 2014, yielded over 10,000 results.

the departments to create it. And, fourth, the moral exemption was directly supported by the Church amendment because four of the mandated drugs "prevent implantation," meaning "many persons believe [they] are abortifacient."[83]

Litigation followed within days.[84] Pennsylvania filed suit, later joined by New Jersey, arguing that the wholesale and moral exemptions were both substantively and procedurally invalid and would cause the states to shoulder the cost of contraceptives for employees working for exempted employers.[85] The district court granted a nationwide preliminary injunction against the wholesale and moral exemptions. When the Little Sisters moved to intervene to defend the wholesale exemption, they were rebuffed by the district court. But on appeal, the Third Circuit permitted their intervention. Otherwise, at the Third Circuit, the states prevailed against the wholesale and moral exemptions. The Supreme Court granted certiorari.

II. The Court's Decision

At the Supreme Court, the Little Sisters and the Trump administration together defended the concessions for religious and moral objectors. The *Little Sisters* decision ultimately rested on a close reading of three words in the ACA, "as provided for." A 7-2 majority ruled for the Little Sisters and the departments, upholding the wholesale and moral exemptions. The ACA authorized the agencies both to fill in the details of preventive care and screenings and to leave aside large swaths of covered employers. Technical shortcomings of the Trump administration rulemaking did not violate the substantive requirements of the Administrative Procedure Act (APA) or cause prejudicial error. The Court avoided the meta question of whether the Obama administration's accommodation was insufficient and had to do more for religious objectors under RFRA.

[83] 82 Fed. Reg. at 47838.

[84] Complaint, Pennsylvania v. Trump, 281 F. Supp. 3d 553, 564 (E.D. Pa. 2017) (17-4540) (filed October 11, 2017, just five days after the wholesale exemption and moral exemption interim final rules' effective date, and two days before the interim final rules themselves were published in the Federal Register).

[85] Pennsylvania, 930 F.3d at 560–61 ("The States expect that when women lose contraceptive insurance coverage from their employers, they will seek out these state-funded programs and services.").

A. Finding Broad Delegation under the ACA

Writing for the Court, Justice Clarence Thomas hinged his analysis on Congress's decision to define the contours of preventive care and screenings "as provided for in comprehensive guidelines by [HRSA]." This handoff to HRSA allowed HRSA both to "identify what preventative care and screenings must be covered [under the ACA] and to exempt or accommodate certain employers' religious objections."[86] In other words, this phrase authorized HRSA not only to specify *what* was required but *who* had to provide coverage. Employing a textualist interpretation of the phrase, the Court held that on its face "the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover," so that "HRSA has virtually unbridled discretion."[87] This unchecked discretion to define coverage requirements, the Court found, also permitted HRSA to "identify and create exemptions from its own Guidelines."[88]

Although the Court recognized that this discretion could result in contraceptives not being provided to numerous women working for exempted employers, it put the blame on Congress: "it was Congress, not the Departments, that declined to expressly require contraceptive coverage in the ACA itself."[89] If tens of thousands of employees were left without coverage that other employees receive under the ACA,[90] that, too, was on Congress, which had made a "deliberate choice to issue an extraordinarily 'broad general directiv[e]' to HRSA to craft the Guidelines, without any qualifications as to the substance of the Guidelines or whether exemptions were permissible. Thus, it is Congress, not the Departments, that has failed to provide the protection for contraceptive coverage."[91]

[86] Little Sisters of the Poor, 140 S. Ct. at 2380.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 2382.

[90] 83 Fed. Reg. at 57578–80 (Nov. 15, 2018) (estimating tens of thousands of women would lose coverage under religious rule).

[91] Little Sisters of the Poor, 140 S. Ct. at 2382. There is an obvious reason for Congress's failure. It barely had enough votes to pass the ACA, much less an ACA that mandated the provision of contraceptive care. Similarly, Republicans wanting to undo the ACA since then have also not carried enough votes. Hence, both fights are being waged in the agencies. See Summary of Administration Actions Undermining the Affordable Care Act, Center on Budget and Policy Priorities, https://bit.ly/2XHCJra.

In dissent, Justice Ruth Bader Ginsburg castigated the Trump administration for crafting an exemption that "casts totally aside" and "tossed entirely to the wind" the interest of providing contraceptives to women.[92] She argued that the departments should have taken a "balanced approach . . . that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs."[93] For Justice Ginsburg, the words "as provided for" permitted HRSA only to determine *what* services the guidelines cover, but not *who* is required to provide them.[94] In other words, HRSA could decide to include the full complement of drugs in the guidelines, but it could not exempt religious or other organizations from providing them. Because of this, Justice Ginsburg concluded the departments had no authority under the ACA to craft the wholesale or moral exemptions.

Justice Elena Kagan took issue with premising broad authority on the ACA's words "as provided for." Instead, because of the ACA's ambiguity, she would defer to an agency's reasonable interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[95] Examining the coverage mandate's history, Justice Kagan noted that there has been no change in interpretation across the Obama and Trump administrations of the ACA as giving HRSA the ability to "create exemptions to the contraceptive-coverage mandate."[96] Because of this, Justice Kagan would defer to the departments' understanding of the phrase "as provided for."

B. Rejecting Procedural Defects under the APA

The states also challenged whether the departments had complied with the APA when issuing the wholesale and moral exemptions. Under the APA, executive agencies are required to hold a notice-and-comment period to receive public comments on a proposed rule.[97] But there are exceptions. For instance, agencies may bypass notice

[92] Little Sisters of the Poor, 140 S. Ct. at 2400 (Ginsburg, J., dissenting); Oral Argument, *infra* note 120, at 10:18–20.

[93] Little Sisters of the Poor, 140 S. Ct. at 2400.

[94] *Id*. at 2404–05.

[95] *Id*. at 2397 (Kagan, J., concurring).

[96] *Id*.

[97] 5 U.S.C. § 553.

and comment for "good cause" and proceed by way of an interim final rule (IFR).[98] Both administrations used IFRs in this context.[99]

The states had argued that the Trump administration's October 2017 IFRs set forth the wholesale and moral exemptions almost exactly as they were finalized. The states contended that the Trump administration lacked good cause to avoid notice and comment, that this procedural defect invalidated the November 2018 final rules, and that the departments had failed to evidence "open-mindedness" in response to public comments. The Little Sisters and the Trump administration countered that the IFRs complied with the APA. They pointed to similar practices under the Obama administration and, in any event, argued that the November 2018 final rules rendered the IFRs harmless.

The Court upheld the procedural validity of the November 2018 final rules. Instead of relying on the names traditionally given to specific agency actions—such as "Interim Final Rule," "Request for Comments," or "General Notice of Proposed Rulemaking"—the Court asked if the departments' actions met the APA's substantive requirements. The Court held that they did. The departments' request for comments in the October 2017 IFRs contained a reference to the departments' legal authority and an explanation of the proposed rules. That gave the public a fair opportunity to comment on the proposals, meeting these important APA requirements.[100]

On the question of "open-mindedness" to public comments when promulgating final rules, the Court rejected open-mindedness as a test for validity; no such test is found in the APA. All that is required under the APA is that the public be given notice and time to make

[98] 5 U.S.C. § 553(b)(3)(B) ("[W]hen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").

[99] As one example, HRSA announced it would develop guidelines in an IFR. 75 Fed. Reg. 41726 (July 19, 2010). After a change in administration, the departments issued two new IFRs which created the wholesale exemption and the moral exemption. 82 Fed. Reg. at 47812 (Oct. 13, 2017); 82 Fed. Reg. 47838 (Oct. 13, 2017). After Pennsylvania launched its action, the departments formalized the October 2017 IFRs into final rules in November 2018. 83 Fed. Reg. 57536 (Nov. 15, 2018); 83 Fed. Reg. 57592 (Nov. 15, 2018). The November 2018 final rules contained explanations of the departments' decision regarding the accommodation.

[100] Little Sisters of the Poor, 140 S. Ct. at 2384–85.

comments on agency proposed rules, that the final rule include a statement of the rule's basis and purpose, and that the rule is published 30 days before it becomes effective. The Court found that each requirement was followed as to the November 2018 final rules, even though nearly identical to the October 2017 IFRs. Given compliance with the APA, the question of good cause for bypassing notice and comment was mooted.[101]

Justice Kagan in her concurrence sketched the next line of attack in the Little Sisters' saga: whether the wholesale and moral exemptions reflect arbitrary and capricious action forbidden by the APA.[102] Justice Kagan pointed to a "mismatch between the scope of the [wholesale exemption] and the problem the agencies set out to address"[103]—namely, the wholesale exemption is cast so broadly that it encompasses religious employers who gladly would accept the accommodation. She believes this overbreadth fails to make good on the departments' obligation to minimize the impact on access of any concessions made for religious objectors. For Justice Kagan, the moral exemption is more problematic; it lacks even the justification that the departments sought to prevent violations of RFRA by failing to narrowly tailor encroachments on religious practice.

C. Leaving RFRA for Another Day, Again

Even as Justice Thomas anchored the majority decision to a textualist interpretation of the ACA, he weighed in on the meta question of whether RFRA demanded such a robust response to claims of religious burden. The majority noted that it was "appropriate for the Departments to consider RFRA."[104] The Court pointed to its holding in *Hobby Lobby* "that the mandate violated RFRA as applied to entities with complicity-based objections," that the "conflict between the [coverage] mandate and RFRA is well settled," and that the Court's decisions in *Zubik* and *Hobby Lobby* "all but instructed the Departments to consider RFRA going forward."[105] "Against this backdrop,"

[101] *Id*. at 2385–86.

[102] *Id*. at 2397–2400 (Kagan, J., concurring).

[103] *Id*. at 2398.

[104] *Id*. at 2383 (Thomas, J., majority op.).

[105] *Id*.

the Court said, "it is unsurprising that RFRA would feature prominently in the Departments' discussion[s]."[106] Justice Thomas went further: "The Departments had authority under RFRA to 'cure' any RFRA violations caused by its regulations."[107] All of these observations are, of course, *dicta* since the majority rested its decision on a reading of the ACA. On the fundamental question—what would constitute a RFRA violation in the context of the accommodation—the Court did not say.

Justice Samuel Alito's concurrence lamented this omission. By not dealing with the RFRA question head on, Justice Alito feared that the "Little Sisters' legal odyssey [would not come] to an end."[108] Justice Alito, the author of the majority opinion in *Hobby Lobby*,[109] would have held that the accommodation violated RFRA. Justice Alito helpfully walks through each step of RFRA's multistaged analysis.[110] As to the Little Sisters' religious belief regarding complicity as a result of using the accommodation, he saw a substantial burden—failing to comply with the accommodation hastens severe financial penalties for noncompliance. The government lacked a compelling interest in providing contraceptive coverage to working women, as shown by Congress's failure to nail down a duty to provide contraceptive coverage in the text of the ACA. Any compelling interest in the coverage mandate is further undermined by the crazy quilt of exemptions in the ACA itself:[111] (1) "The ACA does not provide contraceptive coverage for women who do not work outside the home," (2) the ACA's exemption of employers with fewer than 50 employees, and (3) the ACA's expansive grandfathering of pre-existing plans. Practically, these exemptions mean that "tens of millions of people" do not receive the benefits of the ACA aside from concessions for religious practice.[112]

[106] *Id*.

[107] *Id*. at 2382.

[108] *Id.* at 2389 (Alito, J., concurring).

[109] Hobby Lobby, 573 U.S. 682.

[110] Little Sisters of the Poor, 140 S. Ct. at 2387–96. See also Tanner Bean, "To the Person": RFRA's Blueprint for a Sustainable Exemption Regime, 2019 BYU L. Rev. 1, 14 (2019), https://perma.cc/G44S-EC53.

[111] Little Sisters of the Poor, 140 S. Ct. at 2392 (Alito, J., concurring).

[112] *Id.* at 2393.

Last, the accommodation was not the least restrictive means of accomplishing what valid interest the government did have. Other alternatives exist for providing contraceptives: "the Government . . . [could] assume the cost of providing the . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies"—assuming the Hyde amendment did not restrict such payment, as we explain above.[113] In sharp distinction to Justice Kagan's mismatch analysis, Justice Alito concluded that "it is not clear that the [wholesale exemption's] provisions concerning entities that object to the mandate on religious grounds go any further than necessary to bring the mandate into compliance with RFRA."[114] Overbreadth, in fact, is permissible as RFRA does not require corrective measures to be "the narrowest permissible corrective."[115]

Justice Ginsburg appears to agree that the departments may take RFRA into account to prevent RFRA violations, but urges a limit to proactive measures: they may not "benefit religious adherents at the expense of the rights of third parties."[116] She believes female employees of employers carved out of the coverage mandate by the wholesale and moral exemptions suffer a third-party harm. Indeed, there is now no way for these employees to obtain cost-free coverage for contraceptives if their employer refuses to accept the accommodation.[117] Below, we describe action Congress may take now to end this saga while ensuring employees the promised access.

[113] *Id*. at 2394 (Alito, J., concurring).

[114] *Id*. at 2396.

[115] *Id*.

[116] *Id*. at 2408 (Ginsburg J., dissenting).

[117] We do not discount the impact the Church exemption, accommodation, and wholesale exemption have on women working for religious employers that seek contraceptive coverage. Of the Little Sisters' 2,719 employees (reported on the Little Sisters' publicly available Form 990s for 2018), some who do not share the Little Sisters' religious belief regarding contraception may desire free contraception. See Results for Tax Exempt Organization Search, Internal Revenue Service (last visited July 25, 2020), https://bit.ly/3akWVo8 (searched IRS databases by organization name for "Little Sisters of the Poor"). This should be no surprise. Because of the litigation surrounding the coverage mandate, the Little Sisters' employees, third parties to the litigation, have never had the benefit of a system like the accommodation which would provide coverage while attempting to meet their employer's religious objection.

For Justice Ginsburg, the wholesale exemption is "neither required nor permitted by RFRA."[118] Justice Ginsburg believes that requiring an objecting employer to file the necessary paperwork to avail themselves of the accommodation does not substantially burden religious organizations' free exercise of religion. Under the accommodation, an "employer is absolved of any obligation to provide the contraceptive coverage to which it objects; that obligation is transferred to the insurer."[119] Ultimately, Justice Ginsburg would strike the wholesale and moral exemptions and leave the accommodation in place.

III. Congress Can Bring These Clashes to an End

The Supreme Court need not be the body that resolves this particular saga in the broader culture war over abortion, as the justices themselves have noted.[120] Congress set in motion the process of defining preventative care and screenings, and it can step in to fashion a remedy that respects both the needs of women and of religious objectors.

After supplemental briefing in the *Zubik* litigation, the departments conceded that "contraceptive coverage could be provided to [the Little Sisters'] employees, through [their] insurance companies, without any . . . notice from [them]."[121] The departments later backtracked, saying such a fix was not feasible. But what the departments once thought feasible could be done by Congress by writing such a procedure into ERISA, which governs employer-sponsored health insurance coverage, including self-funded health plans.

[118] Little Sisters of the Poor, 140 S. Ct. at 2409 (Ginsburg, J., dissenting).

[119] *Id*. at 2410.

[120] Justices expressed their dismay that the parties could not resolve this conflict on their own. At oral argument, some justices were noticeably frustrated with the parties' failure to come to a negotiated solution that both accounted for religious liberty and assured the availability of contraception. Justice Breyer said plainly, "I don't understand why this can't be worked out." Tr. Oral Argument at 35:23–24, Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) (No. 19-431). Chief Justice Roberts asked, "Is it really the case that there is no way to resolve th[e] differences?" *Id*. at 30:15–16. He lamented that "the problem is that neither side in this debate wants the accommodation to work. The one side doesn't want it to work because they want to say the mandate is required, and the other side doesn't want it to work because they want to impose the mandate." *Id.* at 30:8–14.

[121] Zubik, 136 S. Ct. at 1559.

The Obama administration's coverage mandate, its church exemption, its accommodation, and the Trump administration's wholesale and moral exemptions are all creatures of regulation, not statute. Only one of these, the accommodation, strived to have it both ways: respecting women's access as well as religious conscience. By contrast, the wholesale and moral exemptions that the Trump administration opened broadly to employers, and the church exemption that the Obama administration offered narrowly to churches, all gave short shrift to women. Under each of these, female employees lost, whether they shared their employer's convictions or not.

Making workable the Obama administration's accommodation should be the goal: it gives up neither on women's access nor on religious liberty. To be workable, it must take seriously the complicity claims that have complicated and raised barriers to its use.

Congress has had the ability all along to short circuit this saga. Consider one simple approach: Amend ERISA so that *individual employees* of exempt religious employers have the benefit of the accommodation.[122] This approach would place the ability to trigger the accommodation in the hands of individual employees. An employee working for an exempt employer would simply provide a Form 700 (modified for individuals seeking contraceptives who work for exempt employers) to the TPA administering her employer's self-insured or ERISA-exempt church health plan. Alternatively, the employee could notify HHS that she seeks contraceptives and is working for an exempt employer, and then HHS could turn around and contact the applicable TPA. This individual notification would have the same effect as the accommodation: It would require the TPA to reach out to the FFE insurer, which would then assume the financial and administrative burden of contraceptive coverage for that individual employee. It would also cause TPAs to be considered ERISA plan administrators for contraceptive coverage. To completely sever objecting employers from the causal chain of contraceptive coverage,

[122] Of course, given the politicization of the coverage mandate and exemptions to it, Congress may also want to amend the ACA to specify a duty to provide contraceptive coverage while making explicit the carve-outs from that duty for specified objectors. Carveouts might be limited to religious objectors as the Obama administration did in regulation or extended to religious and moral objectors as the Trump administration and the archetypal conscience clause, the Church amendment, did.

this approach utilizes separate contraceptive coverage plans rather than co-opting the plan infrastructure of the objecting employer. [123]

This proposal has two advantages. It better solves for the objection at issue (any complicity in ending a life or, for some, preventing it), and it gives access to more women than even the Obama administration's rules. Specifically, employees working for churches could receive coverage. This itself is important since not all employees share their employer's convictions. Under the church exemption, neither women employees nor eligible family members could access cost-free care under the accommodation—no provision was made for them. Under Trump's wholesale and moral exemptions, a woman's employer decides whether someone will step into the access void left by the employer's decision. If Congress amended ERISA, these employees, too, would receive coverage.

This approach would leverage President Obama's innovation in the accommodation, giving a contractual discount to the provider of the stand-alone coverage, thereby honoring the Hyde amendment. But unlike the accommodation, objecting employers would be removed from the causal chain. Importantly, the Little Sisters have said that their complicity concerns are resolved if they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception."[124]

Of course, this congressional fix would be limited to this specific controversy. It would do little for other culture-war conflicts waged in the administrative state. To avoid whiplashing Americans back and forth across culture-war divides every four or eight years, and to provide much-needed stability in the law, some additional principle of permanence needs to be developed.[125] Without a stabilizing device, regulations are nothing more than temporary orders reflecting moral positions of the day. They provide no guarantee of closure, nor do they allow businesses to accurately plan for the future.

[123] Amending ERISA to effect standalone coverage without action by an objecting employer would require technical changes to ERISA, which space does not allow to be explored in full here but are eminently feasible.

[124] Zubik, 136 S. Ct. at 1560.

[125] See, e.g., Aaron L. Nielson, Sticky Regulations and ~~Net Neutrality~~ Restoring Internet Freedom, Hastings L.J. (forthcoming), https://bit.ly/2XN6I0V (advancing a theory of "sticky regulations" and suggestions for creating regulatory stability).

Indeed, something like *stare decisis* in the administrative world would go a long way to calm culture-war battles.

How to impose such a principle on a branch of government that is used to being handed extraordinary discretion by Congress is a big question. But the states offer food for thought. Some states permit the legislature to review proposed regulations within a prescribed period of time or the regulations become effective. The agencies could be required to demonstrate that their work is premised on technical expertise, not culture-war positions. And in order for a subsequent administration to rescind or remake a rule, the administration could be required to provide an interest more compelling than simply gratifying a political base.

Certainly, many will oppose the development of such a *stare decisis*–like principle, especially those seeking a change in the current occupant of the White House. But for those Americans interested in coming together as a nation rather than perpetual moral divides, study of such regulatory reform would be worthwhile.

IV. Looking Forward: Agencies Will Remain a Prime Locus for Culture-War Conflict

Despite its reception, *Little Sisters of the Poor* is not a solid win for religious liberty. What victory the Little Sisters now enjoy is likely to last only as long as the Trump administration. Democratic presidential contender Joe Biden has said he would "restore the Obama-Biden policy that existed before the *Hobby Lobby* ruling: providing an exemption for houses of worship and an accommodation for nonprofit organizations with religious missions."[126]

Just as *Little Sisters of the Poor* will not lay to rest conflicting claims over the coverage mandate, the holding that broad delegation by Congress supports virtually any agency action (that is not arbitrary or capricious) almost certainly means that administrative whiplash will become commonplace for culture-war clashes.

The traditional theory justifying the existence, enormity, and power of the administrative state is that administrative agencies are technical, scientific bodies whose particular expertise lends itself

[126] Nicholas Rowan, "Biden Says He Would Undo Contraception Exemptions for Little Sisters of the Poor," Wash. Exam'r, July 9, 2020, https://washex.am/33M1VAI.

to speedy, yet thoughtful policymaking. In this account, agencies make up for Congress and its characteristic slow pace, lack of expertise on technical matters, and lack of time to address the minutiae of a policy's implementation. This justification for the administrative state is challenged when it comes to culture-war conflicts where moral convictions, not scientific conclusions, often matter most. Further, as culture-war conflicts increasingly dominate presidential politics, the decisionmakers ensconced in agencies by each new administration will carry into their positions pre-existing commitments more and more.[127]

There is a growing appreciation that, like judicial nominations and senior administration appointments, the staffing of agencies has increasingly become a matter of political award or loyalty. Administrative agencies are being staffed more deeply not with subject-matter experts, but with those that share the president's values or come out of the president's base.

New databases examining links to policy groups and groups that supported presidential campaigns find significant permeation into the mechanics of government.[128] Many government actors rotate out of these government positions back to think tanks and lobbying firms, just to return in future administrations. This practice has placed political operatives in key agency positions to influence the outcome of culture-war battles. It would be surprising if such appointees arrived in their roles without significant priors—that is, increasing numbers of agency actors will have worked out positions about the substance of the law appointees are now charged to implement.

Consider one of the key regulators with authority over the coverage mandate, Roger Severino, head of HHS's Office for Civil Rights (OCR). Under Severino, OCR has launched a "new Conscience and Religious Freedom Division," the first federal office for civil rights with a separate division dedicated to ensuring compliance with and enforcement of laws that protect conscience and free exercise

[127] See, e.g., Emma Green, "The Man Behind Trump's Religious-Freedom Agenda for Health Care," The Atlantic, June 7, 2017, https://bit.ly/3fKtnBl.

[128] As one example, the Trump Town database contains a list of roughly 263 staffers who formerly worked for Trump campaign groups. Trump Town, ProPublica & Columbia Journalism Investigations (last updated Oct. 15, 2019), https://bit.ly/3gQ9QRi.

of religion.[129] Severino explained the new division was needed because for "too long, governments big and small have treated conscience claims with hostility instead of protection, but change is coming and it begins here and now."[130] During the same news conference, speakers pointed to the federal government "trying to strongarm nuns."[131] Later that year, the departments promulgated the wholesale and moral exemptions.[132]

To his credit, Severino early on disavowed his priors, saying he would "give everything, to the extent humanly possible, a fresh look" and that his "views before coming into this role cannot dictate what [he does] in this role now."[133] Before entering the administration, Severino took positions that rankled civil-rights organizations. "The Human Rights Campaign, for example, called him a 'radical anti-LGBTQ-rights activist' who 'has made it clear that his number-one priority is to vilify and degrade' people who are lesbian, gay, bisexual, and transgender."[134]

This deep suspicion is anchored in Severino's extensive substantive writings, including about the Little Sisters.[135] In a January 2016 report that Severino coauthored with Heritage Foundation colleague Ryan Anderson, who led Heritage's campaign against legalization of same-sex marriage, the pair argued that "'gender identity and sexual orientation . . . are changeable, self-reported, and entirely self-defined characteristics' that do not deserve the protected-class status given to sex, race, and several other categories under federal civil-rights statutes."[136] Upon entering the administration, Severino quickly proposed rescinding the Obama administration rule that defined sex discrimination under the ACA as including

[129] Trump Administration Actions to Protect Life and Conscience, Dep't of Health & Human Serv. (Jan. 24, 2020), https://bit.ly/33NWKjY.

[130] Susan Morse, "HHS Announces Conscience and Religious Freedom Division," Healthcare Finance, Jan. 18, 2018, https://bit.ly/3iyEkb7.

[131] *Id.*

[132] Green, *supra* note 127.

[133] *Id.*

[134] *Id.*

[135] Roger Severino & Elizabeth Slattery, "Little Sisters of the Poor Win Big in Obamacare Case," The Daily Signal, May 16, 2016, https://dailysign.al/3gL7CTp.

[136] Green, *supra* note 127.

gender identity; the rule rescinding the Obama approach was finalized on June 12, 2020.[137] Three days later, the Supreme Court disagreed in *Bostock v. Clayton County*. The Court found the bans on discrimination based on sex necessarily encompass not only sexual orientation but also gender identity.[138]

But the Office of Civil Rights is charged with enforcing the laws that together protect Americans' fundamental rights of nondiscrimination, conscience, religious freedom, and health-information privacy, not with making them over wholesale. Whether the Obama or Trump administration, no one can reasonably doubt that OCR has impressed a political, nontechnical vision of abortion, contraception, LGBT rights, and other matters in federal law.[139]

OCR is not alone in impressing a political agenda on an agency's technical work. Just weeks into the Trump administration, Department of Education Acting Assistant Secretary for Civil and Attorney General for Civil Rights Sandra Battle, together with Acting Assistant Attorney General for Civil Rights T.E. Wheeler, II, rescinded an Obama-era guidance letter that interpreted Title IX to require schools to provide transgender students access to bathrooms and locker rooms according to their gender identity.[140] The Department of Education has yet to respond to *Bostock*.[141]

The impact of reaching further into administrative agencies with political appointees is predictable. Loosely speaking, if Democrats see government as a force for good in people's lives, one can expect that agencies under those administrations will work to extend

[137] HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs, HHS.gov (June 12, 2020), https://bit.ly/3ipXdNa.

[138] Bostock v. Clayton County, 140 S. Ct. 1731, 1744 (2020) ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex.").

[139] Green, *supra* note 127. For a recent appraisal of OCR's role, see "Majority Staff Report: Children at Risk: The Trump Administration's Waiver of Foster Care Nondiscrimination Requirements," House Committee on Ways & Means, U.S. House of Representatives (Aug. 19, 2020).

[140] Dear Colleague Letter, U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights (Feb. 22, 2017), https://bit.ly/31KC75E.

[141] Rina Grassotti & Sheila Willis, "What the Supreme Court's LGBTQ Decision May Mean for Bathroom and Locker Room Access in Title IX Schools: A 4-Step Best Practices Guide," JDSupra, July 15, 2020, https://bit.ly/3h5xVE1.

their influence over more Americans. The Obama administration, for example, produced 7 out of the 10 largest volumes of the *Federal Register*.[142] If Republicans favor more limited government or prize individual freedom from government, one can expect that agencies under those administrations will pull back the net of regulatory coverage, freeing individuals and organizations from government's reach. Indeed, the Trump administration has rescinded scores of regulations touching on topics like environmental policy, drug testing, affirmative action, endangered species, farming, firearms, internet privacy, health care, television, nondiscrimination, fracking, education, abortion, transgender rights, overtime pay, and, of course, the ACA itself.[143]

As administrative agencies flex their authority over culture-war issues, the raison d'être for deference to them as efficient expert bodies is undermined. Assuming agencies take the APA's required procedural steps (and sometimes even when they do not), few practical limits are placed on an administration's shaping or remolding of regulatory schemes. The APA does require evidence-based, reasoned decisionmaking.[144] But by sustaining, under the guise of broad delegation to agencies, approaches that take diametrically opposed moral views of the same question, *Little Sisters of the Poor* undermines the very idea of scientifically arrived-at and evidence-based judgments guiding our agencies.

Parties are increasingly turning to litigation to stall, or stop altogether, the effect of new, rescinded, or reshaped regulations. Some presidential administrations may never see their administrative restyling take effect. The Trump administration is a prime example. Consider the sheer number of major administrative decisions under President Trump that have been met with a lawsuit.[145] The

[142] Clyde Wayne Crews, "Obama's Legacy: 2016 Ends with a Record-Shattering Regulatory Rulebook," Forbes, Dec. 30, 2016, https://bit.ly/2XNBuHa.

[143] Interactive: Tracking Deregulation in the Trump Era, The Brookings Inst., https://brook.gs/3fKzHJc.

[144] Little Sisters of the Poor, 140 S. Ct. at 2385–86.

[145] Roundup: Trump-Era Agency Policy in the Courts, Inst. for Pol'y Integrity (July 27, 2020), https://bit.ly/3aaXvom; see, e.g., Trump Lawsuit Tracker, Center for Biological Diversity (July 2020), https://bit.ly/2XPXX6i (noting that a single environmental group has filed 214 lawsuits against Trump and has "won 9 out of every 10 resolved cases").

administrative state, far from being seen as efficient and expert, is marked by delay and contempt.

Conclusion

The coverage mandate held the promise of having it both ways: providing meaningful access for women to contraceptives that give control over their lives and ability to work while respecting America's durable détente over abortion and respect for religious belief and conscience. These values could have been, and still may be, reconciled.

Yet deciding what the ACA demanded in terms of preventive care and screenings became an occasion for agencies to stamp very different visions of what matters into the law: that women's reproductive access should be prized above all else, or that religious autonomy should be prized over women's interests. As agencies become the locus for a constant push and pull over culture-war questions, the justification for deferring to them as nonpartisan technocrats recedes.

Ultimately, *Little Sisters of the Poor* is a case about statutory interpretation. Just as the Obama administration was authorized by Congress to create the coverage mandate, the Trump administration is authorized by Congress to gut it, the Court held. The net effect of the *Little Sisters of the Poor* will be to permanently ensconce the administrative state in the culture war. Despite their "long ordeal," the Little Sisters of the Poor almost certainly will be back before the Court.[146]

[146] Christensen Smith, "Pennsylvania AG Says 'Fight Not Over' after SCOTUS Upholds Affordable Care Act Birth Control Exemptions," The Center Square, July 8, 2020, https://bit.ly/3kqZKsp.