



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   LITTLE SISTERS OF THE POOR                   )  
4   SAINTS PETER AND PAUL HOME,                )  
5                                    Petitioner,                    )  
6                                    v.                                 ) No. 19-431  
7   PENNSYLVANIA, ET AL.,                        )  
8                                    Respondents,                    )  
9   - - - - -  
10   DONALD J. TRUMP, PRESIDENT                 )  
11   OF THE UNITED STATES, ET AL.,                )  
12                                    Petitioners,                    )  
13                                    v.                                 ) No. 19-454  
14   PENNSYLVANIA, ET AL.,                        )  
15                                    Respondents.                    )  
16   - - - - -

17  
18                                    Washington, D.C.  
19                                    Wednesday, May 6, 2020

20  
21                                    The above-entitled matter came on for  
22   oral argument before the Supreme Court of the  
23   United States at 10:00 a.m.

24  
25

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9 on behalf of the Respondents.  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case Number  
5 19-431, Little Sisters of the Poor versus  
6 Pennsylvania, and the consolidated case.

7 General Francisco.

8 ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

9 ON BEHALF OF THE PETITIONERS IN 19-454

10 GENERAL FRANCISCO: Mr. Chief Justice,  
11 and may it please the Court:

12 In 2011, the government required  
13 employers to provide insurance coverage for all  
14 FDA-approved contraception, including many  
15 religious employers who objected to the  
16 coverage, sparking years of litigation. In  
17 2017, in the best traditions of this country's  
18 commitment to religious liberty, the government  
19 sought to resolve the issue by promulgating new  
20 rules exempting those employers who objected to  
21 the mandate.

22 Those exemptions are lawful for two  
23 reasons. First, they're authorized by  
24 Section 13(a)(4) of the ACA, which requires  
25 employers to provide the types of coverage that

1 the Health Resources and Services Administration  
2 provides for and supports. So it authorizes the  
3 agencies to require most employers to provide  
4 contraceptive coverage while exempting a small  
5 number of employers who have sincere  
6 conscientious objections.

7 But it doesn't create an  
8 all-or-nothing choice: require coverage for  
9 everyone or no one. Otherwise, the  
10 long-standing church exemption, the effective  
11 exemption for self-insured church plans, and  
12 indeed, Respondents' understanding of the  
13 accommodation itself would also violate the  
14 statute since the employers' group health plans  
15 don't provide the mandated coverage.

16 Second, RFRA at the very least  
17 authorizes the religious exemption. It  
18 prohibits the government from imposing a  
19 substantial burden on religious beliefs subject  
20 to a discretionary exception. It may  
21 substantially burden religious beliefs if it can  
22 satisfy strict scrutiny.

23 But RFRA doesn't require the  
24 government to do that. Otherwise, the  
25 government would have to divine the stingiest

1 accommodations that a court would uphold,  
2 virtually guaranteeing a loss in every case.  
3 Neither RFRA nor the ACA requires that result.

4 I'd like to begin with the  
5 Section 13(a)(4) issue, which requires employers  
6 to provide whatever coverage HRSA provides for  
7 and supports.

8 CHIEF JUSTICE ROBERTS: General,  
9 before you --

10 GENERAL FRANCISCO: And, here, HRSA --

11 CHIEF JUSTICE ROBERTS: -- before you  
12 get to that, I'd like to ask you a question on  
13 your RFRA point. I wonder why it doesn't sweep  
14 too broadly. It is designed to address the  
15 concerns about self-certification and what the  
16 Little Sisters call the hijacking of their plan.

17 But the RFRA exemption reaches far  
18 beyond that. In other words, not everybody who  
19 seeks the protection from coverage has those  
20 same objections. So I wonder if your reliance  
21 on RFRA is too broad.

22 GENERAL FRANCISCO: I don't think so,  
23 Your Honor, for a couple of different reasons.  
24 First, RFRA itself, in its operative language,  
25 prohibits the government from imposing a

1 substantial burden subject to a single  
2 exception. And when you look at that exception,  
3 what it says is that the government may impose  
4 that burden if it thinks it can satisfy strict  
5 scrutiny.

6 So, once there's a substantial burden,  
7 the government has the flexibility to lift it in  
8 different ways, including through a traditional  
9 exemption. Otherwise, this Court's decision in  
10 Zubik doesn't make a whole lot of sense because,  
11 there, the Court ordered the government to  
12 consider further modifying the accommodation,  
13 even assuming the accommodation fully satisfied  
14 RFRA.

15 That doesn't make sense if RFRA  
16 prohibits anything that it doesn't affirmatively  
17 require.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 GENERAL FRANCISCO: But, secondly,  
20 even if the --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas. Justice Thomas.

24 Well, we'll come back to Justice Thomas.

25 Justice Ginsburg?



1 JUSTICE GINSBURG: The glaring feature  
2 of what the government has done in expanding  
3 this exemption is to toss to the winds entirely  
4 Congress's instruction that women need and shall  
5 have seamless, no-cost, comprehensive coverage.  
6 Seamless, no-cost, comprehensive coverage.

7 This leaves the women to hunt for  
8 other government programs that might cover them,  
9 and for those who are not covered by Medicaid or  
10 one of the other government programs, they can  
11 get contraceptive coverage only from paying out  
12 of their own pocket, which is exactly what  
13 Congress didn't want to happen.

14 And in this area of religious freedom,  
15 the major trend is not to give everything to one  
16 side and nothing to the other side. We have had  
17 a history of accommodation, tolerance here,  
18 respect for the employer's workers and students  
19 who do not share the employer's or the  
20 university's objections to contraceptives.

21 And every time we have dealt with this  
22 subject, we have assumed that there would be a  
23 way to provide coverage that would not involve  
24 any cost-sharing by the individual. So, in  
25 Hobby Lobby, we assumed that the

1 self-certification was okay because women --  
2 women could receive coverage without any  
3 cost-sharing by the organization, the group  
4 health plan, or the participants.

5           And then, in Wheaton, we said nothing  
6 in the interim rules affects the ability of  
7 applicants, employees, and students to obtain,  
8 without cost, the full range of FDA-approved  
9 contraceptives.

10           And finally, in Zubik, we said -- we  
11 instructed the parties to endeavor to put in  
12 place an accommodation of the employer's  
13 religious exercise while at the same time  
14 ensuring women covered by employers' health  
15 plans, ensuring that women receive full and  
16 equal health coverage, including contraceptive  
17 coverage.

18           You have just tossed entirely to the  
19 wind what Congress thought was essential, that  
20 is, that women be provided these service --  
21 services, with no hassle, no cost to them.

22           Instead, you are shifting the  
23 employer's religious beliefs, the cost of that,  
24 on to these employees who do not share those  
25 religious beliefs. And I did not understand

1 RFRA to authorize harm to other people, which is  
2 evident here, that the -- the women end up  
3 getting nothing. They -- they are required to  
4 do just what Congress didn't want.

5 CHIEF JUSTICE ROBERTS: General  
6 Francisco, could you respond?

7 GENERAL FRANCISCO: Yes.

8 Respectfully, Your Honor, I think I would  
9 disagree with the premise of your question  
10 because there's nothing in the ACA, as this  
11 Court recognized in Hobby Lobby, that requires  
12 contraceptive coverage. Rather, it delegated to  
13 the agencies the discretion to decide whether or  
14 not to cover it in the first place.

15 And we think that that also includes  
16 the discretion to require that most employers  
17 provide it, but not the small number who have  
18 sincere conscientious objections, because,  
19 otherwise, the original church exemption,  
20 likewise, would be illegal, as would the  
21 effective exemption for self-insured church  
22 plans.

23 JUSTICE GINSBURG: The church  
24 itself --

25 GENERAL FRANCISCO: But even putting

1 that --

2 JUSTICE GINSBURG: -- the church  
3 itself has enjoyed traditionally an exception  
4 from the very first case, the McClure case in  
5 the Fifth -- Fifth Circuit. The church itself  
6 is different from these organizations that  
7 employ a lot of people who do not share the  
8 employer's faith.

9 And I thought that Congress had  
10 delegated to HRSA for its expertise in what  
11 contraceptive coverage women would need.

12 CHIEF JUSTICE ROBERTS: Brief --  
13 briefly, General Francisco?

14 GENERAL FRANCISCO: Yes, Your Honor.

15 Respectfully, the church exemption and  
16 the effective exemption for self-insured church  
17 plans read much more broadly. They encompass  
18 not just churches and their integrated  
19 auxiliaries, but elementary schools, high  
20 schools, colleges, universities, charitable  
21 organizations, hospitals, and other healthcare  
22 organizations. So I don't think that they're  
23 authorized by the so-called ministerial  
24 exception. Rather, they're authorized by  
25 Section 13(a)(4) and by RFRA.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas? I think you're back.

3 JUSTICE THOMAS: General Francisco, a  
4 quick question about HRSA's broad authority.  
5 You seem to, as you did in your past -- your  
6 last answer, suggest that HCRA has almost  
7 unlimited authority to both create guidelines  
8 and exceptions from those guidelines.

9 First, if you would give us just an  
10 idea of what standards are to guide that --  
11 their discretion and -- and the services that  
12 are provided, as well as the exemptions that are  
13 offered by the guidelines.

14 GENERAL FRANCISCO: Yes, Your Honor.  
15 I think there are three limitations that I would  
16 point to. First, because HRSA has the  
17 discretion not to require any contraceptive  
18 coverage at all, as this Court acknowledged in  
19 Hobby Lobby, I think that that plainly  
20 encompasses the discretion to require coverage  
21 by most employers but not the small number with  
22 sincere conscientious objections.

23 Secondly, it's further constrained by  
24 the APA's requirement for reasoned decision  
25 making which prohibits arbitrary -- which would

1 prohibit arbitrary exemptions.

2           And, third, I think that the term  
3 "preventive services" in the statute itself  
4 potentially provides yet another limitation  
5 since, at the very least, that would encompass  
6 the types of things that governments  
7 traditionally take into account when regulating  
8 in this area, including the impact that their  
9 regulations would have on religious believers.

10           And I'd point you to the Federal  
11 Register, 83 Federal Register at 58598, where  
12 the government goes through in detail the  
13 history of according conscientious objectors  
14 protections when regulating in these very  
15 sensitive medical areas.

16           JUSTICE THOMAS: At what point do you  
17 run into a non-delegation problem?

18           GENERAL FRANCISCO: Your Honor, I  
19 don't think we have a non-delegation problem at  
20 all here for the reasons we've said. I think  
21 all of those would establish limiting  
22 principles, including the -- the phrase  
23 "preventive services," which at the very least  
24 would limit what the government can do to the  
25 types of things that traditionally it has done

1 when regulating in this area.

2           If I could just give you a quick  
3 hypothetical. Suppose the Department of -- the  
4 Congress delegated to the Department of Defense  
5 the authority to create a draft. I think that  
6 that would necessarily include the authority for  
7 the Department of Defense to craft conscientious  
8 objections to the draft precisely because that's  
9 the type of thing that governments traditionally  
10 consider in that area.

11           Likewise, here, in regulating in  
12 sensitive medical areas, governments  
13 traditionally take into account the impact that  
14 their regulations have on conscientious  
15 objectors.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 General.

18           Justice Breyer?

19           JUSTICE BREYER: Good morning,  
20 General. I had exactly the same question as  
21 Justice Thomas's first question, so -- about  
22 what are the standards that govern when the  
23 agency can make exceptions and how and what they  
24 must look like.

25           So, if you have anything to add on

1 that, do. And, if not, thank you very much and  
2 you can go on to the next question.

3 GENERAL FRANCISCO: Your Honor, the  
4 only thing I would add is that I think all of  
5 these limitations would fully make sure that any  
6 time that HRSA is exercising its discretion,  
7 it's doing so in a rational way.

8 After all, this is the very same  
9 discretion that was used not just to adopt the  
10 church exemption but also the effective  
11 exemption for self-insured church plans, and  
12 under Respondents' understanding of the  
13 accommodation, even the accommodation itself,  
14 since, in each one of those three instances, the  
15 employers' benefits plan is not providing the  
16 mandated coverage and in two of them, nobody is  
17 providing the mandated coverage.

18 And so, if you concluded that the  
19 agencies didn't have this discretion, that would  
20 undermine the validity of the church exemption,  
21 the effective exemption for self-insured church  
22 plans, and potentially the accommodation more  
23 broadly.

24 JUSTICE BREYER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?



1           JUSTICE ALITO:  General, what factors,  
2   other than medical need, can HRSA or could HRSA  
3   take into account in deciding which preventive  
4   services and the degree to which preventive  
5   services would have to be covered by an  
6   insurance plan?  For example, could it take cost  
7   into account?

8           GENERAL FRANCISCO:  Well, Your Honor,  
9   if it took cost into account, I think that the  
10  question -- the first question would be whether  
11  the manner in which it took cost into account  
12  satisfied the arbitrary and capricious standard.

13           And I certainly do think that they  
14  could take cost into account in deciding what  
15  types of preventative services to require.  If,  
16  for example, there was a particular type of  
17  preventative service that was a new technology  
18  that was actually quite -- quite helpful, but it  
19  was cost-prohibitive for just about every  
20  employer or any insurance company to cover, I  
21  certainly think that HRSA could take that into  
22  account in deciding whether or not to require  
23  it, pursuant to the guidelines issued under  
24  Section 13(a)(4).

25           JUSTICE ALITO:  This broad issue has

1     been before this Court on a number of prior  
2     occasions, and until this case, I hadn't seen  
3     the argument that the Affordable Care Act did  
4     not allow HRSA to make any exceptions based on  
5     conscientious objection. When did this argument  
6     first surface?

7                   GENERAL FRANCISCO: To my knowledge,  
8     Your Honor, it first surfaced in this  
9     litigation. But, if you look back to the  
10    promulgation of the original church exemption  
11    back on August 3, 2011, and you look at the  
12    Federal Register notice, it makes crystal-clear  
13    that the church exemption was based on  
14    Section 13(a)(4).

15                   In describing Section 13(a)(4), the  
16    government determined that it had the authority  
17    under 13(a)(4) to promulgate the church  
18    exemption. And that's likewise the reason why  
19    the effective exemption that covers all  
20    self-insured church plans and the accommodation  
21    more generally is likewise lawful under  
22    13(a)(4). Under my friend's position on the  
23    other side, I think all of those things would  
24    violate 13(a)(4).

25                   JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 General.

3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: General, first of  
5 all, you keep calling it a small number of women  
6 who won't get coverage, but I understand the  
7 figure to be between -- somewhere between 75 --  
8 750,000 -- 75,000 and 125,000 women, correct?

9 GENERAL FRANCISCO: Well, Your Honor,  
10 yes, that's the number that would be affected by  
11 the exemptions as compared to the original  
12 church exemption and effective exemptions that  
13 cover -- that affected around 30,000 women. But  
14 I would note that in this particular litigation,  
15 the Respondents haven't yet identified anyone  
16 who would actually lose access to contraception  
17 as a result of these rules, I think presumably  
18 because contraception -- access to contraception  
19 is widely available in this country through many  
20 other means --

21 JUSTICE SOTOMAYOR: Well, General,  
22 let's -- let's --

23 GENERAL FRANCISCO: -- besides forcing  
24 --

25 JUSTICE SOTOMAYOR: -- let's go there.

1 HHS decided that contraceptives were a  
2 preventive service required under the Act.

3 Now you say it has to take care to  
4 both promulgate the Act and accommodate  
5 religious objections. But, in your calculus,  
6 what you haven't considered or told me about is  
7 the effect on women -- on women who can't -- who  
8 -- who now have to go out, as Justice Ginsburg  
9 said, and search for contraceptive coverage if  
10 they can't personally afford it.

11 And I just wonder if I -- if there is  
12 no substantial burden, how can the government  
13 justify an exemption that deprives those women  
14 of seamless coverage?

15 GENERAL FRANCISCO: So, Your Honor,  
16 two points. First of all, I think 13(a)(4) is  
17 what provides them the -- the discretion to do  
18 it, which is what they did in the effective  
19 exemption that covers self-insured church plans.  
20 That imposes no more or less of a burden than  
21 this exemption does.

22 But putting that to the side, RFRA  
23 itself at Section 2000bb-4 explicitly permits  
24 any exemption that doesn't violate the  
25 Establishment Clause. And, here, I don't think

1 there's any plausible argument that the  
2 exemptions violate the Establishment Clause  
3 under this Court's decision in Amos, which  
4 upheld the Title VII exemption to religious  
5 employers, which, after all, authorized  
6 religious employers to fire an employee for  
7 religious reasons.

8 And since it's permitted under RFRA,  
9 then I -- and it's permitted under  
10 Section 13(a)(4), I don't think any of these  
11 considerations undermine the validity of these  
12 final rules.

13 JUSTICE SOTOMAYOR: One last --

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Justice Kagan?

17 JUSTICE KAGAN: Thank you.

18 Good morning, General. I'd like to go  
19 back to --

20 GENERAL FRANCISCO: Good morning, Your  
21 Honor.

22 JUSTICE KAGAN: -- the Chief Justice's  
23 first question, which was about whether this  
24 rule sweeps too broadly. And I understand your  
25 concern about giving agencies some leeway so

1 that there's -- they don't have to think through  
2 thousands of accommodations in their head and  
3 then find the narrowest one possible for every  
4 person. But that's not really the situation  
5 we're in with respect to this.

6           There was an existing accommodation in  
7 place, and some employers had objections to that  
8 accommodation, the Little Sisters and some  
9 others. And even assuming that those objections  
10 needed to be taken into account, the rule sweeps  
11 far more broadly than that and essentially  
12 scraps the existing accommodation even for  
13 employers who have no religious objection to it.

14           And sort of by definition, doesn't  
15 that mean that the rule has gone too far?

16           GENERAL FRANCISCO: No, Your Honor,  
17 for two reasons. First of all, the  
18 accommodation is available. It's not been  
19 scrapped. But, secondly, including  
20 contraception as a seamless part of your  
21 insurance plan doesn't actually cost employers  
22 anything. So there's no reason why an employer  
23 who doesn't object to providing contraception as  
24 part of their plan, whether through the  
25 accommodation or otherwise, would invoke the

1 exemption since they would be depriving their  
2 employees of a valuable benefit to which they do  
3 not object and that doesn't cost them anything.

4 But I would -- I guess I --

5 JUSTICE KAGAN: I mean, do you have --

6 GENERAL FRANCISCO: -- would add if  
7 there were --

8 JUSTICE KAGAN: -- do you have any  
9 evidence that the current exemption is being  
10 taken -- availed -- that only employers of the  
11 Little Sister kind who have complicity  
12 objections are now taking advantage of the  
13 exemption? I would think that there would be a  
14 lot of employers who would say, you know, we  
15 don't have those complicity beliefs, but now  
16 that they're giving us an option, sure, we'll  
17 take it.

18 GENERAL FRANCISCO: Your Honor, I  
19 respectfully think that that would be  
20 irrational, given that employers would then be  
21 depriving their employees of a valuable benefit  
22 that doesn't cost them anything, because it  
23 doesn't cost any money to add contraceptive  
24 coverage to an insurance plan. It's a  
25 cost-neutral coverage provision.

1 JUSTICE KAGAN: But why couldn't --

2 GENERAL FRANCISCO: So the only --

3 JUSTICE KAGAN: -- you just have --  
4 why couldn't you just have written the rule to  
5 cover only those who have objections to the  
6 existing accommodation? In other words, those  
7 who have these complicity-based beliefs that the  
8 Little Sisters have?

9 GENERAL FRANCISCO: Well, because,  
10 Your Honor, I think, here, there's no reason to  
11 think anybody would do what you're suggesting.  
12 And the original burden stems from the  
13 contraceptive mandate itself. And so I guess  
14 what I would point to is cases like Ricci  
15 against DeStefano, which, at the very least, if  
16 you don't accept my broader argument, give the  
17 government flexibility in the face of  
18 potentially competing statutory obligations.  
19 That's the case where the Court said --

20 CHIEF JUSTICE ROBERTS: Counsel.  
21 Justice Gorsuch?

22 JUSTICE GORSUCH: General, if you just  
23 continue, I'd like to hear the rest of your  
24 answer.

25 GENERAL FRANCISCO: Sure. I was



1 focusing on Ricci against DeStefano, which I  
2 think gives the government flexibility when it's  
3 facing potentially competing obligations.  
4 That's the case where the Court said that an  
5 employer could violate Title VII's disparate  
6 treatment provision if it had a substantial --  
7 substantial grounds for believing it would  
8 otherwise be violating Title VII's disparate  
9 impact provision. It's the way the Court  
10 reconciles statutes that put parties in the --  
11 the -- in the place of having to decide whether  
12 to violate one at the expense of the other.

13           And, here, I think we at the very  
14 least have a strong basis for believing that the  
15 prior regime violated the Religious Freedom  
16 Restoration Act, and that gives us the  
17 discretion to adopt a traditional exemption,  
18 which, after all, is the type -- is the way that  
19 the governments have traditionally accommodated  
20 religious beliefs.

21           And I think that's particularly clear  
22 here since, one, RFRA both applies to and  
23 supersedes the ACA, and, two, even if you don't  
24 think that the ACA authorizes exemptions, even  
25 though we think that they -- it does, there's

1 nothing in the ACA that prohibits exemptions.

2 JUSTICE GORSUCH: Thank you, General.

3 CHIEF JUSTICE ROBERTS: Justice

4 Kavanaugh?

5 JUSTICE KAVANAUGH: Thank you, Chief

6 Justice.

7 Good morning, General Francisco.

8 GENERAL FRANCISCO: Good morning, Your

9 Honor.

10 JUSTICE KAVANAUGH: Your colleague on

11 the other side says the text and structure of

12 the ACA make plain that Congress delegated HRSA

13 authority to oversee guidelines defining what

14 preventive services for women must be covered,

15 not who must cover them.

16 Can you respond to that argument?

17 GENERAL FRANCISCO: Yes, Your Honor.

18 Respectfully, that is not what the ACA

19 says. Section 13(a)(4) says that employers have

20 to provide whatever coverage HRSA itself

21 provides for and supports.

22 Here, HRSA does not provide for and

23 support coverage by the small number of

24 employers with conscientious objections, but it

25 does provide for and support coverage by

1 everybody else.

2           So I think our position follows  
3 plainly from the plain text of 13(a)(4) itself,  
4 whereas, respectfully, I think my friend's  
5 position on the other side is irreconcilable  
6 with that statutory text. They're trying to put  
7 sentences into that text that simply do not  
8 exist.

9           JUSTICE KAVANAUGH: Thank you,  
10 General.

11           CHIEF JUSTICE ROBERTS: Mr. Clement?

12           ORAL ARGUMENT OF PAUL D. CLEMENT  
13 ON BEHALF OF THE PETITIONER IN 19-431

14           MR. CLEMENT: Mr. Chief Justice, and  
15 may it please the Court:

16           From the very beginning, the  
17 government recognized that its contraceptive  
18 mandate implicated deeply-held religious  
19 beliefs, and so it exempted churches and some  
20 religious orders.

21           And Congress recognized that the  
22 mandate was not some sort of categorical  
23 imperative that demanded universal compliance,  
24 and so it exempted tens of millions of employees  
25 under grandfathered plans. Thus, from the very

1 beginning, the government's refusal to exempt  
2 the Little Sisters from the mandate and its  
3 massive penalties has posed a glaring RFRA  
4 problem.

5           The federal government finally got the  
6 message and exempted the Little Sisters. That  
7 exemption remedied the RFRA violation and  
8 followed the best of our traditions.  
9 Nonetheless, the Third Circuit invalidated it by  
10 concluding that the regulatory accommodation  
11 satisfied RFRA and the government was powerless  
12 to go further.

13           That decision is doubly flawed as the  
14 regulatory mechanism plainly violates RFRA and  
15 RFRA does not impose a rule of parsimony or  
16 limit the government to the least accommodating  
17 alternative.

18           The Third Circuit's reasoning was  
19 plainly mistaken as to the substantial burden  
20 analysis as its reasoning really cannot be  
21 squared with this Court's decision in Hobby  
22 Lobby. After all, the penalties that enforce  
23 the mandate here are the exact same penalties  
24 that -- that underlie the basic contraceptive  
25 mandate in the Hobby Lobby decision itself.

1           And so, when the government imposes  
2     an -- a -- a burden on religion by telling the  
3     Little Sisters that they have to comply with the  
4     mandate or the accommodation or else, when the  
5     "or else" is massive penalties, that plainly  
6     provides a substantial burden on religious  
7     exercise.

8           At the same time, the compelling  
9     interest analysis also works in favor of the  
10    Little Sisters for two basic reasons. First,  
11    the government has shown its ability to exempt  
12    churches and other religious orders from the  
13    very beginning. And then, secondly, in the  
14    grandfathered plan's exemption, the government  
15    has shown its ability to exempt tens of millions  
16    of employees who do not even have religious  
17    objections but only object or are only exempted  
18    for reasons of administrative convenience.

19           CHIEF JUSTICE ROBERTS: Mr. Clement,  
20    your client, the Little Sisters, do not object  
21    to their employees having coverage for  
22    contraceptive services, right?

23           MR. CLEMENT: They -- no, the Little  
24    Sisters don't have any objection if their  
25    employees receive those services from some other

1 means. Their objection essentially is to having  
2 their plans hijacked and being forced to provide  
3 those services through their own plan and plan  
4 infrastructure.

5 CHIEF JUSTICE ROBERTS: So, if you  
6 have a situation where the certification was not  
7 necessary, in other words, the government -- the  
8 government finds out that the employees do not  
9 have contraceptive coverage through some other  
10 means, and you do not have the hijacking problem  
11 that you referred to because the insurance  
12 coverer would not provide the services through  
13 the Little Sisters' plan but could provide them  
14 directly to the employees, why isn't that sort  
15 of accommodation sufficient? I -- I didn't  
16 understand the problem at the time of Zubik, and  
17 I'm not sure I understand it now.

18 MR. CLEMENT: Well, I don't think we  
19 would have an objection to simply objecting to  
20 the government and then, if the government has  
21 some way to provide the contraception services  
22 independently of us and our plans, we've never  
23 had an objection to that.

24 But the government has insisted  
25 throughout this whole process that we not just

1 be able to have an opt-out form, an objection  
2 form, but that that same form serve as a  
3 permission slip to allow the government to track  
4 down PPAs and others to provide services through  
5 our plans. And that's always been the gravamen  
6 of our objection. It's never been an objection  
7 to objecting itself.

8 CHIEF JUSTICE ROBERTS: Well, the  
9 problem is that neither side in this debate  
10 wants the accommodation to work. The one side  
11 doesn't want it to work because they want to say  
12 the mandate is required, and the other side  
13 doesn't want it to work because they want to  
14 impose the mandate.

15 Is it really the case that there is no  
16 way to resolve those differences?

17 MR. CLEMENT: I -- Mr. Chief Justice,  
18 in the wake of the Zubik remand order, there was  
19 a lot of back and forth between the religious  
20 objector -- objectors and the government, and I  
21 don't think that there really was a mechanism to  
22 find sort of some third way because the  
23 government has always insisted on seamless  
24 coverage, with seamless, essentially, being a  
25 synonym through -- for through the Little

1 Sisters' plans.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. CLEMENT: And as long as they  
5 insisted on --

6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas?

8 JUSTICE THOMAS: Thank you, Chief  
9 Justice.

10 Mr. Clement, the -- the -- I'd like  
11 you to have an opportunity to comment on the  
12 questionable standing of the states in this  
13 case, as well as the proliferation of national  
14 -- nationwide injunctions, such as the one in  
15 this case.

16 MR. CLEMENT: Certainly, Justice  
17 Thomas. I guess I would say one thing about  
18 each of those issues.

19 At this juncture, as long as  
20 Massachusetts against EPA remains good law, we  
21 don't really have an objection to the states'  
22 standing. But I think their standing has to  
23 depend on that precedent because, as General  
24 Francisco alluded to, throughout this  
25 litigation, they have not been able to identify



1 even a single person who would lose coverage in  
2 such a way that it would increase the burdens  
3 for the state and -- Pennsylvania and New  
4 Jersey.

5           So the only way that they can have  
6 standing in this case is if they're excused from  
7 the requirement of being able to identify  
8 specific individuals who are harmed and increase  
9 their burdens. And I think there's a reading of  
10 Massachusetts against EPA that says that's okay,  
11 but that is certainly the absolute outer  
12 standing -- outer limit of -- of standing to be  
13 sure.

14           With respect to the nationwide  
15 injunctions, that's an issue where I think that  
16 it's particularly inappropriate to have a  
17 nationwide injunction in a case like this. The  
18 one thing we should have learned from years of  
19 litigation over the Affordable Care Act and its  
20 contraceptive mandate in particular is that the  
21 courts do not come to uniform decisions in this  
22 area, and sometimes the majority view in the  
23 circuit courts is rejected by this Court.

24           And so, under those circumstances in  
25 particular, for a single district court judge to

1 think that he or she has a monopoly on the  
2 reasoning here and should impose a remedy that  
3 affects people across the nation seems to me to  
4 be very imprudent and not something that's  
5 consistent with equity practice or really just  
6 sort of good practice and the way that our  
7 judicial system works since it really depends on  
8 having the circuits potentially look at these  
9 issues independently, when they divide, this  
10 Court takes review, and these nationwide  
11 injunctions short-circuit all of that and put  
12 enormous pressure on this Court and it forces  
13 this Court to hear cases in emergency postures  
14 and -- and -- and -- and the rest.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Ginsburg?

18 JUSTICE GINSBURG: I would ask Mr.  
19 Clement the same question I asked the  
20 government. The -- at the end of the day, the  
21 government is throwing to the wind the women's  
22 entitlement to seamless, no cost to them. It is  
23 requiring those women to pay for contraceptive  
24 services if they can -- first, they would have  
25 to go search for a government plan, and, if it

1 turns out, as it will for many of them, that  
2 there is no government -- other plan that covers  
3 them, then they're not covered.

4 And the only way they can get these  
5 contraceptive services is to pay for them out of  
6 pocket, precisely what Congress did not want to  
7 happen in the Affordable Care Act.

8 So this idea that the balance has to  
9 be all for the Little Sisters-type organizations  
10 and not at all for the women just seems to me to  
11 rub against what is our history of  
12 accommodation, of tolerance, of respect for  
13 divergent views.

14 MR. CLEMENT: Well, Justice Ginsburg,  
15 I would -- I would say two things in response.  
16 First, I would echo what the Solicitor General  
17 said in pointing out that Congress itself did  
18 not even specify that contraceptions would be  
19 included in the preventative health mandate.  
20 And Congress went further and said with respect  
21 to grandfathered plans, that there were other  
22 mandates in the Affordable Care Act, like  
23 coverage for people up to age 26 and preexisting  
24 conditions, that they were going to impose even  
25 on grandfathered plans, but they didn't impose

1 the preventative mandate.

2           So Congress itself recognized that  
3 tens of millions of employees could be in the  
4 same position as employees of the Little Sisters  
5 of the Poor even though there's no religious  
6 objection there whatsoever.

7           And I think the clear teaching of RFRA  
8 is that if when you're going to give those kind  
9 of exceptions to people for secular reasons,  
10 then you need to give those kind of exceptions  
11 to religious believers. And --

12           CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14           Justice -- Justice Breyer?

15           JUSTICE BREYER: I have two reactions.  
16 One, of course, is that the point of the  
17 religious clauses is to try to work out  
18 accommodations because they can be some of the  
19 most difficult to resolve disputes and they can  
20 substitute a kind of hostility for harmony.

21           So, from that point of view, I really  
22 repeat, if there's anything you want to add, the  
23 Chief Justice's question. I don't understand  
24 why this can't be worked out. But, if it can't,  
25 from what's been said so far, it seems to me the

1 proper legal box to work it out in is whether  
2 this particular rule is arbitrary, capricious,  
3 or an abuse of discretion.

4 After all, the religious groups say  
5 they have a real basis in objection. And the  
6 other say: Look, these are women who will be  
7 hurt, who have no religious objection. And,  
8 moreover, the insurance companies will be hurt  
9 because it will raise costs. And, moreover, the  
10 taxpayers who pay for it will be hurt.

11 Now you have interests on both sides.  
12 The question is whether this is a reasonable  
13 effort to accommodate. And that, I think, is  
14 arbitrary, capricious, abuse of discretion, but  
15 that is the one thing that isn't argued before  
16 us in these briefs or in this appeal.

17 So what do I do?

18 MR. CLEMENT: So, Justice Breyer, I  
19 think you're absolutely right that that is not  
20 the nature of the objection that's been raised  
21 by the other side. They haven't said, for  
22 example, yeah, this exemption might be okay if  
23 it were limited to the Little Sisters and others  
24 who object to the accommodation, but they went  
25 too far.

1                   That is not the nature of the  
2 challenge. They haven't brought that kind of  
3 substantive APA challenge. So I think what you  
4 would do is you would reject the challenge that  
5 is before you, because I don't think any of the  
6 grounds that have been litigated before you are  
7 valid, and you could make clear in your opinion  
8 that if somebody down the road has an objection  
9 to the scope of the exemption, say they work for  
10 a for-profit company and with respect to that  
11 for-profit company, they're not getting their  
12 services and they think that's because the APA  
13 -- because the -- the rule here is too broad,  
14 that would be a separate APA challenge that I  
15 don't think rejecting the challenge here would  
16 foreclose.

17                   So I think that's the -- the path  
18 forward.

19                   CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21                   Justice Alito?

22                   JUSTICE ALITO: Mr. Clement, I  
23 certainly agree with my colleagues that our best  
24 tradition in this area is to accommodate diverse  
25 religious views. So I want to ask you about the

1 interests that are involved here.

2 On the one hand, what would the Little  
3 Sisters feel compelled to do if they lose this  
4 case and they are told you must provide this  
5 coverage through your plan? And, on the other  
6 side, I want to ask you, since this has now been  
7 going on for some period of time, whether you  
8 have identified the number of women who work for  
9 the Little Sisters who want contraceptives, but  
10 they can't get them through their employer's  
11 plan or through the insurance plan of a family  
12 member or a government program and can't easily  
13 afford to purchase them on their own.

14 MR. CLEMENT: So, Justice Alito, on  
15 both questions, first, the Little Sisters  
16 believe that complying with this mandate is  
17 simply inconsistent with their faith. And so,  
18 if this burden is imposed on them, they will  
19 have to reconfigure their operations. One of  
20 the anomalies here is that the government, from  
21 the beginning, has exempted religious orders,  
22 but they refuse, if they -- if they stick to  
23 their knitting and do only religious services,  
24 but if, on the other hand, they -- they do what  
25 the Little Sisters do, which is go out and

1 provide care for the elderly, poor, and for the  
2 sick, then they don't qualify for the exemption.

3 And so maybe the Little Sisters will  
4 have to reconfigure their operations, but  
5 there's just nothing that they can do that will  
6 allow them to come into compliance with the  
7 plan, and so -- with -- with the government's  
8 mandate.

9 And -- and I think that's what  
10 Congress had in mind with RFRA, because they  
11 understood that when people are faced with a  
12 government obligation that their religion  
13 absolutely forbids them to comply with, that's  
14 something that the government should try to  
15 avoid at all costs.

16 To answer the second part of your  
17 question just quickly, the Little Sisters have  
18 never complied with the mandate throughout this  
19 entire litigation, and so what that means is two  
20 things.

21 One, no one will lose their coverage  
22 that they have now if the Little Sisters are  
23 given this exemption, and, two, throughout that  
24 process, we have not heard of even a single  
25 employee who views this as a problem, presumably



1 because many of these employees, even if they're  
2 not Catholic, because the Little Sisters hires  
3 on a non-discriminatory basis, but they've come  
4 to work for the Little Sisters understanding the  
5 mission of the Little Sisters, and I don't think  
6 they would really want to put the Little Sisters  
7 in the position that you alluded to of maybe  
8 having to stop serving the elderly poor.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Mr. Clement,  
13 assume that the government tomorrow passes a law  
14 that says every insurance company must reimburse  
15 every policyholder they have for COVID-19  
16 vaccine. They say nothing about whether it's in  
17 their policy or not. If someone has a religious  
18 objection, they say they can be exempted from  
19 it. But you, insurance carrier, must pay for  
20 anyone who submits, who has a policy with you,  
21 for anyone who submits for a COVID-19 vaccine.

22 Can the employer object to pay through  
23 that policy?

24 MR. CLEMENT: So, Justice Sotomayor, I  
25 think the answer is no, and if -- I'd like to

1 explain kind of how I would work through that.

2 JUSTICE SOTOMAYOR: Mr. Clement,  
3 exactly the same rules that apply here to  
4 contraceptives, meaning all they have to do is  
5 tell the government that they object to vaccines  
6 -- and, by the way, we both know there are  
7 religious objectors who object to vaccines --  
8 and that they don't want their plans to be  
9 complicit in providing vaccines.

10 MR. CLEMENT: So, Justice Sotomayor --

11 JUSTICE SOTOMAYOR: Provided for --

12 MR. CLEMENT: -- I -- I wanted to  
13 elaborate on my answer and kind of explain, you  
14 know, how the hypo is a little bit different  
15 than the way things work. As I understood the  
16 hypo, the government obligation was imposed  
17 directly on the insurers, so I don't think the  
18 employers could object at all.

19 Now I think an employer -- an insurer  
20 that has a sincere religious objection to  
21 providing the coverage, say like the Christian  
22 Brothers, they might be able to object. I don't  
23 think they actually have that objection, to be  
24 clear, but they could in theory. If they  
25 objected to providing compensation for that

1 coverage, they could object. And I think it  
2 probably would be a substantial burden. In the  
3 context of COVID-19, I think that you might  
4 strike the -- the government might be able to  
5 carry its burden under strict scrutiny, but I  
6 think that would be the way to think through  
7 that hypothetical.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Kagan?

11 JUSTICE KAGAN: Good morning,  
12 Mr. Clement. I'd like to start by asking you  
13 about a -- a response that you gave to the Chief  
14 Justice, because you said there that you had no  
15 objection to objecting, the Little Sisters  
16 didn't, and I've taken that to be your  
17 consistent position throughout the litigation.

18 But what if an employer did have an  
19 objection to objecting? In other words, had an  
20 even more, say, extended view of complicity so  
21 that he thought that -- the employer thought  
22 that extending itself made him complicit because  
23 it led to a sort of chain reaction whereby the  
24 employees were eventually going to get coverage.

25 What -- what would you say about that?

1           MR. CLEMENT: So, Justice Kagan, I  
2 think it would depend on additional factors like  
3 whether the government enforced its requirement  
4 of an objection with the same massive penalties  
5 we have here.

6           If they did, then I think the way to  
7 think about that particular sort of objection  
8 would be that if that objection is sort of -- if  
9 an objection is forbidden by the person's  
10 religious beliefs, sincerely held, and the  
11 government enforces with a massive penalty, then  
12 there is a substantial burden.

13           And then the analysis would shift to  
14 the compelling interest, least restrictive  
15 alternatives test. In most cases, I think the  
16 government would be able to submit or sustain  
17 its requirement of at least having an objection.  
18 The irony is this might be the one context where  
19 they can't, because they've never required the  
20 churches, the religious auxiliaries, the other  
21 orders that stick to their knitting and engage  
22 in only religious activities, they've never had  
23 to even object. They're just --

24           JUSTICE KAGAN: Right, but that should  
25 suggest --

1 MR. CLEMENT: -- exempt --

2 JUSTICE KAGAN: -- that even in that  
3 case where objecting to objecting is the only  
4 thing, that you would think that the employer  
5 would prevail?

6 MR. CLEMENT: I think the employer --

7 JUSTICE KAGAN: You know, I guess that  
8 --

9 MR. CLEMENT: -- would have a --

10 JUSTICE KAGAN: -- would make all the  
11 same arguments, right, you know, that women can  
12 get contraceptive coverage elsewhere and there  
13 are other exemptions to this scheme, so the  
14 employer would prevail even if it were only  
15 objecting to objecting?

16 MR. CLEMENT: I think that's right,  
17 Justice Kagan, but just to be clear, I think  
18 that has to do with the way that the government  
19 has operated this whole program. Since they've  
20 never required the churches or the other  
21 religious orders or the grandfathered plans to  
22 object, I think that puts the government in a  
23 difficult position in this hypothetical  
24 situation.

25 But assuming that at the outset --

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Gorsuch?

4 MR. CLEMENT: -- no one has ever made  
5 that objection.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8 JUSTICE GORSUCH: Mr. Clement, a major  
9 feature of the opinion below and the arguments  
10 in the briefs at least was that the government  
11 had failed to comply with the procedural  
12 requirements of the APA.

13 And I -- I -- I -- I didn't want that  
14 major component of the case to go unaddressed  
15 today. I want to give you a chance to respond  
16 to that.

17 MR. CLEMENT: Thank you, Justice  
18 Gorsuch. I think, on the APA, there are a  
19 number of different ways to come out differently  
20 from the way that the Third Circuit analyzed  
21 this issue. We obviously think the Third  
22 Circuit erred.

23 In some ways, the most straightforward  
24 way is to just find that the good cause standard  
25 or exception for the original IFR here was

1 satisfied. And we think that the good cause  
2 standard here was satisfied for the same reasons  
3 that the government had good cause, for example,  
4 to make immediately effective moderations in  
5 light of this Court's order in the Wheaton  
6 College case.

7           And we think that, likewise, the -- my  
8 friends on the other side say there was good  
9 cause for the original exemptions and the like  
10 and the mandate because they needed to make  
11 changes quickly for additional -- for the  
12 upcoming plan years.

13           And we think all of those same things  
14 apply here. And then, of course, another way to  
15 rule against the Third Circuit on that issue is  
16 to recognize that there's specific statutory  
17 authority here to promulgate IFRs for benefit  
18 plans, which probably recognizes the fact that  
19 these benefit plans will often have to be  
20 changed in ways that will affect sort of future  
21 plan years, and so changes made -- need to be  
22 made very quickly.

23           But the third way, of course, to  
24 reject the reasoning of the Third Circuit is --  
25 is to say, even if there was some sort of

1 original sin in the promulgation of the IFRs, it  
2 was cured by the notice and comment that  
3 actually took place subsequently.

4 And one feature of the Third Circuit  
5 opinion that I just want to draw attention to is  
6 the Third Circuit never faulted the government  
7 for responding to the thousands and thousands  
8 and thousands of comments it got in any kind of  
9 insufficient way.

10 So the government, I think, on this  
11 record has complied with all of the textual  
12 requirements of the APA procedurally, and yet  
13 they've still been found to -- to be out of  
14 compliance based on an atextual test.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice -- Justice Kavanaugh?

18 JUSTICE KAVANAUGH: Thank you, Mr.  
19 Chief Justice.

20 Good morning, Mr. Clement. I want to  
21 follow up on Justice Kagan's question about the  
22 objection to objecting. I had thought that  
23 would be litigated, thought out under the least  
24 restrictive alternative prong of RFRA and the  
25 government might be able to argue that there's



1 no less restrictive alternative available in  
2 that situation.

3           You might disagree and try to identify  
4 a less restrictive alternative, but I had  
5 thought that's where it would be litigated. Is  
6 that correct or not?

7           MR. CLEMENT: I -- I think, Justice  
8 Kavanaugh, that's exactly where it would be  
9 litigated. And I think why -- again, we're  
10 talking about a hypothetical that doesn't arise  
11 for my clients, but I think where I might come  
12 out differently from you on the least  
13 restrictive alternatives analysis is to point to  
14 the fact that the church exemption and the  
15 grandfathered plans exemption have always worked  
16 quite well without requiring there to be any  
17 kind of formal objection registered.

18           And so it does seem to me that those  
19 are essentially other ways that the government  
20 has been able to comply. And then I guess the  
21 other question, of course, is if we're in the  
22 realm where the government itself has through  
23 something like the final rule alleviated the  
24 obligation even to have an objection, I'm not  
25 even sure this question we're talking about

1 would arise.

2 JUSTICE KAVANAUGH: Right. No, I --  
3 I -- I understand that, and that's -- that's  
4 what I expected your argument to be in that  
5 context.

6 Second question just to follow up on  
7 Justice Breyer on the arbitrary and capricious  
8 test, the exercise of discretion must be  
9 reasonable, what are the limits that you would  
10 identify to the government's discretion, if any?

11 MR. CLEMENT: So I would identify all  
12 of the limits that General Francisco alluded to  
13 and one more. One thing I think is a little bit  
14 artificial here about the position of the other  
15 side is they want you to look at the ACA and  
16 RFRA as if they're siloed and they don't  
17 interface, but, of course, they do.

18 And there's an obligation on HRSA to  
19 take into account RFRA as well as its authority  
20 under the ACA. And so it seems to me that an  
21 exemption for religion -- that of the kind  
22 that's in the final rule here, I think, is going  
23 to be insulated from an arbitrary and capricious  
24 challenge in a way that exempting, say, just  
25 large employers or employers incorporated in

1 Delaware.

2 I think all of those would be  
3 irrational and -- and arbitrary and capricious  
4 under the -- under the APA. But, here, the --  
5 the agency has complied with RFRA consistent  
6 with its authority under the ACA, which seems to  
7 give it a particularly strong case for its  
8 actions here to not have been arbitrary and  
9 capricious.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Fischer.

13 ORAL ARGUMENT OF MICHAEL J. FISCHER

14 ON BEHALF OF THE RESPONDENTS

15 MR. FISCHER: Mr. Chief Justice, and  
16 may it please the Court:

17 The moral and religious exemption  
18 rules rest on three sweeping assertions of  
19 agency authority. First, the agencies twist a  
20 narrow delegation that allows the Health  
21 Resources and Services Administration to decide  
22 which preventive services insurers must cover  
23 under the Women's Health Amendment into a grant  
24 of authority so broad it allows them to permit  
25 virtually any employer or college to opt out of

1 providing contraceptive coverage entirely,  
2 including for reasons as amorphous as vaguely  
3 designed moral beliefs.

4 Second, the agencies claim that RFRA,  
5 a statute that limits government action,  
6 affirmatively authorizes them to permit  
7 employers to deny women their rights to  
8 contraceptive coverage even in the absence of a  
9 RFRA violation in the first place.

10 As many of the questions have  
11 reflected, the prior rules struck a balance that  
12 permitted objecting employers to opt out but  
13 still allowed their female employees to receive  
14 contraceptive coverage. These rules, however,  
15 exempt such employers altogether even if they  
16 had no objection to this prior accommodation.

17 And these rules also allow for the  
18 first time publicly traded companies to claim  
19 the same exemption, despite the agencies'  
20 admission that no such company has ever  
21 requested one.

22 And, third, the agencies claim they  
23 were justified in issuing these sweeping new  
24 rules without first putting out a proposal and  
25 seeking comment, as the APA requires. They

1 advance an interpretation of the APA that is  
2 inconsistent with its text and purpose and that  
3 would effectively write the requirement of  
4 pre-promulgation notice and comment out of the  
5 statute.

6 Now, in addition, the agencies also  
7 challenge to -- challenge the scope of the  
8 preliminary relief entered below and, in so  
9 doing, they advance the novel claim that federal  
10 courts simply lack the authority to invalidate  
11 unlawful agency regulations in their entirety.

12 In isolation, the agency's arguments  
13 are incorrect. But taken together, stretching a  
14 narrow delegation well beyond its limits,  
15 finding broad affirmative rulemaking authority  
16 in a statute that doesn't provide it, bypass --  
17 bypassing prior notice and comment where the APA  
18 requires it, and seeking to vastly curtail the  
19 Court's authority to invalidate unlawful agency  
20 action, taken together, these arguments make  
21 apparent that what this case is about is not the  
22 resolution of a long-running dispute but rather  
23 the assertion of vast agency authority at the  
24 expense of Congress and the courts.

25 CHIEF JUSTICE ROBERTS: Thank you,

1       counsel. I have a question. There was a  
2       hypothetical in one of the amicus briefs that I  
3       thought was pretty good and I haven't heard an  
4       answer to yet, and that's -- say you have a  
5       couple going out to dinner, and they tell the  
6       baby-sitter, well, the children have to do  
7       chores, you know, you decide which ones.

8                I think everybody would agree that --  
9       that that includes the authority to say not only  
10      that we have to do the dishes and sweep the  
11      floors, but, Tommy, you sweep -- you -- you do  
12      the dishes and Sally, you sweep the floors, and  
13      not the assumption that each child would have to  
14      do each chore.

15              And, here, your argument about the ACA  
16      statute is that it gives HHS the authority to  
17      specify which services have to be provided, but  
18      does not give them the authority to make  
19      determinations about who has to provide which,  
20      but, instead, imply that every employer has to  
21      provide everyone. So what do you --

22              MR. FISCHER: Yes, Your Honor.

23              CHIEF JUSTICE ROBERTS: What -- what's  
24      your answer do that?

25              MR. FISCHER: Mr. Chief Justice, our

1 answer is that that is the only reasonable  
2 reading of the text of the Women's Health  
3 Amendments. The who must provide is answered by  
4 the beginning of 13(a). It says, "A group  
5 health plan and health insurance issuer offering  
6 individual health insurance coverage shall at a  
7 minimum provide coverage for, and shall not  
8 impose any cost-sharing requirements for."

9 Now, "shall" is mandatory, as this  
10 Court recently acknowledged again in the -- the  
11 cost-sharing case recently, dealing with the  
12 ACA. Below that language, there are four  
13 separate categories of services to be covered.  
14 Nobody disputes that the first three are  
15 mandatory, that all covered insurers must cover  
16 the first three.

17 The only dispute comes in the fourth  
18 one, which is, with respect to women, such  
19 additional preventive care as provided for in  
20 comprehensive guidelines.

21 And in the hypothetical that -- that  
22 Your Honor referred to, which I believe is in  
23 the -- the Texas amicus brief, they modified the  
24 language of this requirement by taking out the  
25 "such additional" language. That language is

1 key because it answers the question of what  
2 services are insurers to provide.

3 Well, with respect to women, it is  
4 such additional preventive care and screenings  
5 as provided for in comprehensive guidelines. So  
6 "as provided for" clearly modifies "such  
7 additional care and screenings." It doesn't go  
8 beyond that in --

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 JUSTICE THOMAS: General, just a brief  
13 question that's a little different.

14 I'm interested in your view on  
15 standing. And with your argument for standing  
16 in this case, that challenge a regulation, the  
17 government's regulation that might impact your  
18 costs, the state's costs, seems to suggest that  
19 any time there's a rule change at the federal  
20 level that affects you, you would have standing.  
21 And then that, again, following this case to its  
22 remedy of a nationwide injunction, would suggest  
23 that in these sorts of cases, a nationwide  
24 injunction would be in -- appropriate.

25 I would like you to have -- to comment



1 on that. It seems to be somewhat problematic in  
2 -- to suggest that there's a problem with both  
3 standing and nationwide injunctions, if they are  
4 this easy to -- to get.

5 MR. FISCHER: Thank you, Your Honor.  
6 And to -- to be clear, we have to satisfy  
7 standing requirements just as any other litigant  
8 has to show standing. And we did in this case  
9 by showing that the rules would impose costs on  
10 Pennsylvania and New Jersey. And that is in  
11 some way sort of the most basic type of injury  
12 that all parties, not just states, allege in  
13 showing harm.

14 Now, my friend on the other side  
15 referred to Massachusetts versus EPA, which  
16 certainly recognizes that states have a special  
17 place in our constitutional order. However, we  
18 still demonstrated that based on the  
19 government's own estimates of the number of  
20 women affected, these rules would impose direct  
21 costs on us.

22 And with respect to the question about  
23 nationwide injunctions, first of all, I want to  
24 stress that we're here in a preliminary posture.  
25 We were granted a preliminary injunction. We've

1 moved for summary judgment. The government  
2 requested that the case be stayed. The district  
3 court granted that. We could have the case  
4 wrapped up now.

5 The analysis with respect to  
6 nationwide injunctions is different, we submit,  
7 in the context of an APA challenge, where the  
8 ultimate remedy available is that the Court  
9 shall set aside a rule that is invalid.

10 If courts sort of were able to slice  
11 and dice rules and say, well, agency, you can  
12 enforce this with this person but it stays in  
13 effect as to everybody else, the result really  
14 would be regulatory chaos.

15 So where a challenge is brought under  
16 the APA to a regulation, taking account of that  
17 final remedy that's available, granting  
18 preliminary relief on a nationwide basis is  
19 appropriate.

20 It was also appropriate here because  
21 the district court found in a very thorough,  
22 very well-reasoned discussion that acknowledged  
23 Your Honor's concerns, as expressed about  
24 nationwide injunctions, discussed this idea that  
25 -- that there's significant cross-border harms

1 here that simply couldn't be addressed in a more  
2 narrow injunction.

3 JUSTICE THOMAS: Thank --

4 MR. FISCHER: And --

5 JUSTICE THOMAS: -- you. The -- it  
6 would seem, though, that -- that ultimately you  
7 could get, if that's the argument, nationwide  
8 injunctions with virtually any regulatory  
9 change.

10 MR. FISCHER: I don't believe that's  
11 the case, Your Honor. I would -- I would think  
12 that there are many regulations that are not  
13 going to impose costs on the states directly or  
14 indirectly.

15 And -- and certainly in a nationwide  
16 injunction context, I think it would still  
17 depend on the specifics of the rule being  
18 challenged and the nature of the harm that the  
19 challengers are alleging.

20 And -- and as I again indicated, the  
21 -- the district court really took account of all  
22 these concerns, talked about the need for  
23 percolation among the circuit courts, and -- and  
24 acknowledged, frankly, in -- in plain terms,  
25 that fashioning preliminary relief is an

1 imperfect science, that district courts try  
2 their best and they're reviewed for the abuse of  
3 discretion standard. I think that --

4 JUSTICE THOMAS: I didn't want to cut  
5 you off --

6 MR. FISCHER: -- is what --

7 JUSTICE THOMAS: -- but one -- I do  
8 want to get in one question about when the APA  
9 was adopted, do you think there were such things  
10 as nationwide injunctions, or were they handled  
11 on a case-by-case basis?

12 MR. FISCHER: Your Honor, I believe  
13 there is a history, certainly, of relief going  
14 beyond -- beyond the parties to a case. Whether  
15 they were classified as nationwide injunctions  
16 is difficult to say. And I think this is dealt  
17 with very well by the various amicus briefs.

18 But I also think that in passing the  
19 APA, Congress provided a very specific remedy.  
20 And as Your Honor stated in the -- the travel  
21 ban case, you know, authority for nationwide  
22 injunction has to come from either the  
23 Constitution or a statute.

24 Well, the APA here is the authority  
25 that we would allege -- we argued that the --

1 the basis for this injunction comes from. It  
2 says, as a final remedy, court shall set aside  
3 improper agency action, and that it permits  
4 agencies or permits courts to stay agency  
5 action, as this Court did a few years ago in the  
6 Clean Power Plan case. It permits a better  
7 injunctions. It permits them to postpone the  
8 effective dates.

9 And many of those remedies suggest  
10 going -- relief going to the rule in its  
11 entirety.

12 CHIEF JUSTICE ROBERTS: Thank, you --

13 MR. FISCHER: So I think here the text  
14 --

15 CHIEF JUSTICE ROBERTS: -- counsel.  
16 Justice Ginsburg?

17 JUSTICE GINSBURG: Let's see. So I --  
18 I just remain troubled by the complete  
19 abandonment of the Congress's interest in saving  
20 women costs. This is going to impose costs on  
21 the women that Congress wanted to provide free  
22 coverage for. I've never seen any of our prior  
23 decisions suggest that those interests could be  
24 thrown to the wind and the women could be left  
25 to their own resources to -- to cover

1 themselves, to get policies that would cover  
2 them for these contraceptive services at -- at  
3 -- at a premium to them.

4 MR. FISCHER: Your Honor, that is  
5 absolutely correct. And I think it's important  
6 to remember just how broad these rules are.

7 First of all, there are two rules that  
8 we're dealing with. One that we haven't talked  
9 about as much is the moral rule, that simply  
10 says an employer with a moral objection to  
11 providing contraception can be completely  
12 exempted.

13 The district court noted this could in  
14 theory allow an employer that objects to women  
15 in the workforce, for instance, to remove itself  
16 from providing contraception.

17 And with respect to the religious  
18 exemption, you know, there are certain key  
19 features that really show how broad this is.  
20 First of all, it eliminates the accommodation as  
21 a mandatory requirement. So even for, for  
22 instance, all the various plaintiffs in the  
23 Hobby Lobby cases that this Court recognized  
24 were perfectly fine with the accommodation, they  
25 are now exempt.

1           And I disagree with my friend's  
2 conclusion that they're unlikely to take  
3 advantage of the exemption, because these are  
4 entities that object to contraception. They  
5 made that clear. They were simply fine with  
6 complying with the accommodation. So I think  
7 it's likely that many of them will, in fact, opt  
8 out.

9           In addition, as I mentioned, this  
10 applies --

11           JUSTICE GINSBURG: Where is the --

12           MR. FISCHER: -- to publicly traded --

13           JUSTICE GINSBURG: Where is the moral  
14 -- where would the moral exemption come from?  
15 That doesn't seem to come from --

16           MR. FISCHER: So it does not -- they  
17 do not rely on RFRA for the moral exemption.  
18 They claim authority under 300gg-13, under the  
19 ACA's women's health amendment, for the moral  
20 exemption. And as we have argued and as -- as  
21 the courts below found, that statute simply  
22 doesn't support the conclusion that they can  
23 create whatever exceptions they want.

24           If their reading were correct, there  
25 would be no limits to what HRSA could do, other

1 than arbitrary and capricious review. HRSA  
2 could decide to eliminate the no cost sharing  
3 requirement, it could decide that, you know,  
4 certain services really don't need to be covered  
5 at all, even if they're in -- you know, even if  
6 they're widely recognized as preventive  
7 services. It could exempt whole classes of  
8 employers for reasons having nothing to do with  
9 the reasons here.

10 So our reading, we submit, is a far  
11 better one. And, frankly, we have to remember  
12 we're talking about the Health Resources and  
13 Services Administration. It's really unlikely  
14 that Congress would have delegated to that  
15 organization authority to create broad religious  
16 and moral objections -- exemptions, given that  
17 they have no expertise in that area.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Breyer?

20 JUSTICE BREYER: Two related  
21 questions. Thank you.

22 One is, as you know, the statute says  
23 that they have to provide additional preventive  
24 care as provided for in comprehensive guidelines  
25 supported by the Health Resources and Services



1 Administration.

2 Well, read that and you have at least  
3 some ambiguity. So my question is really, given  
4 your argument and given what may well be  
5 ambiguity at least in the statute, why didn't  
6 you make the argument, it's arbitrary,  
7 capricious, abuse of discretion, you're saying  
8 it's too broad, you're saying it'll hurt women,  
9 you -- you -- you know, you -- you point out  
10 that it'll raise healthcare costs and a whole  
11 lot of things.

12 And -- and the government has things  
13 to reply to that. But why isn't that the proper  
14 legal box? That's my first -- my related  
15 question is, if you were to let a district court  
16 get at that issue, that district judge might try  
17 to reach an accommodation by saying: Have you  
18 read -- which you have -- the brief of Phyllis  
19 Borzi and Daniel Maguire? And it points out  
20 that the prior rule didn't pirate -- did not  
21 pirate the health plan of Little Sisters.

22 And if they think it did, and you  
23 think it didn't, well, my goodness, you should  
24 be able to monkey with it in some way so that  
25 everybody reluctantly agrees that it's okay.

1 All right. Now those are advantages I  
2 see of going back and making a different kind of  
3 argument, put all your arguments in a different  
4 legal box. So why not?

5 MR. FISCHER: So, Your Honor, I -- I  
6 don't disagree with any of that. I do think the  
7 rules are additionally arbitrary and capricious  
8 and we did raise that argument in our complaint.

9 We also argued, I think correctly,  
10 that they exceeded the statutory authority cited  
11 by the agencies, did not support the rules. And  
12 since we won on that basis, there was no need to  
13 go any further and say, well, if they had the  
14 authority, did they exercise it correctly?

15 I disagree also with Your Honor's  
16 suggestion that the language is ambiguous. I  
17 think, as we explained, the use of the word  
18 supported in context reflects similar language  
19 in paragraph 3 immediately preceding. And all  
20 that refers to is the fact that the guidelines  
21 in paragraph 3, which are the -- the bright  
22 horizons guidelines, were funded by HRSA but  
23 actually conducted or produced by the American  
24 Academy of Pediatrics. So HRSA supports those  
25 guidelines by contracting, by funding. And I

1 think Congress borrowed that language.

2           And the as-provided for, as I -- as I  
3 indicated, refers back to such additional  
4 preventive care and screenings. So we don't  
5 think there's an argument as to ambiguity.

6           Now, as to whether there could be a  
7 resolution, I certainly would hope that there  
8 is. As the Borzi and Maguire brief explains,  
9 the government, the prior administration, we do  
10 not believe that these plans are being hijacked.

11           And to be clear, we brought this suit  
12 against the federal government. We have not  
13 challenged the Little Sisters. We have not  
14 challenged their Colorado injunction. They and  
15 all the other parties to Zubik are protected by  
16 injunctions and do not have to comply with the  
17 contraceptive mandate no matter what happens in  
18 this case.

19           But could there be a resolution to the  
20 narrow set of cases out there? I would hope so.  
21 But the fact that there was this ongoing dispute  
22 doesn't justify jettisoning the accommodation  
23 for everyone else, bringing in publicly traded  
24 companies, certainly doesn't justify the moral  
25 rule. And those, I think, are the -- the most

1 egregious examples of simply how overbroad this  
2 -- these two regulations are.

3 JUSTICE BREYER: Thank you. Thank you  
4 very much.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: Mr. Fischer, you say  
7 that the Affordable Care Act does not allow the  
8 government to make any exceptions to the  
9 contraceptive mandate to accommodate religious  
10 objections.

11 Now, if that's true, the original  
12 exemption for churches, their auxiliaries, and  
13 conventions with churches, which was established  
14 by the prior administration, violated the  
15 Affordable Care Act. But you come back and say  
16 that was required to comply with a First  
17 Amendment church autonomy doctrine.

18 And what I'd like you to explain is  
19 your understanding of the scope of that  
20 doctrine. And let's take as an example a woman  
21 who works for a church in an entirely secular  
22 capacity. Let's say a woman who cleans church  
23 property.

24 Under your understanding of this  
25 religious autonomy doctrine, does that mean that

1 that employment relationship is entirely off  
2 limits for any federal regulation, for example,  
3 or any state regulation?

4 For example, from Title VII's  
5 prohibition of discrimination on the basis of  
6 race, Age Discrimination in Employment Act, the  
7 Americans with Disabilities Act, Equal Pay Act,  
8 the Fair Labor Standards Act?

9 MR. FISCHER: Your Honor, we would not  
10 agree with that conclusion that individuals in  
11 entirely secular positions are exempt from all  
12 those requirements under the church autonomy  
13 doctrine.

14 What we have argued is that --

15 JUSTICE ALITO: I don't mean to  
16 interrupt you, but you do say that it would  
17 violate the First Amendment to require the  
18 church to provide contraceptive coverage for  
19 that woman?

20 MR. FISCHER: Your Honor, what we are  
21 arguing is that there is a basis in the First  
22 Amendment for exempting churches in some way,  
23 that certainly there is a core of church  
24 autonomy that -- that agencies in implementing  
25 federal law must protect.

1 JUSTICE ALITO: Well, in some way as  
2 to the provision of insurance coverage for  
3 contraceptives. I took your argument to mean  
4 the First Amendment would prohibit the  
5 government from requiring a church to provide  
6 that.

7 And what I wanted to --

8 MR. FISCHER: Certainly, as to -- as  
9 to ministers, certainly.

10 JUSTICE ALITO: Pardon me? Do I -- I  
11 hadn't finished what I wanted --

12 MR. FISCHER: As to ministers,  
13 certainly. That -- that is correct, but -- but  
14 I would add we are not arguing necessarily that  
15 the prior administration got everything right in  
16 the details. There have been arguments on both  
17 sides that perhaps the churches have to --

18 JUSTICE ALITO: Mr. Fischer, I'm not  
19 talking about the details. I'm talking about  
20 exempting a secular employee of a church from  
21 receiving the contraceptive coverage. Your  
22 argument has to be that's required by the First  
23 Amendment or you have to say -- maybe this is  
24 your position -- that the original church  
25 exemption is contrary to the Affordable Care

1 Act?

2 MR. FISCHER: That is not our  
3 position. We think that the original church  
4 exemption was supported by the afford --  
5 supported by the First Amendment. We don't  
6 agree it was supported by the Affordable Care  
7 Act. We -- we think the prior administration  
8 was wrong in --

9 JUSTICE ALITO: All right. I really  
10 would appreciate your answering my question. If  
11 the First Amendment requires an exemption for  
12 the provision of contraceptive coverage, why  
13 would it not also require an exemption for all  
14 of the other regulations that I mentioned?

15 MR. FISCHER: Certainly, in a core --  
16 in the core ministerial functions, it does. We  
17 don't dispute that.

18 I think the question is whether --

19 JUSTICE ALITO: I'm not talking about  
20 a minister. I'm talking about a woman who  
21 cleans the church.

22 MR. FISCHER: Exactly. And our  
23 position there is I don't think it's necessarily  
24 the case that the first -- that the First  
25 Amendment required that the church exemption be

1 as broad as it was. However, given the  
2 realities of insurance and the need for ERISA  
3 plans to be consistent, the prior administration  
4 made a decision that they were going to apply to  
5 all employees of churches.

6 We don't take issue with that, even if  
7 that went a little bit broader than what the  
8 First Amendment requires, which is protecting  
9 individuals in ministerial functions and the  
10 church's autonomy with respect to those  
11 individuals.

12 That's a far cry from what they did in  
13 these rules, which goes well beyond the core of  
14 the protection that the First Amendment requires  
15 or that RFRA requires.

16 JUSTICE ALITO: If I could ask one  
17 other question. Explain to me why the Third  
18 Circuit's analysis of the question of  
19 substantial burden is not squarely inconsistent  
20 with our reasoning in Hobby Lobby.

21 MR. FISCHER: So the --

22 JUSTICE ALITO: Hobby Lobby held that  
23 if a person sincerely believes that it is  
24 immoral to perform an act that has the effect of  
25 enabling another person to commit an immoral



1 act, a federal court does not have the right to  
2 say that this person is wrong on the question of  
3 moral complicity. That's precisely the  
4 situation here.

5 Reading the Third Circuit's discussion  
6 of the substantial burden question, I wondered  
7 whether they had read that part of the Hobby  
8 Lobby decision.

9 MR. FISCHER: So, in Hobby Lobby, the  
10 question was essentially the degree of  
11 attenuation between providing coverage and  
12 utilizing the contraceptive care. And the --  
13 the Court rightly concluded that the fact that  
14 others were involved didn't really matter.  
15 Here, the Court said essentially that where an  
16 objection -- it depends on the operation of the  
17 law. And here it is -- it is the legal  
18 requirements that are shifting the burden to the  
19 insurer or the third-party administrator.

20 Courts still have a duty to inquire as  
21 to what the law actually requires of the  
22 objector. And the -- the nature of the  
23 objection was that filling out this form made  
24 them complicit in providing contraception. They  
25 do not object to the idea of filling out a form

1 stating their objection by itself. They  
2 objected to what flowed from the form.

3 And the Third Circuit, consistent with  
4 the seven other circuits that reached the same  
5 conclusion prior to Zubik, concluded that in  
6 that situation a court can look at what's  
7 actually being required of the objector. And --  
8 and this finds support in the Bowen v. Roy case,  
9 where notwithstanding the fact that applying for  
10 a food stamps would have triggered the  
11 government utilizing the daughter's Social  
12 Security number, which was the nature of the  
13 objection, HHS still said that -- you know,  
14 essentially, that does not raise a cognizable  
15 First Amendment claim --

16 JUSTICE ALITO: But you're -- you're  
17 arguing that --

18 MR. FISCHER: -- because it was --

19 JUSTICE ALITO: -- the Little Sisters  
20 didn't understand what the law required them to  
21 do or didn't understand the significance of what  
22 the law required them to do?

23 MR. FISCHER: Not at all. We are  
24 simply arguing that they have not --

25 JUSTICE ALITO: Which of those stances

1 is it? They didn't understand what the law  
2 required them to do?

3 MR. FISCHER: No, we're not saying  
4 that at all. We're saying that the harm they've  
5 alleged is not a legally cognizable, substantial  
6 burden. The courts do not --

7 JUSTICE ALITO: If they're wrong in  
8 their -- their understanding of moral complicity  
9 is wrong?

10 MR. FISCHER: No, we're not saying  
11 that the all. We do not challenge their view of  
12 moral complicity. What we do challenge is  
13 whether that -- what they are saying rises to  
14 the level of a substantial burden, which is  
15 ultimately a legal test. And Congress included  
16 the word "substantial" for a reason, because it  
17 recognized that not every law that had an effect  
18 on religion necessarily should be subject to  
19 strict scrutiny.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: Counsel, going  
24 back to the Chief Justice's example a second,  
25 clearly we understand that there's inherent

1 power to share the chores between the two  
2 children, correct? However --

3 MR. FISCHER: Yes, I think --

4 JUSTICE SOTOMAYOR: -- if the  
5 baby-sitter decides, Ahh, I just disagree with  
6 the mom, I'm not going to have either of them do  
7 anything, would that be contrary to the  
8 instructions that the law gave?

9 MR. FISCHER: That -- that certainly  
10 would be, Your Honor.

11 JUSTICE SOTOMAYOR: All right.

12 MR. FISCHER: I would agree with that.

13 JUSTICE SOTOMAYOR: So let's talk  
14 about this situation. Here the government's  
15 exemption is not merely saying to the Little  
16 Sisters you don't have to provide coverage,  
17 whether it's you or a church or anyone else, but  
18 we're not going to -- we're also saying that  
19 your insurance policies, independent actors, who  
20 have a legal obligation to pay for the  
21 contraceptives that employees use, that they  
22 don't have to do it either.

23 You're objecting to that second part  
24 of the exemption, aren't you?

25 MR. FISCHER: So that is correct as a

1 general matter. I just want to make one  
2 specific point, which is that -- Your Honor  
3 mentioned the Little Sisters -- their -- their  
4 insurance carrier stated that it will not  
5 provide contraception no matter what. Or their  
6 -- their health plan. And because it's a church  
7 plan exempt from ERISA, the government cannot  
8 enforce it. So even if they didn't have their  
9 injunction, their employees would not receive  
10 contraception. We're not trying to challenge  
11 that at all. We're not trying require --

12 JUSTICE SOTOMAYOR: Oh, oh --

13 MR. FISCHER: -- them to provide  
14 coverage --

15 JUSTICE SOTOMAYOR: That -- that's an  
16 interesting point. I didn't know that. So the  
17 Little Sisters' claim is actually moot here? So  
18 --

19 MR. FISCHER: Well, that is why we  
20 argued -- that's why we argued that they lacked  
21 appellate standing, and the Third Circuit  
22 agreed.

23 JUSTICE SOTOMAYOR: They -- they lack  
24 appellate standing because they don't have to  
25 provide it; neither does their insurance

1 carrier, correct?

2 MR. FISCHER: That's correct, yes.

3 And as --

4 JUSTICE SOTOMAYOR: And that --

5 MR. FISCHER: -- a result of the  
6 injunction.

7 JUSTICE SOTOMAYOR: -- has nothing --  
8 that has nothing to do with this case, as I  
9 understood it -- well, no, that has to do with  
10 the church exemption. Church plans do not have  
11 to provide -- under the law, they're not ERISA  
12 plans, so they don't have to provide coverage in  
13 this situation, correct?

14 MR. FISCHER: So where -- where the  
15 employer utilizes the accommodation, the  
16 government lacks a means of enforcing the  
17 requirements against church plans because they  
18 are exempt from ERISA. So if an employer  
19 utilizes the accommodation, the church plan can  
20 decide whether or not it wants to comply and  
21 there's no penalty if the government -- if -- if  
22 it chooses not to comply.

23 JUSTICE SOTOMAYOR: All right. So  
24 tell me which part of the government's exemption  
25 you are actually challenging?

1           MR. FISCHER: So we -- we think the  
2 government's claims of authority for the  
3 exemptions were incorrect, but we -- we think  
4 that the most egregious parts of the rules are,  
5 first of all, the moral rule, which I -- I think  
6 is important to stress, that that's half of  
7 what's at issue in this case; the elimination of  
8 the accommodation as a mandatory requirement,  
9 including for companies that had no problem with  
10 it, the inclusion of publicly traded companies  
11 and large universities.

12           And then two other points. One, to  
13 claim this exemption, companies do not have to  
14 provide any specific notice to their employer --  
15 employees. They can simply, you know, include  
16 the fact that contraception isn't covered in all  
17 of the other ERISA notices that they mail out.  
18 They don't have to say specifically we have this  
19 objection. We are not providing coverage.

20           And in addition they don't have to  
21 show substantial burden. They don't have to  
22 show anything to the government saying we  
23 believe we're burdened for these reasons. We  
24 have these objections. So there's really no way  
25 to evaluate, for instance, whether a company is

1 sincere in the nature of its objections.

2 That is part of the RFRA analysis.

3 And, you know, as this Court acknowledged  
4 recently in -- in *O Centro*, RFRA creates a  
5 mechanism for courts to enforce this. We don't  
6 dispute that agencies should take RFRA into  
7 account, but ultimately RFRA creates a judicial  
8 remedy, and courts -- and agencies should be  
9 looking to guidance from the courts and ensuring  
10 that when they do exempt people, there's at  
11 least a meaningful opportunity for judicial  
12 review of their decisions.

13 JUSTICE SOTOMAYOR: So if --

14 CHIEF JUSTICE ROBERTS: Thank you --

15 JUSTICE SOTOMAYOR: Sorry.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor, proceed.

18 JUSTICE SOTOMAYOR: I guess the  
19 question I have is the exemption as structured  
20 permits the insurance carriers not to provide  
21 coverage?

22 MR. FISCHER: Yes. There -- there's  
23 no requirement that objecting entities utilize  
24 the accommodation. It's completely optional.  
25 So they can simply claim the exemption and tell



1 their insurer don't provide contraception. And  
2 no entity has an obligation to -- to provide it  
3 at that point.

4 JUSTICE SOTOMAYOR: And that is --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel -- thank you, counsel.

7 Justice Kagan?

8 JUSTICE KAGAN: Good morning,  
9 Mr. Fischer. I'd like to ask you --

10 MR. FISCHER: Good morning, Your  
11 Honor.

12 JUSTICE KAGAN: -- a few questions  
13 about what many people will think of as the most  
14 boring part of your argument, which is APA  
15 notice and comment, because I'm not quite sure I  
16 understand the argument, so let me just start by  
17 saying -- what you're doing is you're  
18 hypothesizing there should be some significant  
19 difference between what happens and how a court  
20 reviews what happens, when an agency works off  
21 of an interim final rule as opposed to when an  
22 agency works off a notice of proposed  
23 rule-making.

24 And I -- I guess the question is why  
25 should there be any real difference between

1 those two?

2 MR. FISCHER: So, Your Honor, I want  
3 to stress one aspect of our argument, which is  
4 that our argument hinges on whether the first  
5 rule, the 2017 rules were themselves  
6 procedurally valid. If they were valid, then  
7 the 2018 rules are procedurally valid as well.

8 JUSTICE KAGAN: Okay. So that's --

9 MR. FISCHER: So --

10 JUSTICE KAGAN: -- but let me just  
11 make sure I understand it.

12 Suppose that there were good cause for  
13 issuing an interim final rule. At that point,  
14 if the agency then says, well, that's nice, we  
15 had good cause for doing this because we had an  
16 emergency but now we're going to notice and  
17 comment, at that point should the notice and  
18 comment be treated the exact same way as it  
19 would be if there were no good cause rule at  
20 all?

21 MR. FISCHER: Your Honor, if the  
22 agency has good cause to issue the rule with  
23 immediate effect, then the provisions of  
24 Section 553 simply don't apply.

25 JUSTICE KAGAN: No, that's not right.

1 MR. FISCHER: I'm actually not --

2 JUSTICE KAGAN: I don't think that's  
3 right because a good cause can give you cause to  
4 act right now, but it -- it doesn't give you  
5 cause to act for 20 years without notice and  
6 comment. So an agency could say we have good  
7 cause to act right now, but now we understand  
8 that we have to do a notice and comment  
9 proceeding because now, you know, there's  
10 something in place and we can take our time and  
11 do it.

12 MR. FISCHER: That's certainly true,  
13 Your Honor. I apologize. If the agency wishes  
14 to -- to modify the rule or take further  
15 comment, then, yes, it can go through the 553  
16 process if -- if the good cause that -- that  
17 prompted the immediately effective rule no  
18 longer applies. So that -- that's correct.

19 JUSTICE KAGAN: Okay. So, I mean, it  
20 not only can but, in many cases, it has to. The  
21 --

22 MR. FISCHER: That's right.

23 JUSTICE KAGAN: -- good cause doesn't  
24 last forever. So in that kind of case, do you  
25 think that the standard is heightened when a

1 court looks at -- at -- at -- at -- at this and  
2 says did they do notice and comment correctly?

3 MR. FISCHER: No, Your Honor. In that  
4 -- in that case, the standard would be the same  
5 as it would be in any other APA case.

6 JUSTICE KAGAN: Okay. Because --  
7 because I thought that your reasons for why the  
8 standard should be heightened would apply even  
9 when there was -- when the -- when the interim  
10 rule was valid, because, as I understand your  
11 reasons for thinking that the standard should be  
12 heightened, it's that the agency has kind of  
13 gotten psychologically used to the rule and --  
14 and may be less willing to make departures from  
15 it.

16 But -- but that applies even when the  
17 good cause rule is valid, doesn't it?

18 MR. FISCHER: It -- it does. And I  
19 think that reflects a balance that Congress  
20 struck, recognizing that, in most cases, prior  
21 notice and comment is the most effective means  
22 of getting to a more informed decision.

23 In some cases, that interest is  
24 trumped by the need for an immediately effective  
25 rule, so the benefits of notice and comment have

1 to sort of give way a little bit so that the  
2 agency could act quickly.

3 And -- but, here, where we believe  
4 the -- the good cause standard wasn't satisfied,  
5 the APA plainly requires the agency seek comment  
6 on a proposal --

7 JUSTICE KAGAN: And so --

8 MR. FISCHER: -- and comment.

9 JUSTICE KAGAN: Okay. So I'm right in  
10 saying that this really does depend on whether  
11 the good cause requirement was satisfied in the  
12 first place?

13 MR. FISCHER: Yes, absolutely.

14 JUSTICE KAGAN: Okay. And then, as a  
15 remedy, you say we should just go back to the  
16 original rule, but the original rule was done in  
17 the exact same procedural manner.

18 So how would that make anybody any  
19 happier?

20 MR. FISCHER: So there are a number of  
21 rules that have been implemented dealing with  
22 this. A number of them went through full notice  
23 and comment. In one case, there was an advance  
24 notice of prior rulemaking, of proposed  
25 rulemaking, an NPRM.

1           In two cases since the women's health  
2 guidelines were issued and one time before, the  
3 prior administration did immediately go to an  
4 immediately effective rule. They argued good  
5 cause. In one instance, the D.C. Circuit upheld  
6 that finding. In another instance, it was  
7 never, as far as we know, ruled on by any court.

8           We think the arguments made were much  
9 stronger in those cases and, regardless, to be  
10 litigating this question nine years after the  
11 fact, simply doesn't make a lot of sense. What  
12 we're saying is that the good cause claims made  
13 here by these agencies in these rules have to be  
14 evaluated on their own.

15           And if -- if what the agency said here  
16 satisfies good cause, then agencies could always  
17 find good cause. And the result would be -- and  
18 I think this is the most important part of our  
19 argument -- if what the agency did here is okay,  
20 every agency could say we're just going to issue  
21 a rule, make it effective immediately, claim  
22 good cause, and then take comment.

23           And even if they lose on the good  
24 cause finding, they don't have to worry for long  
25 because, as soon as they've taken comment, they

1 issued a new rule, then the rule will be  
2 immediately effective, and it will be as if  
3 there was no violation in the first place.

4 And it's reasonable to think that  
5 agencies will -- will take their cues and will  
6 say, okay, well, we're going to take the risk  
7 and we're going to do that because, frankly,  
8 there really isn't much of a risk in the end if  
9 everything will be fine once they've taken  
10 comment and issued a new final rule.

11 JUSTICE KAGAN: Thank you, counsel.

12 MR. FISCHER: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice --  
14 Justice Gorsuch?

15 JUSTICE GORSUCH: Good morning,  
16 counsel. I'd like to turn back to where Justice  
17 Breyer left off on the substantive challenge,  
18 and I suppose the argument on the other side  
19 goes something like one could understand an  
20 arbitrary and capricious argument about the  
21 overbreadth, arguable overbreadth of these  
22 exemptions, but the challenge before us is  
23 whether the -- the agencies exceeded its  
24 statutory authority.

25 And looking at the statute here, it's

1 about as excessive a delegation of -- of  
2 statutory authority -- not excessive --  
3 expansive a delegation of statutory authority as  
4 one might -- might imagine. It talks about  
5 comprehensive regulations.

6 And when -- when an agency's given  
7 that kind of leeway, we normally think of  
8 comprehensive to include limitations,  
9 conditions, exceptions, as well as a general  
10 rule because there's no rule that doesn't have  
11 an exception.

12 And then we look at the original  
13 accommodation, and at least some suggest that --  
14 that that original accommodation to churches was  
15 consistent with that statutory delegation.

16 And then you throw RFRA in the mix,  
17 and that's normally thought to trump any and  
18 inform any other existing statutory obligation.  
19 So what -- what do we do about that? I -- I  
20 think that's what Justice Breyer was trying to  
21 get at, and I guess I'm curious for a little  
22 further thought on it.

23 MR. FISCHER: So, yes, Your Honor, I  
24 think if -- if the delegation is read the way  
25 the agencies would like to read it, then it is



1 remarkably broad and I think would, frankly,  
2 raise non-delegation problems.

3 I think the delegation is cabined by  
4 the fact that -- two things. First of all, I  
5 think the structure of the section makes clear  
6 that Items 1, 2, 3, 4 are all simply categories  
7 of services.

8 Even though, in identifying those  
9 services, it refers to comprehensive guidelines,  
10 what begins that paragraph 4 is, with respect to  
11 women, "such additional preventive care and  
12 screenings." And then the second point is that  
13 to the extent there might be --

14 JUSTICE GORSUCH: Counsel, I -- I'm  
15 sorry to interrupt there, but -- and I -- I just  
16 want to understand how you read that because it  
17 does -- I -- I -- I heard that a few times, such  
18 additional preventive care and screenings, but  
19 then ... as provided for in these comprehensive  
20 guidelines.

21 Can you explain how those two  
22 interact, I guess?

23 MR. FISCHER: Yes, so -- so "such,"  
24 which -- which typically means, you know, in the  
25 manner to be indicated --

1 JUSTICE GORSUCH: Yes.

2 MR. FISCHER: -- refers or sort of  
3 sets the stage for "as provided for." So, if  
4 you're asking the question, well, what  
5 additional preventive care and screenings must  
6 be provided, the answer is such -- so in the  
7 manner to be provided as provided for in the  
8 comprehensive guidelines.

9 So all of that is answering the  
10 question of what additional preventive care and  
11 screenings are to be provided. If you read "as  
12 provided for" as sort of applying to the entire  
13 section, sort of going back into subsection (a)  
14 and modifying those requirements, then you're  
15 sort of unmooring it from the way it's used in  
16 paragraph 4 and leaving "such additional  
17 preventive care and screenings" without any  
18 further explanation.

19 And -- and in addition, I think the  
20 other three categories provide some guidance and  
21 I think reasonably have in the agency's  
22 authority. The other three paragraphs all refer  
23 to guidelines that already existed.

24 So HRSA had the ability to look to  
25 those. And those are all -- you know, there are

1 no religious exemptions in those guidelines or  
2 no broad exemptions. They're simply lists of  
3 services, lists of vaccinations that are  
4 required, other things.

5 So where Congress lists several items,  
6 I think it's reasonable to conclude that  
7 Congress envisions that the agencies will  
8 operate or will exercise their discretion sort  
9 of in a similar manner in each instance. And I  
10 think that's what was assumed here.

11 JUSTICE GORSUCH: But is -- is -- is  
12 -- is not part of that a function -- I think the  
13 argument is, A, we can't specify which  
14 preventative care and screenings will be  
15 provided or under what conditions? And  
16 that any -- any provision of care is necessarily  
17 going to be conditioned and subject to all sorts  
18 of exceptions. That's just the way the world  
19 works. There's no rule without an exception.

20 And -- and -- and toward that end,  
21 again, just drawing your attention back to  
22 the -- the accommodation for churches, many  
23 people have argued, and -- and, certainly, the  
24 prior administration did, that that was  
25 consistent with the statute, not -- not

1 something imposed upon it from outside by the  
2 First Amendment.

3 What do you say about that?

4 MR. FISCHER: Your Honor, so we  
5 disagree with the prior administration's  
6 conclusion that this section authorized the  
7 prior church exemption --

8 JUSTICE GORSUCH: I understand that.

9 MR. FISCHER: -- and challenged and --

10 JUSTICE GORSUCH: Let -- let -- let's  
11 suppose, though -- let's suppose, though, that  
12 that was correct. And -- and -- and -- and I  
13 understand that's not your position.

14 What would follow from that for this  
15 case?

16 MR. FISCHER: So, if -- if that were  
17 correct, then the agencies would have some  
18 discretion to create exemptions. And then I  
19 think we would be in a position where we would  
20 evaluate these rules under arbitrary and  
21 capricious review.

22 And I think there are several problems  
23 with them, but we would not be in a world where  
24 the question of the agency's authority in the  
25 abstract was at issue.

1 JUSTICE GORSUCH: Okay. And if I  
2 could turn quickly to one other point entirely,  
3 the substantial burden argument that Justice  
4 Alito raised.

5 And I -- I -- I understand your  
6 position. I -- I -- I thought that there would  
7 be no substantial burden imposed by a  
8 requirement that they pay for contraceptive  
9 care. Is -- is that correct?

10 MR. FISCHER: No, Your Honor, not at  
11 all. I mean, that -- you know, if an employer  
12 objected to that requirement, there -- there  
13 would certainly be a -- a substantial burden.

14 JUSTICE GORSUCH: Okay. All right, I  
15 misunderstood that colloquy then. Thank you  
16 very much.

17 MR. FISCHER: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Thank you, Chief  
21 Justice.

22 And good morning, Mr. Fischer.

23 MR. FISCHER: Good morning, Your  
24 Honor.

25 JUSTICE KAVANAUGH: I want to see your

1 reaction to this way to think about the case,  
2 maybe picking up on Justice Breyer's question  
3 and -- and Justice Gorsuch's first question.

4 As a number of my colleagues have  
5 pointed out, Justices Ginsburg, Sotomayor,  
6 Alito, Breyer and others, there are very strong  
7 interests on both sides here, which is what  
8 makes the case difficult, obviously. There's  
9 religious liberty for the Little Sisters of the  
10 Poor and others. There's the interest in  
11 ensuring women's access to healthcare and  
12 preventive services, which is also a critical  
13 interest. So the question becomes who decides?  
14 Who decides how to balance those interests? And  
15 the answer of course is Congress in the first  
16 interest -- instance.

17 And -- and RFRA provides a back stop  
18 on that, but even beyond RFRA, in the ACA,  
19 Congress has delegated to the agency. Okay, so  
20 we have a delegation from Congress to the  
21 agency, and -- which is common, and sometimes  
22 Congress delegates narrowly with narrow  
23 language, and sometimes it delegates broadly.

24 And the rule of thumb I've always  
25 thought is courts should construe narrow

1 language narrowly and broad language broadly.  
2 And this seems to be broad language, as Justice  
3 Thomas noted. And when you have that kind of  
4 broad language, you're going to get different  
5 executive branches who are going to exercise  
6 their discretion within that broad language and  
7 balance the interests differently.

8           And then the question is what's the  
9 judicial role? And it seems to me the judicial  
10 role is not to put limits on the agency  
11 discretion that Congress has not put there.

12           And then we're left, I think, as  
13 Justice Breyer said, with -- and -- and I want  
14 to get your reaction to this -- with the  
15 arbitrary and capricious test at the end of the  
16 day and just making sure that in exercising its  
17 discretion and balancing those interests, the  
18 agency didn't go outside the limits of  
19 reasonableness, which is a very deferential  
20 test. It's not abdication, but it's  
21 deferential.

22           Why isn't that the way to look at the  
23 case, and if we get down to the bottom line of  
24 is this reasonable, not maybe everyone's  
25 preferred choice but at least within the bounds

1 of reasonable, why isn't this a reasonable way  
2 to balance it? So just get your reaction to all  
3 that.

4 MR. FISCHER: Thank you, Your Honor.

5 So on -- on that last point, the  
6 reason this is not a reasonable way of balancing  
7 is that the rules go well beyond when RFRA even  
8 arguably would require. As we mentioned, for  
9 instance, companies that have no objection to  
10 accommodation are now wholly exempt.

11 And however you interpret the Women's  
12 Health Amendment and -- and we -- we strenuously  
13 believe that it imposed a -- a mandatory duty on  
14 insurers to provide this coverage, but certainly  
15 it would defeat the purpose of that amendment to  
16 say that women should not receive coverage if  
17 they work for an employer that objects to  
18 contraception generally but was willing to  
19 participate in the accommodation process or to  
20 note its objections so that they could still  
21 receive coverage.

22 We also think there's -- that the  
23 exemption for publicly traded companies, in the  
24 absence of any evidence that any publicly traded  
25 companies requested one, goes well beyond. We



1 think the moral rule is so untethered from any  
2 reasonable standard that -- that it's certainly  
3 arbitrary and capricious.

4           And we also think that -- that if  
5 we're in the RFRA world, that the way this  
6 exemption -- the way these exemptions are  
7 structured would really defeat any opportunity  
8 for scrutiny as to whether an employer claiming  
9 an objection has a sincere religious belief,  
10 whether it is substantially burdened, and would  
11 essentially remove the courts from the process  
12 entirely.

13           And -- and I think one point to -- to  
14 remember is we are dealing with the interplay  
15 between two statutes. And as -- as the Court  
16 acknowledged in *Epic Systems v. Lewis*,  
17 ultimately deciding how two statutes work  
18 together, where the boundaries are, is a  
19 question for courts. That can't be left just to  
20 the agencies.

21           And we submit the Women's Health  
22 Amendment impose a mandatory obligation. It  
23 says "shall at a minimum provide coverage for"  
24 "and shall not impose any cost-sharing  
25 requirements for." And, nevertheless, what is

1 clear from the -- the floor debate on that is  
2 that Congress envisioned that it would require  
3 coverage for preventive services, that family  
4 planning would be included.

5 Now, you also have extremely important  
6 interests in RFRA, and in the nature of the  
7 religious objections that are being claimed.  
8 Ultimately, courts need to resolve these  
9 questions. And the agencies have essentially  
10 taken these decisions out of the -- the realm of  
11 the judiciary and decided for themselves. And  
12 that -- that simply isn't how RFRA works, and  
13 under Epic, it's not how these questions should  
14 be resolved.

15 JUSTICE KAVANAUGH: Thank you very  
16 much, Mr. Fischer.

17 MR. FISCHER: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 General Francisco, you have a minute  
21 for rebuttal.

22 REBUTTAL ARGUMENT OF GEN. NOEL J. FRANCISCO  
23 ON BEHALF OF THE PETITIONERS IN 19-454

24 GENERAL FRANCISCO: Thank you,  
25 Mr. Chief Justice.

1           Although RFRA both authorizes and  
2 requires these exemptions, at the very least  
3 they're justified under Section 13(a)(4). That,  
4 after all, was the very basis for the church  
5 exemption back in 2011. It's also the basis for  
6 the effective exemption that applies to  
7 self-insured church plans as illustrated with  
8 respect to the colloquy between my friend and  
9 Justice Sotomayor. And if you accept  
10 Respondents' interpretation of the  
11 accommodation, it's also the basis for the  
12 accommodation itself.

13           Under my friend's position, they seem  
14 to concede that all of these other provisions  
15 violate Section 13(a)(4). After all, the church  
16 exemption is not limited to ministers, and the  
17 church exemption applies to churches that don't  
18 even object to contraception.

19           But regardless of how you resolve the  
20 issue, the rules here bring a decade-long  
21 dispute to a durable end, and they should be  
22 upheld.

23           CHIEF JUSTICE ROBERTS: Thank you,  
24 General.

25           The case is submitted.

1                   (Whereupon, at 11:40 a.m., the case  
2 was submitted.  
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## Official - Subject to Final Review

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