AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

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

*Little Sisters of the Poor is an organization of Catholic Women that run group homes for the elderly poor. They objected to a federal law that required them to either provide contraception services to their employees or certify that providing contraception services on the ground that both alternatives violated the Religious Freedom Restoration Act of 1993. After the Supreme Court in* Zubik v. Burwell *(2016) remanded their attack on the certification requirement, the Trump Administration announced that all employers with religious objections to the contraception mandate would not be required to either provide contraception services or certify their unwillingness to provide those services. Pennsylvania claimed that this executive policy was inconsistent with federal law and was adopted inconsistently with the Administrative Procedure Act [APA]. The federal district court issued a national injunction against implementing the Trump Administration’s new rules and that decision was affirmed by the Court of Appeals for the Third Circuit. Little Sisters of the Poor appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 5-4 vote overruled the Third Circuit. Justice Clarence Thomas’s majority opinion declared that granting all religious employers an exemption from the certification requirement was consistent with federal law. Justice Samuel Alito’s concurrence insisted that the exemption was required by the Religious Freedom Restoration Act of 1993/ Justice Ruth Bader Ginsburg insisted that granting exemptions from the certification requirement violated by the relevant federal law and was not mandated by the Religious Freedom Restoration Act. How do Thomas and Ginsburg interpret the relevant federal statue? Who has the better argument on statutory interpretation?* Little Sisters *is a case of statutory interpretation? The Supreme Court, however, may be revisiting free exercise doctrine? Is* Little Sisters *likely to influence that reconsideration? Should* Little Sisters *be reinterpreted as the correct interpretation of the free exercise clause?*

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9) delivered the opinion of the Court.

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. . . . [T]he ACA states that, “with respect to women,” “[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide ... such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by [Health Resources and Services Administration {HRSA}].” The Departments maintain, as they have since 2011, that the phrase “as provided for” allows HRSA both to identify what preventive care and screenings must be covered and to exempt or accommodate certain employers’ religious objections. They also argue that, as with the church exemption, their role as the administering agencies permits them to guide HRSA in its discretion by “defining the scope of permissible exemptions and accommodations for such guidelines.” Respondents, on the other hand, contend that [the federal statute] permits HRSA to only list the preventive care and screenings that health plans “shall ... provide,” not to exempt entities from covering those identified services. Because that asserted limitation is found nowhere in the statute, we agree with the Departments.

“Our analysis begins and ends with the text.” . . . 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. But the statute is completely silent as to *what* those “comprehensive guidelines” must contain, or how HRSA must go about creating them. The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included. . . . It does not, as Congress has done in other contexts, require that HRSA consult with or refrain from consulting with any party in the formulation of the Guidelines. This means that HRSA has virtually unbridled discretion to decide what counts as preventive care and screenings. But the same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.

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. . . . As even the dissent recognizes, contraceptive coverage is mentioned nowhere . . . and no language in the statute itself even hints that Congress intended that contraception should or must be covered. Thus, contrary to the dissent's protestations, it was Congress, not the Departments, that declined to expressly require contraceptive coverage in the ACA itself. . . .

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. . . . RFRA “provide[s] very broad protection for religious liberty.” In RFRA's congressional findings, Congress stated that “governments should not substantially burden religious exercise,” a right described by RFRA as “unalienable.” . . . It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. . . . Additionally, we expressly stated in *Burwell v.* [*Hobby Lobby*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *Stores, Inc.* (2014) that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections.  Thus, the potential for conflict between the contraceptive mandate and RFRA is well settled. . . . .

Moreover, our decisions all but instructed the Departments to consider RFRA going forward. For instance, though we held that the mandate violated RFRA in [*Hobby Lobby*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we left it to the Federal Government to develop and implement a solution. At the same time, we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not “tell the plaintiffs that their beliefs are flawed” because, in the Departments’ view, “the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too attenuated.”  Likewise, though we did not decide whether the self-certification accommodation ran afoul of RFRA in *[Zubik](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2038848366&pubNum=0004031&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* *v. Burwell* (2016), we directed the parties on remand to “accommodat[e]” the free exercise rights of those with complicity-based objections to the self-certification accommodation.  It is hard to see how the Departments could promulgate rules consistent with these decisions if they did not overtly consider these entities’ rights under RFRA.

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For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. “[T]hey commit to constantly living out a witness that proclaims the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless.” But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate.

We hold today that the Departments had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption. We further hold that the rules promulgating these exemptions are free from procedural defects.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9) joins, concurring.

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. . . . RFRA compels an exemption for the Little Sisters and any other employer with a similar objection to what has been called the accommodation to the contraceptive mandate.

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Under RFRA, the Federal Government may not “substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,” unless it “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Applying RFRA to the contraceptive mandate thus presents three questions. First, would the mandate substantially burden an employer's exercise of religion? Second, if the mandate would impose such a burden, would it nevertheless serve a “compelling interest”? And third, if it serves such an interest, would it represent “the least restrictive means of furthering” that interest?

. . . . It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct. As in [*Hobby Lobby*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “it is not for us to say that their religious beliefs are mistaken or insubstantial.”

. . . . The inescapable bottom line is that the accommodation demanded that parties like the Little Sisters engage in conduct that was a necessary cause of the ultimate conduct to which they had strong religious objections. Their situation was the same as that of the conscientious objector . . . who refused to participate in the manufacture of tanks but did not object to assisting in the production of steel used to make the tanks. Where to draw the line in a chain of causation that leads to objectionable conduct is a difficult moral question, and our cases have made it clear that courts cannot override the sincere religious beliefs of an objecting party on that question.

For these reasons, the contraceptive mandate imposes a substantial burden on any employer who, like the Little Sisters, has a sincere religious objection to the use of a listed contraceptive and a sincere religious belief that compliance with the mandate (through the accommodation or otherwise) makes it complicit in the provision to the employer's workers of a contraceptive to which the employer has a religious objection.

. . . . [T]the Government concedes that it lacks a compelling interest in providing such access [to contraceptives], and this time, the Government is correct.

In order to show that it has a “compelling interest” within the meaning of RFRA, the Government must clear a high bar. In *Sherbert v. Verner* (1963), the decision that provides the foundation for the rule codified in RFRA, we said that “ ‘[o]nly the gravest abuses, endangering paramount interest’ ” could “ ‘give occasion for [a] permissible limitation’ ” on the free exercise of religion. . Thus, in order to establish that it has a “compelling interest” in providing free contraceptives to all women, the Government would have to show that it would commit one of “the gravest abuses” of its responsibilities if it did not furnish free contraceptives to all women.

. . . . We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest. . . . . [T]he ACA does not provide contraceptive coverage for women who do not work outside the home. If Congress thought that there was a compelling need to make free contraceptives available for all women, why did it make no provision for women who do not receive a paycheck? Some of these women may have a greater need for free contraceptives than do women in the work force. . . . [I]if Congress thought that there was a compelling need to provide cost-free contraceptives for all working women, why didn't Congress mandate that coverage in the ACA itself? . . . [T]he ACA's very incomplete coverage speaks volumes. The ACA “exempts a great many employers from most of its coverage requirements.” . . . [T]he Court's recognition in today's decision that the ACA authorizes the creation of exemptions that go beyond anything required by the Constitution provides further evidence that Congress did not regard the provision of cost-free contraceptives to all women as a compelling interest.

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The ACA does not provide “seamless” coverage for all forms of medical care. Take the example of dental care. Although lack of dental care can cause great pain and may lead to serious health problems, the ACA does not require that a plan cover dental services. Millions of employees must secure separate dental insurance or pay dentist bills out of their own pockets.

In short, it is undoubtedly true that the contraceptive mandate provides a benefit that many women may find highly desirable, but Congress's enactments show that it has not regarded the provision of free contraceptives or the furnishing of “seamless” coverage as “compelling.”

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In [*Hobby Lobby*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we observed that the Government has “other means” of providing cost-free contraceptives to women “without imposing a substantial burden on the exercise of religion by the objecting parties.”  “The most straightforward way,” we noted, “would be for the Government to assume the cost of providing the ... contraceptives ... to any women who are unable to obtain them under their health-insurance policies.” . . .

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. . . . Once it is recognized that the prior accommodation violated RFRA in some of its applications, it was incumbent on the Departments to eliminate those violations, and they had discretion in crafting what they regarded as the best solution. The solution they devised cures the problem, and it is not clear that any narrower exemption would have been sufficient with respect to parties with religious objections to the accommodation. . . . .

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Needless to say, the remedy for a RFRA problem cannot violate the Constitution, but the new rule does not have that effect. The Court has held that there is a constitutional right to purchase and use contraceptives. *Griswold v. Connecticut* (1965). . . . But the Court has never held that there is a constitutional right to free contraceptives.

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Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9) joins, concurring in the judgment.

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Try as I might, I do not find that kind of clarity in the statute. Sometimes when I squint, I read the law as giving HRSA discretion over all coverage issues: The agency gets to decide who needs to provide what services to women. At other times, I see the statute as putting the agency in charge of only the “what” question, and not the “who.” If I had to, I would of course decide which is the marginally better reading. But [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference was built for cases like these. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* (1984). [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme.

Here, the Departments have adopted the majority's reading of the statutory delegation ever since its enactment. . . . While the exemption itself has expanded, the Departments’ reading of the statutory delegation—that the law gives HRSA discretion over the “who” question—has remained the same. I would defer to that longstanding and reasonable interpretation.

But that does not mean the Departments should prevail when these cases return to the lower courts. The States challenged the exemptions not only as outside HRSA's statutory authority, but also as “arbitrary [and] capricious.”  Because the courts below found for the States on the first question, they declined to reach the second. That issue is now ready for resolution, unaffected by today's decision. . . . .

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5d9079b4c0be11eaacfacd2d37fb36e9) joins, dissenting.

In accommodating claims of religious freedom, this Court has taken a balanced approach, one that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs. Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree. Specifically, in the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), Congress undertook to afford gainfully employed women comprehensive, seamless, no-cost insurance coverage for preventive care protective of their health and well-being. Congress delegated to a particular agency, the Health Resources and Services Administration (HRSA), authority to designate the preventive care insurance should cover. HRSA included in its designation all contraceptives approved by the Food and Drug Administration (FDA).

Destructive of the Women's Health Amendment, this Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and, absent another available source of funding, to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result. Nor does the Religious Freedom Restoration Act of 1993 (RFRA) condone harm to third parties occasioned by entire disregard of their needs. I therefore dissent from the Court's judgment, under which, as the Government estimates, between 70,500 and 126,400 women would immediately lose access to no-cost contraceptive services. . . .

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Due to the Women's Health Amendment, the preventive health services that group health plans must cover include, “with respect to women,” “preventive care and screenings ... provided for in comprehensive guidelines supported by [HRSA].” Pursuant to this instruction, HRSA undertook, after consulting the Institute of Medicine, to state “what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women.” The resulting “Women's Preventive Services Guidelines” issued in August 2011. . . . HRSA directed that, to implement, women's preventive services encompass “all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”

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I begin with the statute's text. The ACA's preventive-care provision reads in full: “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 . . . Congress instructed who is to “provide coverage for” the specified preventive health services: “group health plan[s]” and “health insurance issuer[s].” . . . Nothing in paragraph (a)(4) accorded HRSA “authority to undermine Congress's [initial] directive,” stated in subsection (a), “concerning *who* must provide coverage for these services/”

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. . . . The Court correctly acknowledges that HRSA has broad discretion to determine *what* preventive services insurers should provide for women.  But it restates that HRSA's “discretion [is] equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines.”  Like the Government, the Court and the opinion concurring in the judgment shut from sight [the] overarching direction that group health plans and health insurance issuers “shall” cover the specified services. See *supra*, at 2404 – 2405. That “ ‘absent provision[s] cannot be supplied by the courts,’ ” . . .

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HRSA's role within HHS also tugs against the Government's, the Court's, and the opinion concurring in the judgment's construction of [the statute]. That agency was a logical choice to determine *what* women's preventive services should be covered, as its mission is to “improve health care access” and “eliminate health disparities.”. . . HRSA's expertise does not include any proficiency in delineating religious and moral exemptions. One would not, therefore, expect Congress to delegate to HRSA the task of crafting such exemptions. . . .

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. . . “[O]ne person's right to free exercise must be kept in harmony with the rights of her fellow citizens.”  In this light, the Court has repeatedly assumed that any religious accommodation to the contraceptive-coverage requirement would preserve women's continued access to seamless, no-cost contraceptive coverage. The assumption . . . rests on the basic principle just stated, one on which this dissent relies: While the Government may “accommodate religion beyond free exercise requirements,”  when it does so, it may not benefit religious adherents at the expense of the rights of third parties. . . .

The expansive religious exemption at issue here imposes significant burdens on women employees. Between 70,500 and 126,400 women of childbearing age, the Government estimates, will experience the disappearance of the contraceptive coverage formerly available to them. . . . Lacking any alternative insurance coverage mechanism, the exemption leaves women two options, neither satisfactory.

The first option—the one suggested by the Government in its most recent rulemaking is for women to seek contraceptive care from existing government-funded programs. Such programs, serving primarily low-income individuals, are not designed to handle an influx of tens of thousands of previously insured women. . . .

The second option for women losing insurance coverage for contraceptives is to pay for contraceptive counseling and devices out of their own pockets. Notably, however, “the most effective contraception is also the most expensive.” . . .

As the foregoing indicates, the religious exemption “reintroduce[s] the very health inequities and barriers to care that Congress intended to eliminate when it enacted the women's preventive services provision of the ACA.” . . .

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. . . . A religious adherent may be entitled to religious accommodation with regard to her own conduct, but she is not entitled to “insist that ...*others* must conform *their* conduct to [her] own religious necessities.’ ” Counsel for the Little Sisters acknowledged as much when he conceded that religious “employers could [not] object at all” to a “government obligation” to provide contraceptive coverage “imposed directly on the insurers.” But that is precisely what the self-certification accommodation does. As the Court recognized in [*Hobby Lobby*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000780&originatingDoc=I5d9079b4c0be11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)): “When a group-health-insurance issuer receives notice that [an employer opposes coverage for some or all contraceptive services for religious reasons], the issuer must then exclude [that] coverage from the employer's plan and provide separate payments for contraceptive services for plan participants.”  Under the self-certification accommodation, then, the objecting employer is absolved of any obligation to provide the contraceptive coverage to which it objects; that obligation is transferred to the insurer. This arrangement “furthers the Government's interest [in women's health] but does not impinge on the [employer's] religious beliefs.”

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. . . . Little Sisters do not object to what the self-certification accommodation asks of *them*, namely, attesting to their religious objection to contraception. They object, instead, to the particular use insurance issuers make of that attestation. But that use originated from the ACA and its once-implementing regulation, not from religious employers’ self-certification or alternative notice.