

LOOKING FORWARD: ANALYZING THE THIRD-PARTY HARMS PRINCIPLE AS APPLIED TO THE CONTRACEPTIVE MANDATE LITIGATION

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INTRODUCTION

On August 3, 2011, the Health Resources and Services Administration (HRSA) fulfilled its obligation under the Affordable Care Act (ACA) in naming what “preventive care and screenings” without “any cost sharing requirements” women were entitled to receive through their employer’s health plans.¹ HRSA’s guidelines created what became known as the “contraceptive mandate.” On its face, the contraceptive mandate ensured that women receiving health insurance through their employers—ranging from nuns to corporate heads at for-profit giants—could receive contraceptive coverage without cost sharing, if they wanted it.²

Less than twenty-four hours later, nuns (and any other women who worked at religious organizations) could no longer receive contraceptive coverage if their employers took advantage of the “religious exemption” to the contraceptive mandate.³ Six years later, executives at publicly traded corporations could no longer receive contraceptive coverage if their employers took advantage of the “moral exemption” to the contraceptive mandate.⁴

Over the past decade, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (collectively, the Departments) have systematically cut the availability of contraceptives without cost sharing to female employees. What initially started as a broad mandate with a limited exemption for religious organizations soon became two all-consuming exemptions that leave the contraceptive mandate as little more than a pipe dream. While the Supreme Court first struggled to find the middle ground that upheld religious interests but ensured access to contraceptives, this struggle seemed to end when the Supreme Court wholesale approved the religious and moral exemptions to the contraceptive mandate in *Little Sisters of the Poor Saints*

1. 42 U.S.C. § 300gg-13(a)(4).

2. *See id.*

3. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

4. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

Peter and Paul Home v. Pennsylvania, without regard to the unknown number of women who will be impacted by the exemptions.

Part I provides an overview of the debate over the third-party harm principle and its existence in the Supreme Court's jurisprudence. Part II discusses the line of cases and regulations that occurred before the Supreme Court's decision in *Little Sisters of the Poor*, including the shift in the Court's perspective on the third-party harms principle. Part III analyzes *Little Sisters of the Poor* and highlights Justice Alito's foreshadowing that this litigation is far from over. Part IV argues that (1) the religious exemption is arbitrary and capricious as applied to for-profit entities that are not closely held and that (2) the moral exemption lacks a rational connection to the identified problem.

I. THIRD-PARTY HARMS AS A LIMITING PRINCIPLE TO RELIGIOUS EXEMPTIONS

For the purposes of the Author's argument asserted in Part III, a discussion of the third-party harms principle is required. However, this Note does not purport to exhaustively cover the debate or case law regarding this principle or its emergence. Instead, Subpart A provides a brief summary of the scholarly debate over defining the third-party harms principle and its scope, as well as the debate over its existence. Subpart B discusses several decisions which tend to show that the Supreme Court has applied the third-party harms principle in its religious exemption jurisprudence.

A. *The Third-Party Harms Principle: Fact or Fiction?*

The third-party harms principle states that the government cannot accommodate religious adherents at the expense of third-parties, at least to some extent.⁵ Proponents of this principle assert that it is rooted in the Free Exercise and Establishment Clauses of the First Amendment.⁶ When defining this principle, proponents often quote Professor Zechariah Chafee Jr. in stating, "[Y]our right to swing your arms ends just where the other man's nose begins."⁷ This quote suggests that proponents admonish any level of harms that may result from an accommodation, but that is usually not the case. For instance, since America's founding, the government has created military draft exemptions for pacifist religious groups, such as the Quakers, if they obtained

5. Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781, 782 (2018).

6. *Id.* at 788.

7. Elyssa Sternberg, Note, *Who Moved My Harm Principle? How the Relationship Between Complicity Claims and the Contraception Mandate Shows that Considerations of Third-Party Harms in Religious Exemption Cases Are Not Where We Think They Are*, 28 S. CAL. REV. L. & SOC. JUST. 165, 171 (2019) (quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 134 HARV. L. REV. 560, 560 (2020).

a substitute, paid a fee, or “perform[ed] alternative service.”⁸ Proponents often rationalize this accommodation by arguing that, as a minority community, exempting Quakers from the draft is “relatively costless” to other third parties, despite the slightly increased likelihood of non-Quakers being drafted.⁹ While proponents avoid framing the third-party harms approach as a “balancing test,” the consideration of opposing views usually evolves into a balancing act in effect, regardless of what the balancing is called.

Proponents of this principle rarely provide clear guidance to the extent of harm that they deem permissible, likely because the proponents’ “willingness to tolerate [third-party] harm depends heavily on context.”¹⁰ Professor Christopher Lund takes on this challenge by enumerating four factors that help determine when a religious exemption is unconstitutional for harming third parties.

First, the “magnitude” of the potential harm the religious exemption may cause on third parties helps delineate between “significant and insignificant burdens,” but Lund recognizes that this boundary is still unclear.¹¹ He points to *Devaney v. Kilmartin*, a case that involves a plaintiff who brought an Establishment Clause claim against his town’s noise ordinance because it exempted bells at “places of religious worship,” along with sirens and bands.¹² The plaintiff lived across the street from a church who frequently rung its bell and claimed, in part, that the constant ringing caused his marriage to fail.¹³ The magistrate judge recommended that all of the motions to dismiss be granted.¹⁴ Lund questioned whether the judge “took this claim seriously or not.”¹⁵ While ringing bells may cause some harm, such as irritating the couple to the point of divorce, the magistrate judge and Lund’s reaction to this claim suggest that a more significant burden is required to tip the scale towards the objector.¹⁶

Second, the “likelihood” that the religious exemption will harm third parties, along with the “spread of third-party burdens” across a population, affect the permissiveness of the exemption.¹⁷ Here, like many other proponents,

8. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808 (2006); see also Schwartzman et al., *supra* note 5, at 805 n.113.

9. Schwartzman et al., *supra* note 5, at 805 n.113; see also Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1378 (2016).

10. Lund, *supra* note 9, at 1384.

11. *Id.* at 1377.

12. *Id.*; *Devaney v. Kilmartin*, 88 F. Supp. 3d 34, 41–42 (D.R.I. 2015).

13. *Kilmartin*, 88 F. Supp. 3d at 40.

14. *Id.* at 59.

15. Lund, *supra* note 9, at 1378.

16. See *id.* at 1377–78; *Kilmartin*, 88 F. Supp. 3d at 54 (“[T]he nature of the benefit is secular and totally unrelated to whatever content the Churches might choose to inject.”).

17. Lund, *supra* note 9, at 1378 (emphasis omitted).

Lund argues that religious exemptions to the draft only marginally increase an individual's draft risk.¹⁸

Third, “the strength of the religious interest” at issue may warrant a religious exemption, even if it will result in significant third-party harms.¹⁹ For instance, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the Supreme Court unanimously upheld a statutory exemption protecting religious organizations from religious discrimination claims in employment cases.²⁰ By siding with religious organizations, this exemption left a class of employees jobless—a seemingly substantial third-party burden. As Lund explains, “the more serious the religious interest, the more of a third-party burden it justifies.”²¹

Lastly, the number of secular exemptions a purported law of general applicability contains affects the necessity of a religious exemption.²² In *Burwell v. Hobby Lobby*, for example, the ACA provided secular exemptions to the contraceptive mandate for “grandfathered health plans” and “employers with fewer than 50 employees.”²³ The Supreme Court did not rely on the secular exemptions to uphold the religious exemption to the mandate.²⁴ However, Lund argues that the religious exemption becomes “more understandable” in the context of the secular exemptions that already “limit[] the health coverage of millions of employees.”²⁵ While the Supreme Court has not adopted Lund's four factors, they provide a helpful roadmap for understanding the Court's decisions from a proponent's perspective.

Critics of the third-party harms approach, who seem to be in the minority, tend to focus on whether the principle exists at all as a limitation on religious exemptions. In particular, they argue that the third-party harms principle has no basis in Supreme Court jurisprudence.²⁶ For instance, Gene Schaerr and Michael Worley deem the third-party harms principle as merely “wishful thinking.”²⁷ To begin, they enumerate historical religious exemptions to military

18. *Id.* at 1378.

19. *Id.* at 1380.

20. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987).

21. Lund, *supra* note 9, at 1380.

22. *Id.* at 1381.

23. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 699 (2014).

24. *Id.* at 727–28 (“The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA [such as the secular exemptions] that support that view. . . . We find it unnecessary to adjudicate this issue.”).

25. Lund, *supra* note 9, at 1381.

26. Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 734 (2018); Gene Schaerr & Michael Worley, *The “Third Party Harm Rule”: Law or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 629 (2019).

27. Schaerr & Worley, *supra* note 26, at 631.

drafts,²⁸ fugitive slave laws,²⁹ as well as the widely-accepted priest-penitent privilege.³⁰ These religious exemptions necessarily caused third-party harms, yet each occurred “roughly contemporaneous with the adoption of the First Amendment.”³¹ Therefore, they conclude that religious exemptions serve to debunk any argument that the third-party harms principle has any roots in the Establishment Clause.³²

Further, they use *Cutter v. Wilkinson* as an example of the Supreme Court’s failure to endorse the third-party harms principle. In *Cutter*, the Supreme Court unanimously upheld the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which prohibits the government from imposing a substantial burden on inmates’ religious exercise without a compelling interest, against a challenge by prison officials arguing that it violates the Establishment Clause by advancing religion.³³ Schaerr and Worley assert two main arguments as to why *Cutter* does not apply the third-party harms principle. First, the Court ruled against the prison officials without regard to the third-party harms principle,³⁴ despite the prison officials raising prison security concerns.³⁵ Second, while proponents hinge on the Court’s mention of third-party harms, this “modest dicta . . . was narrow.”³⁶ Ultimately, Schaerr and Worley emphasized that the Court did not provide “any general rule” regarding the third-party harms principle.³⁷

Similarly, as more of a skeptical proponent than a critic, Kathleen Brady stressed that the Court has not adopted “a general framework for analyzing these harms” and that the relevant cases “are few in number and narrow in their holdings.”³⁸ Unlike Schaerr and Worley, Brady recognizes that the Court does not have the unfettered discretion to create a limiting principle to religious exemptions due to the risk of creating “[a] rule that is too restrictive [which] will undermine the ability of legislators and administrators to relieve burdens on religious exercise.”³⁹ Additionally, her article raises a simple yet demanding question: What is a “harm”?⁴⁰ When defining impermissible harms, some scholars cherry-pick buzz words from Supreme Court decisions such as “undue

28. *Id.* at 630.

29. *Id.* at 640.

30. *Id.* at 638.

31. *Id.* at 635.

32. *Id.* at 641.

33. *Cutter v. Wilkinson*, 544 U.S. 709, 712–13 (2005).

34. Schaerr & Worley, *supra* note 26, at 644.

35. *Cutter*, 544 U.S. at 717.

36. Schaerr & Worley, *supra* note 26, at 644.

37. *Id.* at 645 (internal quotation marks omitted).

38. Brady, *supra* note 26, at 738.

39. *Id.*

40. *See id.* at 738–39.

hardship,” which opens the door for judicial bias.⁴¹ Taking a page from Lund’s article,⁴² Brady advocates for a balancing approach that weighs “the nature and size of the harm, whether it is shouldered by individuals or corporate entities, and whether the government has made exceptions for secular reasons that involve similar costs.”⁴³

B. *The Third-Party Harms Principle: More Than Just Wishful Thinking*

While Schaerr and Worley admonished the third-party harms “rule,”⁴⁴ the Supreme Court in dicta has referred to third-party harms as more of a *principle* that must be considered when addressing religious exemptions.

In *Estate of Thornton v. Caldor*, the Supreme Court set an upper limit on statutory religious accommodations that do not take into account the “burden or inconvenience” that it places on third parties.⁴⁵ There, a Connecticut statute allowed employees to not work on their chosen Sabbath and protected employees from dismissal for refusing to work on that day.⁴⁶ Donald Thornton, a manager of a retail store, invoked this statute to observe Sunday as his Sabbath, resulting in his employer transferring him to a lower position in a different store.⁴⁷ Thornton claimed that he was discharged in violation of the Connecticut statute, but the employer argued the statute violated the Establishment Clause.⁴⁸ In an unusually short opinion, the Supreme Court held that the Connecticut statute promoted “a particular religious practice,” namely Christianity, and therefore violated the Establishment Clause.⁴⁹

While one scholar said “the Court says so little” in *Caldor*,⁵⁰ the Court’s one page of legal analysis indicates that the religious adherent’s benefits were simply disproportionate to the burdens it would place on employers and employees.⁵¹ The statute “impose[d] on employers and employees *an absolute duty to conform* their business practices to the particular religious practices of the employee” without regard to the “convenience or interests of the employer or those of other employees who do not observe a Sabbath.”⁵² The Court reiterated the

41. *Id.* at 738.

42. In a footnote, Brady cites to Lund for “sketching some parameters” to the third-party harms principle. *Id.* at 723 n.42.

43. *Id.* at 739.

44. Schaerr & Worley, *supra* note 26, at 641.

45. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–09 (1985).

46. *Id.* at 706.

47. *Id.*

48. *Id.* at 707.

49. *Id.* at 710–11.

50. Christopher C. Lund, *Reconsidering Thornton v. Caldor*, 97 WASH. U. L. REV. 1687, 1694 (2020).

51. *Caldor*, 472 U.S. at 708–11.

52. *Id.* at 709 (emphasis added).

“absolute” nature of the statute three times in this single page.⁵³ Secular individuals, or those who did not choose the same Sabbath, would be forced to “adjust their affairs” whenever an employee invoked this statute.⁵⁴ When describing the “significant burdens on other employees,”⁵⁵ the Court created hypothetical employees who would be burdened by this imposition.⁵⁶ One group includes employees who “have strong and legitimate, but non-religious, reasons for wanting a weekend day off,” such as those who have seniority and earned weekends off.⁵⁷ Another group included employees whose spouses have the weekends off and want to spend time with their spouses on their days off.⁵⁸ The Court does not mention employees who fall under these categories that took issue with the statute. Rather, the Court *created* examples of third-party harms that would result—an extra step the Court likely would not have taken if it was not considering third-party harms when evaluating the religious accommodation.

Twenty years later, in *Cutter v. Wilkinson*, the Supreme Court affirmed its *Caldor* decision and applied a similar approach to weighing third-party harms. As previewed in Subpart A, the plaintiffs in *Cutter*, who were current and former inmates, argued that the prison officials violated RLUIPA by refusing to accommodate their “nonmainstream religions.”⁵⁹ The prison officials brought a facial challenge to RLUIPA under the Establishment Clause.⁶⁰ The Court rejected this challenge but warned that, “[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”⁶¹ Citing *Caldor*, the Court emphasized that its previous decisions required religious accommodations to “be measured so that it does not override other significant interests.”⁶²

Schaerr and Worley are correct that religious accommodations won the day in *Cutter* and that the Court’s discussion of third-party harms is limited. However, unlike in *Caldor*, the Court in *Cutter* concluded that the burdens imposed on third parties were not disproportionate to the benefits gained by the religious adherents, leaving no need for a detailed discussion of competing harms. The Court determined that there was a way to “appropriately balance[]” the competing religious and security interests⁶³ that contrast with the absolute nature of the statute in *Caldor*. The Court left open the possibility that the prison

53. *Id.* at 709–11.

54. *Id.* at 709.

55. *Id.* at 710.

56. *Id.* at 712 n.9.

57. *Id.*

58. *Id.*

59. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005) (internal quotation marks omitted).

60. *Id.* at 713.

61. *Id.* at 720.

62. *Id.* at 722.

63. *Id.*

officials could refuse accommodations if the “inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution.”⁶⁴ In other words, the Court was not advocating for a cost-benefit analysis of religious and secular harms or any other form of a general rule that critics seek. Instead, the Court seems to use the third-party harms principle as a factor that must be weighed against religious interests to reach some level of proportionality.

More recently, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court applied the third-party harms principle in a new light by recognizing dignitary harms that may result from religious accommodations.⁶⁵ The plaintiffs in *Masterpiece Cakeshop* were a same-sex couple who were refused a wedding cake from a bakery owner with religious beliefs against same-sex marriage.⁶⁶ As a result, the plaintiffs filed a complaint under the Colorado Anti-Discrimination Act which prohibits discrimination on the basis of sexual orientation in places of public accommodation.⁶⁷ The baker argued that forcing him to bake a cake for a same-sex wedding violated his rights to freedom of speech and free exercise of religion.⁶⁸ The Supreme Court ruled in favor of the baker due to the Commission’s failure to apply the law in a neutral manner, not based on the substance of the arguments asserted by the plaintiffs or baker.⁶⁹ In its conclusion, the Court explicitly recognized that similar claims by future plaintiffs may have different outcomes.⁷⁰

The Court’s analysis made a distinction between harms that result in the “serious diminishment to [same-sex couples] dignity and worth” and those that do not.⁷¹ For example, a clergy member can constitutionally refuse to officiate a same-sex wedding, but this exemption must be “confined” to prevent “a long list of persons” from refusing to cater same-sex weddings.⁷² The Court stressed that the law cannot treat same-sex couples “as social outcasts or as inferior in dignity and worth.”⁷³ Based on the Court’s statements, if it were to decide the merits of a similar free exercise claim (in a world without hostile comments by the Commission), the Court would necessarily be required to weigh the religious adherent’s beliefs against gay marriage and the dignitary harm same-sex couples

64. *Id.* at 726.

65. *See generally* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J.F.* 201 (2018).

66. *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018).

67. *Id.* at 1725.

68. *Id.* at 1726.

69. *Id.* at 1732 (“The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.”).

70. *Id.*

71. *Id.* at 1727.

72. *Id.*

73. *Id.*

would face. Admittedly, public accommodation law in particular is concerned with the “full and equal enjoyment of certain public facilities.”⁷⁴ However, this weighing of interests is the core of the third-party harms principle.

II. THE CONTEXT OF *LITTLE SISTERS OF THE POOR*

The ACA requires employers to offer health plans that provide “minimum essential coverage.”⁷⁵ Under the umbrella of minimum essential coverage, the ACA included “preventive care and screenings” without “any cost sharing requirements.”⁷⁶ However, Congress left it to the HRSA to promulgate guidelines enumerating the preventive care and screenings that health plans must cover.⁷⁷ Before HRSA released its guidelines, the Departments released an interim final rule with no mention of any religious or moral exemptions to preventive care and screenings.

On August 1, 2011, HRSA unknowingly kicked off a line of litigation that would revitalize the uncertainty surrounding the third-party harms principle. HRSA’s adopted and released guidelines created the contraceptive mandate through “recommend[ing] that the full range of female-controlled U.S. Food and Drug Administration-approved contraceptive methods, effective family planning practices, and sterilization procedures be available as part of contraceptive care.”⁷⁸

Two days later, the Departments released an interim rule creating the narrow church exemption, which only applied to churches and other religious orders who “primarily serve[] persons who share [their] religious tenets.”⁷⁹ Thus, the Departments intended this exemption to apply to religious organizations who employ women that share the same religious beliefs. In other words, if a woman is working for a church that does not believe in contraceptive use, then it is more likely that the woman would be against using contraceptives herself. The Department laid out the balancing test it applied in creating this exemption: “The definition set forth here is intended to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions.”⁸⁰

74. *Id.* at 1725 (citation omitted).

75. I.R.C. § 5000A(a).

76. 42 U.S.C. § 300gg-13(a)(3)–(4).

77. *Id.* at § 300gg-13(a)(4).

78. HEALTH RES. & SERVS. ADMIN., *Women’s Preventative Services Guidelines*, <https://www.hrsa.gov/womens-guidelines-2016/index.html> (last visited Feb. 4, 2022).

79. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

80. *Id.*

To operationalize the church exemption, the Departments later created a self-certification accommodation in which a religious organization could file its objections to providing contraceptive coverage to its health plan insurer, thus excluding contraceptive coverage from the employer's health plan.⁸¹ The religious organization did not have to submit the certification to the Departments or make it public.⁸² Instead, the religious organization had to submit the accommodation to its insurer and maintain the accommodation in its files.⁸³ Once the religious organization filed the accommodation, its health plan insurer would become solely responsible for the provision of contraceptive coverage to the organization's employees.⁸⁴

A. The Supreme Court's Application of the Third-Party Harms Principle in Hobby Lobby and Zubik

The first time the Supreme Court answered a question regarding the contraceptive mandate was in *Burwell v. Hobby Lobby*, in which the Court held that the contraceptive mandate violated the Religious Freedom Restoration Act of 1995 (RFRA) as applied to for-profit closely held corporations.⁸⁵ The Court's analysis focused on the definition of "persons" in RFRA, which includes corporations.⁸⁶ Even though corporations are fictional "persons," Congress's intent in including corporations in the definition was to protect the individuals behind the corporation who hold sincere religious beliefs.⁸⁷

While siding with the religious interests, the Court established that its holding was narrow at the outset of its decision.⁸⁸ The Court hinted to the third-party harms principle in stating that RFRA does not require "accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby."⁸⁹ In applying a proportionality-type analysis, the Court reasoned that, when applying the religious exemption to Hobby Lobby, the harms the accommodation would have on its female employees is "precisely zero" because they could still receive contraceptives through Hobby Lobby's health plan insurer following self-certification.⁹⁰

81. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156).

82. *Id.*

83. *Id.*

84. *Id.* at 39,871.

85. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 690–91 (2014).

86. *Id.* at 706.

87. *See id.* at 706–07.

88. *Id.* at 692–93.

89. *Id.* at 693 (citation omitted).

90. *Id.* at 693.

Additionally, the Court further narrowed its holding by explaining that this case “do[es] not involve publicly traded corporations.”⁹¹ Unlike with publicly traded corporations, Congress seemed confident in the courts’ abilities to “weed out insincere claims” brought by closely held for-profit corporations.⁹² With publicly traded corporations, the Court believed it may be impossible for the corporation’s executives and shareholders to collectively run the corporation under a single religious belief.⁹³

Two years later, in *Zubik v. Burwell*, nonprofit organizations challenged the self-certification accommodation for substantially burdening their free exercise of religion in violation of RFRA.⁹⁴ In particular, the nonprofits challenged the notice requirement under the accommodation in which the nonprofits must inform their insurers of their objections to providing contraceptive coverage.⁹⁵ Here, the Court did not address the merits of the parties’ arguments.⁹⁶ It simply remanded the case to allow the Government and nonprofit organizations to reach a compromise, namely, a compromise in which the nonprofit organizations could receive insurance plans that did not include contraceptives but would allow their employees to receive contraceptive coverage without cost-sharing from the health plan insurer.⁹⁷

While the Court did not address the merits of the case, *Zubik* represents the turning point in how the Court analyzed the third-party harms principle as applied to the contraceptive mandate. The *Hobby Lobby* decision was the result, in part, of the ability for female employees to receive contraceptive coverage through their employer’s health plan insurer after the employer self-certified. For the first time in *Zubik*, religious employers challenged the viability of the self-certification accommodation, which previously served as a tool to balance the harms imposed on female employees who work for religious employers. Nonetheless, the Court in *Zubik* still sought a way that would allow women to receive contraceptive coverage.

Following the *Zubik* decision, the Departments sought public comments on how to reach a compromise that would make both sides happy,⁹⁸ but these efforts ultimately failed. On October 13, 2017, the Department of Labor released *FAQs About Affordable Care Act Implementation Part 36*, in which it stated that the parties could not reach an agreement on how to comply with *Zubik* in

91. *Id.* at 717.

92. *Id.* at 718.

93. *Id.* at 717.

94. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016).

95. *Id.*

96. *Id.* at 1560.

97. *Id.*

98. Coverage for Contraceptive Services, 81 Fed. Reg. 47,741 (July 22, 2016) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

a way that would continue to allow women to “receive full and equal health coverage, including contraceptive coverage.”⁹⁹

B. *A Change in Administration and A Change in Approach*

After the Trump Administration took office, President Trump released an Executive Order that required all agencies to “respect and protect” the religious freedoms of individuals and organizations, which included a requirement for the Departments to create a new moral exemption to the contraceptive mandate.¹⁰⁰ This Order resulted in a conceptual shift of how the Departments, and soon the Supreme Court, approached the balancing of religious interests and third-party harms when addressing the contraceptive mandate.

In response to the Executive Order and *Zubik*, the Departments released a 2017 interim final rule that created an expansive moral exemption to the contraceptive mandate in which employers (including for-profits and publicly traded entities) with “sincerely held religious beliefs” do not have to comply with the contraceptive mandate.¹⁰¹ In doing so, the Departments, for the first time, concluded that RFRA mandated the accommodations.¹⁰² As a result, the Departments eliminated the self-certification accommodation.¹⁰³ In justifying their departure from prior rulings, the Departments determined that the exemptions “do not burden third parties to a degree that counsels against providing the exemptions” because they can receive contraceptives through government programs.¹⁰⁴

Within a few weeks of the creation of the moral exemption, the Attorney General released a memorandum broken down into three parts: (1) the twenty “Principles of Religious Liberty,” (2) guidance to agencies when implementing these principles, and (3) an appendix that outlines the religious liberties protected by the Constitution and federal statutes.¹⁰⁵ While the memorandum may have been part of a broader effort to protect religious liberties, it seemed to serve as a command to the Departments to uphold and expand exemptions to the contraceptive mandate that would allow objecting employers to avoid

99. U.S. DEP’T OF LAB., FAQs ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 36, at 4 (2017), https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/19-431/19-431-2.pdf.

100. Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

101. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,801 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

102. *Id.* at 47,800. *But cf.* U.S. DEP’T OF LAB., *supra* note 99 (“As the government explained in its briefs in *Zubik*, the Departments continue to believe that the existing accommodation regulations are consistent with RFRA . . .”).

103. Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. at 47,808.

104. *Id.* at 47,807.

105. *See generally* Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668 (Oct. 26, 2017).

contraceptive coverage.¹⁰⁶ For instance, the memorandum prohibited the Department of Health and Human Services (HHS) from “second-guess[ing]” a religious employer’s statement that supplying contraceptive coverage would violate its religious beliefs.¹⁰⁷ From the viewpoint of the third-party harms principle, the Executive Order, moral exemption, and memorandum seemed to collectively place a thumb on the scale in favor of religious interests, in opposition to the Supreme Court’s previous approach of seeking proportionate benefits and harms.

III. THE SUPREME COURT HEARS *LITTLE SISTERS OF THE POOR*

A. *Making Its Way Up*

Within a week of the Departments’ 2017 interim final rule (IFR), Pennsylvania sought a nationwide preliminary injunction against enforcement of the rule, which the Eastern District of Pennsylvania granted.¹⁰⁸ The crux of the dispute between the parties was on the scope of the third parties harmed by this rule; Pennsylvania argued that “millions of women” would be impacted by this rule, while the Government argued that only a “small number of religious objectors” would be able to take advantage of this rule.¹⁰⁹

Judge Beetlestone acknowledged the “remarkable breadth of the [n]ew IFRs” because they allow both for-profit and non-profit entities, even if not closely held, to refuse contraceptive coverage.¹¹⁰ She also recognized the impossibility of policing a rule that requires reading the minds of the executives to determine if their moral beliefs are truly “sincerely held.”¹¹¹

Further, she found that Congress did not grant the Departments the authority to create new exemptions to the statutory mandate, particularly in light of Congress’s explicit exemption of “grandfathered health plans.”¹¹² The only way the Departments could glean the authority to create exemptions would be through a RFRA-mandated exemption, which she found also did not exist.¹¹³

To begin, the Departments conceded that RFRA does not mandate the moral exemption.¹¹⁴ Turning to the religious exemption, Judge Beetlestone

106. *See id.*

107. *Id.* at 49,669.

108. *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 560 (E.D. Pa. 2017), *aff’d sub nom.* *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019), *rev’d and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), and *rev’d sub nom.* *Pennsylvania v. President U.S.*, 816 F. App’x 632 (3d Cir. 2020).

109. *Id.*

110. *Id.* at 577.

111. *Id.*

112. *Id.* at 578.

113. *Id.* at 578–79.

114. *Id.* at 579.

found that Pennsylvania would face irreparable harm if the preliminary injunction was not granted for two main reasons.¹¹⁵ First, Pennsylvania would face financial harm in being forced to subsidize coverage of contraceptive services to women who worked for religious employers.¹¹⁶ While financial harm does not generally merit a preliminary injunction, Pennsylvania would be unable to recover monetary damages from the federal government.¹¹⁷ Second, a disproportionate number of women would lose coverage, with the minimum being around 31,700 women.¹¹⁸ Judge Beetlestone looked to the MyNewOptions Study that found “the number of women using IUDs and other implants—contraceptive methods that carry the highest up-front costs are the most effective—doubled in two years after the Contraceptive Mandate took effect.”¹¹⁹ If these women lose coverage, it is likely that they will simply “forgo contraceptive services or seek out less expensive and less effective types of contraceptive services in the absence of no-cost insurance coverage.”¹²⁰ Ultimately, in balancing the harms, Judge Beetlestone concluded that equity weighed in favor of Pennsylvania’s “interest in securing the health and well-being of its women residents and containing its costs for contraceptive services.”¹²¹

While the appeal from *Pennsylvania v. Trump* was pending, the Departments finalized the 2017 interim final rule and determined that an “expanded exemption” was required in response to the lawsuits against the self-certification accommodation.¹²² As a result, the Little Sisters of the Poor intervened in the suit to support the exemptions, and New Jersey joined Pennsylvania in filing an amended complaint.¹²³ Judge Beetlestone again found that the number of women who would be impacted by the exemptions would result in direct and significant harm to the States.¹²⁴ Additionally, while courts generally try to narrow the geographic area of injunctions, nothing less than a nationwide injunction would have been sufficient to prevent these harms from

115. *Id.* at 581.

116. *Id.*

117. *Id.* at 582.

118. *Id.*

119. *Id.* at 583.

120. *Id.* at 583–84.

121. *Id.* at 584.

122. Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018) (to be codified 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

123. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 797 (E.D. Pa. 2019), *aff'd sub nom.* *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *rev'd and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

124. *Id.* at 835.

occurring.¹²⁵ The Third Circuit affirmed the nationwide preliminary injunction against the enforcement of the final rules.¹²⁶

B. *The Supreme Court's Opinion*

In a 7–2 decision, the Supreme Court in *Little Sisters of the Poor* reversed the Third Circuit's decision and dissolved the nationwide preliminary injunction.¹²⁷ Justice Thomas wrote the majority opinion.¹²⁸ Justice Ginsburg wrote the dissenting opinion.¹²⁹ Justice Alito and Justice Kagan each wrote a concurrence.¹³⁰

1. *The Majority Opinion*

The Court first found that the Departments had the statutory authority to promulgate the rules creating the religious and moral exemptions, rejecting the States' argument that the ACA only permitted HRSA to affirmatively mandate coverage but not to negate it.¹³¹ The Court explained that the State's argument would require modifying the statute rather than simply interpreting it.¹³² If Congress wanted to limit the Departments' authority, it could have done so but instead used "expansive language" that gave the Departments broad discretion in creating religious exemptions.¹³³ The Court rejected the dissent's assertion that applying the Departments' interpretation would go against Congress's goal of expanding contraceptive coverage and left the policy concerns for Congress to address.¹³⁴

Next, because the ACA permitted the exemptions, the Court refused to answer whether RFRA mandated the exemptions. However, the Court clarified that "it was appropriate for the Departments to consider RFRA" when creating the exemptions.¹³⁵ In fact, the Court left open whether the Departments' rules may have been arbitrary and capricious if they failed to do so.¹³⁶

Finally, the Court rejected the argument that the final rules were procedurally invalid under the Administrative Procedure Act (APA) for two

125. *Id.*

126. *Pennsylvania v. President U.S.*, 930 F.3d at 556.

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

128. *Id.* at 2372.

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

130. *Id.* at 2387 (Alito, J., concurring); *see also id.* at 2396 (Kagan, J., concurring).

131. *Id.* at 2379.

132. *Id.* at 2381.

133. *Id.* at 2380.

134. *Id.* at 2381–82 ("[I]t is Congress, not the Departments, that has failed to provide the protection for contraceptive coverage that the dissent seeks.").

135. *Id.* at 2383.

136. *Id.* at 2384.

reasons. First, even if the Departments were required to issue “a document entitled ‘notice of proposed rulemaking,’” this error was harmless.¹³⁷ Second, the Court rejected applying the open-mindedness test to final rules and found that the Departments’ rules complied with the APA’s procedural requirements.¹³⁸

In its conclusion, the Court highlighted the Little Sisters’ “faithful service and sacrifice” and acknowledged that they have had “to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs.”¹³⁹ It ultimately concluded that the exemptions are the “solution” that allows religious organizations to uphold their religious beliefs.¹⁴⁰

2. *The Concurrences*

Justice Alito’s concurrence agreed with upholding the exemptions, but he would have answered whether RFRA requires the religious exemption.¹⁴¹ He foreshadowed that the litigation is far from over because the States “are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA.”¹⁴² He explained that the rules cannot be arbitrary and capricious if mandated by RFRA, which illuminates the importance of this open question.¹⁴³

On the other end, Justice Kagan questioned whether the exemptions will survive arbitrary and capricious scrutiny.¹⁴⁴ While she agreed that the Departments had the authority to create the exemptions, the *scope* of the exemptions was so broad that the solution may lack a rational connection to the problem it set out to address.¹⁴⁵ She advocated for agencies to take a balanced approach by weighing “the benefits of exempting more employers from the mandate against the harms of depriving more women of contraceptive coverage.”¹⁴⁶ Thus, even though agencies are afforded broad discretion, this discretion must still satisfy reasoned decision making, which the Departments seemed to have fallen short on in creating the exemptions to the contraceptive mandate.¹⁴⁷

137. *Id.* at 2385.

138. *Id.* at 2385–86.

139. *Id.* at 2386.

140. *Id.*

141. *Id.* at 2387 (Alito, J., concurring).

142. *Id.*

143. *Id.*

144. *Id.* at 2397 (Kagan, J., concurring).

145. *Id.* at 2399.

146. *Id.* at 2400.

147. *Id.*

3. *The Dissent*

Justice Ginsburg found that the religious and moral exemptions were impermissible under the ACA and RFRA.¹⁴⁸ To begin, she reminded the Court of its prior approach when addressing religious questions:

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 *n*th degree.¹⁴⁹

She explained that Congress's goal was to ensure women receive contraceptive coverage without cost sharing requirements,¹⁵⁰ but the exemptions did not include an alternative means for women to receive coverage if their employer utilizes the exemptions.¹⁵¹ Congress intended to give HRSA the ability to decide "*what* women's preventive services should be covered" but did not anticipate delegating broad authority to enumerate exemptions to coverage.¹⁵²

IV. THE FUTURE OF THE RELIGIOUS AND MORAL EXEMPTIONS

The Little Sisters' win at the Supreme Court may be short-lived. Pennsylvania and New Jersey are likely to return to the Supreme Court to challenge the religious and moral exemptions as arbitrary and capricious under the APA.¹⁵³ Under an arbitrary and capricious analysis, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'"¹⁵⁴ A regulation is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem,"¹⁵⁵ such as ensuring access to contraceptives without cost sharing.¹⁵⁶ While the Court takes a highly deferential approach to administrative actions,¹⁵⁷ agencies must produce "reasoned decisionmaking."¹⁵⁸

148. *Id.* at 2411 (Ginsburg, J., dissenting).

149. *Id.* at 2400 (citations omitted).

150. *Id.* at 2400.

151. *Id.* at 2403.

152. *Id.* at 2406.

153. *Id.* at 2387 (Alito, J., concurring).

154. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

155. *Id.* at 43.

156. *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2399 (Kagan, J., concurring).

157. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

158. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 52.

The viability of the religious and moral exemptions under arbitrary and capricious scrutiny is in limbo with the change in the Supreme Court's makeup and the Biden Administration taking office. The majority's opinion suggested that those Justices will side with the Departments in future litigation on whether the exemptions are arbitrary and capricious,¹⁵⁹ along with Justice Alito's concurrence.¹⁶⁰ However, Justice Kagan's concurrence, joined by Justice Breyer, doubted that the exemptions would survive future litigation.¹⁶¹ While Justice Breyer is retiring from the Court as of June 2022,¹⁶² the consensus is that Judge Ketanji Brown Jackson, his likely replacement as of the date of publication, will not affect the current ideological makeup of the court.¹⁶³ Notably, Justice Barrett, a devout Catholic like the Little Sisters of the Poor, has replaced the late Justice Ginsburg, a vocal opponent to the exemptions, on the bench. During her time as a law professor, Justice Barrett joined a statement by the Becket Fund for Religious Liberty criticizing the contraceptive mandate, arguing that it is "[u]nacceptable" to require religious employers to purchase insurance that covers "these objectionable things."¹⁶⁴

Additionally, the Trump Administration's protections for religious liberty may come to an end with President Biden, also a devout Catholic, seeking to "restore the Obama-Biden policy that existed before the *Hobby Lobby* ruling."¹⁶⁵ He plans to narrow the religious exemption to "houses of worship" and "nonprofit organizations with religious missions."¹⁶⁶ Despite religious organizations previously rejecting this compromise, he intends for women to access contraceptives "through their insurance company or a third-party administrator."¹⁶⁷

Besides the political battle over the contraceptive mandate, the Little Sisters' win is likely to be short-lived due to the scope of the religious and moral exemptions, resulting in some portions of them being arbitrary and capricious. Ultimately, the effect of the moral exemption and the 2018 expanded religious exemption renders the contraceptive mandate null. This Note argues that (1)

159. *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2384.

160. *Id.* at 2387 (Alito, J., concurring).

161. *Id.* at 2398 (Kagan, J., concurring).

162. Amy Howe, *Stephen Breyer, pragmatic liberal, will retire at end of term*, SCOTUSBLOG (Jan. 26, 2022, 12:46 PM), <https://www.scotusblog.com/2022/01/stephen-breyer-pragmatic-liberal-will-retire-at-end-of-term/>.

163. See Orville Vernon Burton & Armand Derfner, *Biden's pick won't shift the Supreme Court, but here's what might*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/outlook/2022/02/25/bidens-pick-wont-shift-supreme-court-heres-what-might/> (explaining that President Biden's nominee will not affect the ideological makeup of the Court because it "will continue to include six conservatives and three liberals").

164. BECKET FUND FOR RELIGIOUS LIBERTY, UNACCEPTABLE 1 (2012), <https://becketpdf.s3.amazonaws.com/Unacceptable-4-11.pdf>.

165. Catholic News Agency, *Biden Says Nuns Inspire Him to Run, Plans to Sue Little Sisters of the Poor*, ANGELUS NEWS (Aug. 13, 2020), <https://angelusnews.com/news/nation/biden-says-nuns-inspire-him-to-run-plans-to-sue-little-sisters-of-the-poor/>.

166. *Id.*

167. *Id.*

the religious exemption is arbitrary and capricious as applied to for-profit entities that are not closely held, and (2) the moral exemption lacks a rational connection to the identified problem.

A. *The Religious Exemption*

Before 2018, the debate regarding the contraceptive mandate focused on exempting entities with religious missions, such as churches or closely held for-profit entities.¹⁶⁸ Under RFRA, the contraceptive mandate “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government “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.”¹⁶⁹ In the context of entities with religious purposes, the concern that the contraceptive mandate without a religious exemption fails RFRA scrutiny has merit. While the Supreme Court has not decided this issue,¹⁷⁰ the Court in *Zubik* remanded the case for the Government and religious objectors to find a way to provide coverage without self-certification or any other means that required notice from the objectors.¹⁷¹ This decision suggests that the Court questioned the adequacy of the mandate’s religious exemption and anticipated a more thorough exemption for these religious entities.

However, in 2018, the Departments took an unprecedented step by expanding the religious exemptions to for-profit entities that are *not* closely held.¹⁷² This step resulted in an exemption that is beyond what any religious objector asked for in court. In fact, “the Departments are not aware of any publicly traded entities that have publicly objected to providing contraceptive coverage on the basis of religious belief.”¹⁷³ The Departments’ reasons for expanding the exemption failed to “examine the relevant data and articulate a satisfactory explanation” to survive arbitrary and capricious scrutiny.¹⁷⁴

When expanding the exemption, the Departments emphasized that RFRA’s definition of “persons” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as

168. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

169. 42 U.S.C. § 2000bb-1(a)–(b).

170. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2387 (2020) (Alito, J., concurring).

171. *Zubik*, 136 S. Ct. at 1559–61.

172. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,536 (Nov. 15, 2018) (to be codified 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

173. *Id.* at 57,562.

174. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

individuals.”¹⁷⁵ Because the definition includes corporations, the Departments quickly concluded that the exemption must extend to publicly traded for-profit entities.¹⁷⁶ They provided no explanation as to why RFRA covers these entities beyond quoting the definition.¹⁷⁷

This logical leap is at odds with the Court’s statements in *Hobby Lobby* and the decision’s narrow holding. In *Hobby Lobby*, HHS expressed concern about identifying the religious beliefs of “large, publicly traded corporations such as IBM or General Electric” if RFRA is applied to for-profit entities.¹⁷⁸ The Court balked at this concern, deeming it “unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.”¹⁷⁹ It further clarified that *Hobby Lobby* only addresses closely held entities that are owned by one family and expressly excluded publicly held entities as relevant to its decision.¹⁸⁰ Ironically, the Departments made no mention of *Hobby Lobby* when finding that any publicly traded entity falls under RFRA’s definition of “persons,” despite the Court’s decision centering on that definition. It also provided no reasoning as to why the exemption should be extended to entities that are not closely held without the Court’s direction to do so or objections from the entities themselves.

As one commenter noted, expanding the religious exemption to include both closely held and not closely held entities would cover “virtually all employers.”¹⁸¹ To rebut this statement, the Departments provided one restriction to the exemption: state laws will serve as “mechanisms for determining whether a company has adopted and holds certain principles or views.”¹⁸² However, the Departments did not propose any uniform or efficient way of ensuring that publicly traded entities do not abuse this exemption, which would allow the entities to punt the expense of covering contraceptives to the entities’ insurers.

Additionally, the Departments acknowledged that they had “limited data” on the impact the exemption would have on women.¹⁸³ The Departments assumed the impact would be insignificant because no publicly traded entity challenged the mandate despite being unable to invoke the religious exemption at the time.¹⁸⁴ Thus, the Departments’ “best estimate” was that “no publicly

175. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,562.

176. *Id.*

177. *See id.*

178. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726, 717 (2014).

179. *Id.* at 717.

180. *Id.*

181. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,562.

182. *Id.*

183. *Id.*

184. *Id.*

traded employers will invoke the religious exemption.”¹⁸⁵ However, it is probable that no publicly traded entity sought an exemption because they did not think they would fall under its scope unlike religious organizations who publicly profess their religious tenets. To further illustrate the Departments’ failure to investigate the exemptions’ harms, they provided a bulleted list of the “multiple levels of uncertainty,” and this list included critical questions like whether the women will be able to receive contraceptives through other means and the number of women who will be affected by the expanded exemption.¹⁸⁶

Justice Kagan explained that the Departments have broad discretion when creating exemptions, but they must do so with reasoned decision making.¹⁸⁷ The Court “assume[d]” in *Hobby Lobby* that providing women access to contraceptives without cost sharing is a compelling interest under RFRA¹⁸⁸ and instructed the Government in *Zubik* to ensure women receive contraceptive coverage.¹⁸⁹ Yet, the Departments opened the door for an unknown number of women to lose contraceptive coverage by upholding the religious interests of publicly traded corporations who have not objected to the mandate. Even if no publicly traded companies have invoked the exemption thus far, the risk remains that female employees who do not share the same religious beliefs as their employer will lose coverage in the near future. Unlike the female employees of a religious employer, the female employees at publicly traded entities may not be on notice that their coverage is at risk.¹⁹⁰ The expanded exemption may have been able to withstand arbitrary and capricious scrutiny if the Departments had, for instance, provided data on the number of publicly traded entities who would qualify for the exemption under state law and the number of potentially affected women. However, pointing to RFRA’s definition of “persons” and claiming insufficient data will likely be insufficient to qualify as reasoned decision making.

185. *Id.*

186. *Id.* at 57,574.

187. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2400 (2020) (Kagan, J., concurring).

188. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726, 728 (2014).

189. *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

190. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,802 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (“Employees of [religious] organizations, even if not required to sign a statement of faith, often have access to, and knowledge of, the views of their employers on contraceptive coverage In many cases, the employees of religious organizations will have chosen to work for those organizations with an understanding—explicit or implicit—that they were being employed to advance the organization’s goals and to be respectful of the organization’s beliefs even if they do not share all of those beliefs.”).

B. *The Moral Exemption*

On May 4, 2017, President Trump issued an Executive Order directing agencies “to address conscience-based objections” to the contraceptive mandate.¹⁹¹ As a result, the Departments released interim final rules creating the moral exemption to the mandate,¹⁹² which were finalized in 2018.¹⁹³ The final rule exempts entities with “sincerely held moral objections” to contraceptives,¹⁹⁴ including nonreligious nonprofits, closely held for-profit entities that are not publicly traded, institutions of higher education, and certain health insurance issuers.¹⁹⁵ Thus, these entities can eliminate contraceptive coverage in their employee plans *without* certifying their objections, or reasons for their objections, to the mandate.¹⁹⁶

The moral exemption falls short under an arbitrary and capricious analysis for failing to consider an important aspect of the problem—women’s access to contraceptives. The Departments previously identified that women incur “significant out-of-pocket expenses” to obtain contraceptives and sought to remedy this problem “by providing women broad access to preventive services, including contraceptive services.”¹⁹⁷ However, the Departments have systematically undercut this objective by reducing the number of women who will access contraceptives without cost-sharing, particularly by no longer requiring a religious objection. The Departments admitted that they do not know the extent of harm the moral exemption will cause, but they do know that it may cause “less insurance coverage of contraception for some women who may want the coverage.”¹⁹⁸

While RFRA applies to conscience objections, Justice Kagan explained that the Departments still should have weighed “the benefits of exempting more employers from the mandate against the harms of depriving more women of contraceptive coverage.”¹⁹⁹ Here, the exemption is primarily premised on two small nonprofits that employ fewer than five people who sued with objections

191. Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

192. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).

193. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147).

194. *Id.*

195. *Id.*

196. *Id.* at 57,593.

197. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54).

198. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,625.

199. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2400 (2020) (Kagan, J., concurring).

to providing coverage.²⁰⁰ The Departments do not know of any closely held for-profits,²⁰¹ institutions of higher education,²⁰² or health insurance issuers²⁰³ who have nonreligious objections to the mandate. However, these hypothetical objectors “might exist or come into being” at some later point and wish to invoke the exemption.²⁰⁴ The Departments reasoned that, because other exemptions to contraceptive mandate exist, the third-party harms principle is insufficient to warrant further investigation to the female employees’ harms.²⁰⁵

Even if few entities have invoked the moral exemption thus far, the Supreme Court has viewed the third-party harms principle as more than just a numerical balancing of harms by looking at the dignity harms that may follow.²⁰⁶ In describing these dignity harms, Judge Battlestone explained:

A simple hypothetical illustrates the insidious effect of the Moral Exemption Rule. It would allow an employer with a sincerely held moral conviction that women do not have a place in the workplace to simply stop providing contraceptive coverage. And, it may do so in an effort to impose its normative construct regarding a woman’s place in the world on its workforce, confident that it would find solid support for that decision in the Moral Exemption Rule. It is difficult to comprehend a rule that does more to undermine the Contraceptive Mandate or that intrudes more into the lives of women.²⁰⁷

Like the religious exemption applying to publicly traded for-profit entities, the moral exemption raises a problem of notice. Women who are applying for jobs at these entities or students applying for colleges will not know whether the potential employer or institution covers contraceptives. Some of these women will be unable to pay out-of-pocket costs upwards of \$1,100 for long-term contraceptives.²⁰⁸ As a result, the burden shifts to women to ask whether the entity’s health plan includes contraceptive coverage, forcing women to ask a question associated with sexual promiscuity. Thus, a woman will be left with two choices: forego asking the question altogether or expose an intimate detail of her life.

200. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,626.

201. *Id.* at 57,618.

202. *Id.* at 57,619.

203. *Id.* at 57,620.

204. *Id.* at 57,619.

205. *Id.* at 57,606 (“[T]he doctrine of third party burdens should not be interpreted to impose such an obstacle.”).

206. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719 (2018).

207. *Pennsylvania v. Trump*, 281 F. Supp. 3d. 553, 577 (E.D. Pa. 2017), *aff’d sub nom.* *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *rev’d and remanded sub nom.* *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

208. Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,608 (referencing the costs of intrauterine devices that last three-to-six years).

The Departments' regulation is laden with a historical discussion of federal and state legislation that include some form of conscience accommodations,²⁰⁹ but it fails to recognize that legislatures are not held to the arbitrary and capricious standard. Their rulemaking lacks any thread connecting the reasons for creating the moral exemption, namely the two nonprofits who sued, to ensuring access to contraceptives as enumerated in HRSA's Guidelines. With no evidence of any other entities seeking accommodation and no evidence of how many will seek accommodation in the future, the Departments prioritized the nonreligious objections of two nonprofits and hypothetical entities over the unknown number of women who will be directly or indirectly impacted by this exemption.

CONCLUSION

This Note does not assert that no religious exemption to the contraceptive mandate can survive arbitrary and capricious scrutiny. Religious organizations and persons have historically received exemptions to otherwise neutral laws. As applied here, women who work for religious employers have sufficient notice that, if they choose to work for a religious organization, they may not receive contraceptive coverage, such as through the religion's known belief against contraceptives. However, this Note takes issue with the extension of the religious exemption to entities that are not closely held and the creation of the moral exemption. The scope of the exemptions fail to achieve any level of proportionality by allowing corporations, whose executives and shareholders are unlikely to hold a common belief system, to remove contraceptive coverage from their health plans. With the elimination of the self-certification accommodation, women will be forced to look elsewhere for contraceptives and potentially pay prices beyond their financial abilities. If Pennsylvania and New Jersey raise an arbitrary and capricious argument, the Supreme Court should find that the religious exemption is arbitrary and capricious as applied to for-profit entities that are not closely held and that the moral exemption lacks a rational connection to the identified problem.

209. *Id.* at 57,598–602.