NOTES AND COMMENTS

DON'T FORGET ABOUT YOUR SISTERS: THE WOMEN'S EQUALITY IMPLICATIONS OF THE *LITTLE SISTERS OF THE POOR* DECISION

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INTRODUCTION

Imagine being a woman in your late twenties, diagnosed with endometriosis, a painful disorder in which the tissue that lines the inside of the uterus instead grows outside of it.[2] Your doctor prescribed you birth control pills to help manage your symptoms.[3] But when you go to the pharmacy to pick up your prescription, the pharmacist tells you that the birth control pills are not covered under your employer provided healthcare plan. Later, you call your health insurance and learn the reason the pills are not covered is because your employer decided that birth control is against its moral beliefs and have refused coverage.[4]

This scenario is precisely what happened to Gina Berry Crider of Murray, Kentucky.[5] Gina was diagnosed with endometriosis and her doctor prescribed her birth control pills in order to slow the progression of her prognosis.[6] Gina went to fill her prescription and was surprised when her health insurance did not cover the cost. She went to speak with the Human Resources department at Briggs and

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1. Throughout the course of this note, women's health issues will be discussed from the perspective of cisgender women. It is not intended to exclude or minimize the perspective of transgender and nonbinary people on the same issues.

2. *Endometriosis*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/endometriosis/symptoms-causes/syc-20354656#:~:text=Endometriosis (last visited Feb. 5, 2022).

3. Birth control is frequently prescribed by physicians to treat the symptoms of endometriosis. Receiving a regular dose of hormones everyday by taking birth control pills helps alleviate symptoms more so than other treatment options. *Managing Endometriosis with the Pill*, PANDIA HEALTH, https://www.pandiahealth.com/resources/managing-endometriosis-with-the-pill/ (last visited Feb. 5, 2022).

4. Kim Greene, *After a Supreme Court Ruling, Yes, Your Boss Can Now Take Away Your Birth Control*, COURIER J., https://www.courier-journal.com/story/opinion/2020/07/31/supreme-court-ruling-lets-your-boss-take-away-your-birth-control/5522878002/ (last visited Feb. 5, 2022).

5. *Id.*

6. *Id.*

Stratton factory, her employer, where they confirmed that contraception was not covered under the company's health insurance plan.[7] Gina tried to explain that she wasn't using birth control for contraceptive purposes, but to help ease the painful symptoms that come with endometriosis.[8] The Human Resources representative responded to her with, "It still serves that other purpose though, doesn't it?"[9]

Gina later found out that although her employer's health insurance did not provide coverage for birth control pills, it did provide complete coverage for Viagra.[10] Viagra is a drug taken to increase blood flow to the penis and remedy erectile disfunction in men.[11] After this discovery, Gina felt upset that her employer decided that her prescribed treatment plan did not amount to health care worthy of health insurance coverage, but male employees had the opportunity to get Viagra at no out of pocket cost.[12] Gina eventually had to undergo a hysterectomy after challenges with bowel obstruction and infertility caused by her endometriosis, all of which might have been delayed or avoided if she had affordable access to the treatment plan her doctor prescribed.[13]

Unfortunately, after the recent United States Supreme Court decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (*Little Sisters of the Poor*), women are going to increasingly find themselves in similar situations to Gina.[14] In *Little Sisters of the Poor*, the Court greatly expanded the already vast exemptions available to employers to avoid providing coverage for contraceptive services under their group health insurance.[15] Now, employers, including for-profit corporations, are able to invoke "religious" or "moral" exemptions to avoid providing female employees equal and affordable access to preventative health services.[16] The Court should have limited the decision to reflect what the exemptions were originally intended for – churches and similar auxiliaries – and maintained the self-certification accommodation process for other entities that opposed coverage for contraception based on religious views. This decision explicitly shows that working women's health is minimally valued in comparison to an entity's preferred monetary expenses or religious and moral beliefs.[17] The Court is diligent to remind its readers that corporations and similar organizations

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Viagra (sildenafil)*, MED. NEWS TODAY, https://www.medicalnewstoday.com/articles/viagra (last visited Feb. 5, 2022).

12. Green, *supra* note 3.

13. *Id.*

14. *See generally* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020) [hereinafter *Little Sisters of the Poor*].

15. *Id.* at 2385.

16. *Id.* at 2386.

17. Working women are directly impacted by the *Little Sisters of the Poor* decision because they are employees who rely on their employers' health insurance to cover contraceptive services costs in order to maintain their place in the workforce. Without contraceptive care coverage, many working women will not be able to remain employed due to unwanted pregnancies, unbearable periods, or other major health concerns.

are legal "people" with limited rights. This may be a true and convoluted legal reality, but it is incumbent on the Court to remember that women are real "people" with constitutional rights, as well.

Women have a constitutional right to reproductive freedom, which has been established in the United States since the Court's decisions in *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Roe v. Wade* (1973), and *Planned Parenthood v. Casey* (1992).[18] This constitutional right includes access to contraceptives, regardless of whether a woman is married or has any particular religious beliefs. It is essential to women's equality in the United States. Congress intended to enforce women's individual rights when it enacted the Women's Health Amendment in the Affordable Care Act of 2010 by giving women an equal opportunity to access contraceptives at an affordable price.[19] The decision of *Little Sisters of the Poor* invades upon these rights. Now, women are forced to abandon their medically prescribed treatments because their employer refuses to provide them with adequate insurance coverage and the out-of-pocket costs are too high. Not to worry though, employers won't make their male employees pay out of pocket for their Viagra.

This article will begin with the discussion of a brief history of the Affordable Care Act of 2010 (ACA) and the Women's Health Amendment, otherwise referred to as the Employer or Contraceptive Mandate. Then it will discuss the response of both non-profit and corporate entities to the Employer Mandate and the history of the case law leading up to the decision in *Little Sisters of the Poor*. Afterwards, the article will take a deep dive into the rights the Supreme Court ignored in its *Little Sisters of the Poor* decision – women's sexual equality, individual liberties in accessing contraception, and women's autonomy and control over their own reproductive health. This article will also explore the effects of lack of access to preventative health services, such as contraception, on women's health and how this decision will be a catalyst leading to negative effects on women who were initially, but no longer, protected by the mandate.

I. THE AFFORDABLE CARE ACT AND THE AFTERMATH OF THE WOMEN'S HEALTH AMENDMENT

A. Introduction

Section I begins with a brief background of the ACA and the goals the Obama Administration had when adopting it. An understanding of the ACA and the motivation behind it is important to this article because it was one of the first instances in the United States history of federal civil rights law prohibiting sex discrimination in federally funded health programs.[20] This section will then discuss

18. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

19. 42 U.S.C. § 300gg-13(a)(4).

20. Jamila Taylor, *How Women Would Be Hurt by ACA Repeal and Defunding of Planned Parenthood*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/issues/women/news/2

the details of the Women's Health provision in the ACA. The Women's Health provision led to the *Little Sisters of the Poor* case as well as other challenges by similar entities. It is a part of the ACA that caused a significant amount of controversy amongst employers in the United States. After the initial discussion of the Women's Health Provision, this section will address what occurred once entities began to oppose the provision and how the government attempted to compromise between women's rights and the religious rights of employers.

B. The Affordable Care Act of 2010

The ACA is a product of the Obama Administration.[21] It was enacted on March 23, 2010, with intentions of providing access to affordable, equal health insurance coverage for Americans.[22] The Obama Administration's major goals were to improve the quality of health care and insurance, regulate the insurance industry, and to reduce health care spending in the United States.[23] As a result of the Act, those with preexisting conditions, children, and employees of small businesses have greater opportunities to obtain health care coverage.[24]

The shared responsibility provisions, otherwise known as the Employer Mandate, were major provisions of the ACA that significantly broadened the scope of employer-provided health insurance coverage. These provisions of the Act require organizations that employ more than fifty people to "offer minimum essential coverage that is 'affordable' and that provides 'minimum value' to their full-time employees (and their dependents) . . . ."[25] If an organization that meets the requirements of the provisions fails to comply with the mandate, it faces potential employer shared responsibility fees from the IRS.[26] This requirement does not apply to employers with fewer than fifty employees, nor "grandfathered health plans" which includes health care plans that existed prior to the enactment of the ACA and that were not thereafter changed or amended.[27] The Employer Mandate caused controversy among large employers who did not want to face penalties from the IRS for not offering the required minimal coverage to all of its employees.

C. The Addition of the Women's Health Provision and the Aftermath

The ACA was able to reduce the cost of health insurance and increase coverage for preventative care for women by eliminating the cost sharing

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017/01/18/296705/how-women-would-be-hurt-by-aca-repeal-and-defunding-of-planned-parenthood/ (last visited Feb. 5, 2022).

21. Nicole Galan, *The Affordable Care Act: An Update*, MED. NEWS TODAY, https://www.medicalnewstoday.com/articles/247287 (last visited Feb. 5, 2022).

22. 42 U.S.C. § 300gg-13.

23. Galan, *supra* note 23.

24. *Id.*

25. *Employer Shared Responsibility Provisions*, IRS, https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions (last visited Feb. 5, 2022).

26. *Id.*

27. 42 U.S.C. §§ 18011(a); 45 C.F.R. § 147.140(g).

components of traditional health insurance.[28] Cost sharing is the "share of cost covered by your insurance that you pay out of your own pocket."[29] Examples of cost sharing include "deductibles, coinsurance, and copayments . . . ."[30] Women's preventative care was not originally included in the draft of the Act, which led Senator Barbara Mikulski to introduce the Women's Health Amendment.[31] The Amendment was "designed 'to promote equality in women's access to healthcare,' countering gender-based discrimination and disparities in such access."[32] The Amendment is codified in the Affordable Care Act today.[33]

The Women's Health Amendment requires that group health plans and health insurance providers must provide coverage for preventative care for women without cost sharing. Importantly, the Amendment gives the Health Resources and Services Administration (HRSA) the authority to determine what preventative care services are included under the provision.[34] The HRSA partnered with the Institute of Medicine to determine "what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women."[35] HRSA stated that "[p]reventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services . . . ."[36]

In 2011, the HRSA released the "Women's Preventive Services Guidelines" which resulted in women gaining access to contraceptive services, annual wellness visits, counseling, and screenings for cancer, as well as other services free of charge under their employer's health insurance coverage.[37] Subsequently, employers began to object to providing contraceptive care for their full-time female employees. A majority of the objecting employers were religious entities that did not believe in contraceptive use and felt as if their religious rights were being violated by having to provide that coverage to their employees through their health insurance plans.[38]

In an attempt to address these employers' concerns with religious liberty, the HRSA created a four-part test to determine whether an employer met the criteria to exempt it from providing contraceptive services coverage to employees on

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28. 42 U.S.C. § 300gg-13.

29. *Cost Sharing*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/cost-sharing/ (last visited Feb. 5, 2022).

30. *Id.*

31. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 741 (2014) (Ginsburg, J., dissenting); *see also* 155 CONG. REC. 28841 (2009) (statement of Sen. Boxer).

32. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2401 (2020) (Ginsburg, J., dissenting) (quoting Brief for 186 Members of the United States Congress as Amici Curiae Supporting Respondents).

33. 42 U.S.C. § 300gg-13(a)(4).

34. 42 U.S.C. § 300gg-13(a)(1).

35. *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., https://www.hrsa.gov/womens-guidelines/index.html (last visited Feb. 5, 2022).

36. *Id.*

37. *Id.*

38. Group Health Plans and Heath Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

religious grounds.[39] Under the test, "a religious employer is one that: (1) Has the inculcation[40] of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code."[41] Entities included in section 6033(a)(1) and (a)(3)(A)(i) or (iii) include churches and their integrated auxiliaries.[42] This exemption is known as the Church Exemption.[43]

The HRSA created a temporary rule before the Guidelines went into effect that banned the Guidelines from applying to certain religious non-profit entities while it worked on the final rules to better protect their interests.[44] The temporary rule exempted religious non-profits "whose plans have consistently not covered all or the same subset of contraceptive services for religious reasons."[45] This gave non-profit organizations a chance to elect to be covered temporarily until the final rules the HRSA developed were effective.

In 2013, the HRSA finalized the rule that accommodated religious non-profit organizations.[46] This rule clarified and broadened the definition of a religious employer. The rule defined what criteria religious non-profit organizations must meet to be eligible for exemption from providing contraceptive services to their employees. The rule required that the organization "(1)[o]ppos[e] providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections; (2) [be] organized and operat[e] as a nonprofit entity; (3) hol[d] itself out as a religious organization; and (4) self-certif[y] that it satisfies the first three criteria."[47]

The self-certification accommodation process requires that the organization satisfy the first three criteria of the test to "self-certify that it is an eligible organization, provide the issuer with a copy of the self-certification, and satisfy the recordkeeping and inspection requirements of the self-certification standard."[48] Once an insurance issuer receives a self-certification from an organization, it must exclude contraceptive coverage from the group health plan and provide payments to those beneficiaries separately at no cost so long as they remain on the group

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39. *Id.*

40. *Inculcation*, DICTIONARY.COM, https://www.dictionary.com/browse/inculcation (last visited Feb. 5, 2022) (Inculcation is "the act of inculcating, or teaching or influencing persistently and repeatedly so as to implant or instill an idea, theory, attitude, etc.").

41. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

42. *Id.*

43. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2374 (2020).

44. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012).

45. *Little Sisters of the Poor*, 140 S. Ct. at 2374-75 (2020).

46. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873-74 (July 2, 2013).

47. *Id.* at 39,874.

48. *Id.* at 39,878.

health plan.[49] As the insurance issuer provides payments to the beneficiaries, it must assure the eligible organization that it is not issuing money received from premiums the organization has paid to pay the individuals for contraceptive services.[50] Any of the participants or beneficiaries of the group health plan do not have to use contraceptive services and the eligible organization is not held responsible for the insurance issuer's failure to make payments to the beneficiaries of the plan.[51]

The HRSA stated that the self-certification accommodation for religious non-profit organizations aimed to "'protec[t]' religious organizations 'from having to contract, arrange, pay, or refer for [contraceptive] coverage' in a way that was consistent with and did not violate the Religious Freedom Restoration Act of 1993 (RFRA)[.]"[52] The RFRA

> prohibits any agency, department, or official of the United States or any State from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[53]

Although the HRSA thought the rules it adopted were going to strike a balance between providing necessary preventative care services to women and protecting organizations' religious beliefs, many religious employers couldn't bear to have contraceptive services related to their health insurance plans at all, resulting in a number of challenges to the Women's Health Provision.

II. CASE HISTORY LEADING UP TO THE *LITTLE SISTERS OF THE POOR* DECISION

A. Introduction

Section II explores the history of cases that occurred in the years following the enactment of the ACA, the Women's Health provision, and the Employer Mandate. The section begins by looking at the challenges different non-profit organizations and educational institutions brought against the self-certification accommodation process that the government created in an attempt to strike a balance between providing equal, affordable health care for women while recognizing the religious beliefs of certain entities. Non-profit organizations and educational institutions were not alone in their opposition to the self-certification accommodation process and the Employer Mandate. This section will also look at different instances of corporations challenging the process and what the Court's

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2375 (2020).
53. Religious Freedom Restoration Act of 1993, H.R. 1308, 103d Cong. (1993).

response was – the new exemptions. The exemptions the Court approved to apply to different entities with "religious" or "moral" objections to providing contraceptive coverage caused a negative response from a number of states in the United States, which led to the *Little Sisters of the Poor* case.

B. The Self-Certification Accommodation Challenges by Non-Profit Organizations and Educational Institutions

After the self-certification accommodation rule became effective, religious organizations and educational institutions began to challenge the self-certification process arguing that it still violated the RFRA. Many of these arguments failed because the courts found that the self-certification process was the least burdensome method of achieving the government's compelling interest.[54] The Little Sisters of the Poor, like many of the other religious organizations, challenged the self-certification process. The Little Sisters of the Poor argued that the Act violated the RFRA because the government is prohibited from requiring a religious organization to do something against its core beliefs, such as "take actions that directly cause others to provide [contraception], or otherwise appear to participate in the government's delivery scheme[.]"[55] The RFRA requires that a law that substantially burdens the exercise of religion must serve "a compelling governmental interest" and be "the least restrictive means of furthering that compelling governmental interest."[56] The Little Sisters of the Poor did not prevail on this argument in the court of appeals.[57]

Organizations[58] continued to make similar arguments regarding the certification process violating the RFRA, but these arguments also ultimately failed. In *East Texas Baptist University v. Burwell*, several cases were consolidated dealing with religious organizations challenging the Employer Mandate and the self-certification accommodation process and their validity under the RFRA. The Fifth Circuit Court of Appeals explained that "the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties."[59] The court further stated that there is no right to challenge a third party's conduct under the RFRA, and therefore the plaintiffs did not show a substantial burden on their exercise of religion.[60] The organizations argued that their religious beliefs forbade them from providing or facilitating access to contraceptives, and the court found that filling out the

54. *Little Sisters of the Poor*, 140 S. Ct. at 2377; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730-31 (2014).

55. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1167 (10th Cir. 2015).

56. *Little Sisters of the Poor*, 140 S. Ct. at 2376 (citing to §§ 2000bb-1(a)-(b)).

57. *Little Sisters of the Poor Home for the Aged, Denver, Colo.*, 794 F.3d at 1160.

58. Organizations challenging the order included: religious orders like the Little Sisters of the Poor, churches, religious non-profit organizations, religious educational organizations, and for-profit corporations.

59. E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir. 2015) (emphasis in original).

60. *Id.*

certification form required by the self-certification process did not force them to violate their religious beliefs.[61]

Similarly, in *Geneva College v. Secretary of the United States Department of Health and Human Services*, religious educational organizations objected to both the ACA's requirement that contraceptives be provided by their plan to their employees and the self-certification accommodation.[62] These parties argued that the certification process forces them to "facilitate" providing coverage for contraceptives, which violates their religious beliefs and the RFRA.[63] The district court found that Geneva College showed a likelihood of success on their argument that the certification process substantially burdened their religious beliefs.[64] The college argued that filling out the certification form imposed a burden on their religious exercise.[65] They stated that by turning in the form to their insurance company, it makes them "'complicit' in sin."[66] But, the Third Circuit Court of Appeals reversed, finding that the certification form "totally removes the appellees from providing [contraceptive] services," and that the ACA takes into account their religious beliefs and "*accommodates* them."[67] Because of this, the court held that the self-certification accommodation does not substantially burden the organization's religious beliefs.[68]

Traditional religious organizations were not the only ones challenging the self-certification process to be exempt from providing contraceptive services to their employees.[69] Most of the challenges to the process failed in similar ways to the cases discussed above, with a couple exceptions.[70] In *Zubik v. Burwell*, the Supreme Court of the United States refused to answer the RFRA question at hand and remanded cases back down to the Court of Appeals to give the parties a chance to strike a balance between accommodating the organizations religious beliefs while still ensuring women covered by their health insurance had equal and full opportunities to receive contraceptive services.[71]

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61. *Id.* at 461.

62. Geneva Coll. v. Sec'y United States Dep't of Health and Hum. Servs., 778 F.3d 422, 427 (3d Cir. 2015).

63. *Id.*

64. *Id.* at 432.

65. *Id.* at 435.

66. *Id*.

67. *Id.* at 441 (emphasis in original).

68. *Id.* at 442.

69. *See generally* Priests for Life v. United States Dep't of Health and Hum. Servs., 772 F.3d 229 (D.C. Cir. 2014) (Priests for Life is a pro-life and anti-abortion organization); Michigan Cath. and Cath. Fam. Servs. v. Burwell, 755 F.3d 372 (6th Cir. 2014) (Charity groups that provide spiritual, educational, social, and financial services); Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (The University of Notre Dame is an educational institution). *But see* Sharpe Holdings, Inc. v. United States Dep't of Health and Hum. Servs., 801 F.3d 927 (8th Cir. 2015) (Corporations and non-profit corporations); Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015) (Dordt College and Cornerstone University are educational institutions).

70. *See Sharpe Holdings, Inc*., 801 F.3d at 932; *Dordt Coll*., 801 F.3d at 950.

71. Zubik v. Burwell, 136 S. Ct. 1557, 1560-61 (2016).

C. The Self-Certification Accommodation Challenges by Closely Held Corporations

Today, non-profit organizations and educational institutions are not the only entities eligible to be exempt under the self-certification accommodation for religious objections to providing contraceptive services to their employees. Closely held corporations with religious beliefs began to challenge the Employer Mandate under the ACA as violating the RFRA at the same time non-profit organizations were challenging the certification process.[72] The Supreme Court reviewed two cases to decide whether the Employer Mandate, in the context of closely held corporations, violated the RFRA.[73]

In *Burwell v. Hobby Lobby Stores, Inc.,* the plaintiffs were owners of a closely held corporation who believed that the Employer Mandate violated their religious beliefs by requiring them to facilitate the accession of drugs that operate after the point of conception.[74] The Third and Tenth Circuit Courts of Appeals were split about whether or not for-profit corporations could engage in religious exercise under the RFRA.[75] The Department of Health and Human Services argued that for-profit corporations were not "persons" within the meaning of the RFRA because they seek to make a profit for their owners, thus, they could not bring suit.[76] The Court rejected this argument as they had already established that corporations are "persons."[77] Because corporations are persons, the Court held that the RFRA protects the religious liberty of the people who own those corporations and the practices of those corporations.[78]

Ultimately, the Court held that the mandate substantially burdened the corporations' free exercise of religion because corporations felt as if they were complicit to abortion and if they complied with the mandate, but they would face heavy penalties from the IRS if they did not.[79] The Court further held that the mandate was not the least restrictive means the government could use to achieve their interests, and that the self-certification accommodation available to non-profit

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72. *See generally* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc); Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Gilardi v. United States Dep't of Health and Hum. Servs., 733 F.3d 1208 (D.C. Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of United States Dep't of Health and Hum. Servs., 724 F.3d 377 (3d Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013).

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

74. *Id.* at 683.

75. *Id.*

76. *Id.* at 705.

77. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010) (the Court recognized that corporations are considered "people" and have some of the same rights as humans).

78. *Burwell*, 573 U.S. at 707.

79. *Id.* at 691.

organizations could be a less intrusive alternative made available to closely held corporations.[80]

In response to the *Zubik* and *Hobby Lobby Stores* holdings, the HRSA had to strike a balance between religious exercise and full, equal coverage for women's contraceptive services for both non-profit organizations and closely held organizations. In 2017, the HRSA effectuated two rules that lead to the *Little Sisters of the Poor* case. These rules will be discussed in the next section.

D. The Religious and Moral Exemptions

In 2017, President Trump issued Executive Order 13798 titled, "Promoting Free Speech and Religious Liberty."[81] Section One of the order stated that "[i]t shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom."[82] The Trump Administration argued that the Founders' vision for the United States was to protect people's religious rights and freedoms "without undue interference."[83] Section Three of the order demanded that "[t]he Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate . . . ."[84] As a result of President Trump's order, the HRSA created two rules that tried to strike the balance between free exercise of religion for organizations and corporations and free, equal health insurance coverage for women's contraceptive services.[85]

The HRSA's first rule expanded the definition of what a "religious employer" is from the previous definition in the church exemption. A religious employer under this rule included any employer that "'objects . . . based on its sincerely held religious beliefs,' 'to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services.'"[86] This definition includes closely held corporations and publicly traded corporations.[87] The broadened definition resulted in these types of employers no longer having to go through the self-certification accommodation process, although it was still available.[88] This rule is known as the religious exemption.

The second rule the HRSA adopted in 2017 is known as the moral exemption, which applies to non-profit organizations and closely held corporations that are not publicly traded.[89] The moral exemption is for employers that maintain "sincerely

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80. *Id.* at 730-31.

81. Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017).

82. *Id.*

83. *Id.*

84. *Id.*

85. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,806 (Oct. 13, 2017).

86. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2377 (2020) (quoting 82 Fed. Reg. 47,812 (2017)).

87. 82 Fed. Reg. 47,806 (2017).

88. 82 Fed. Reg. 47,806 (2017).

89. *Id.* at 47,793, 47,861-862.

held moral" objections to providing some or all forms of contraceptive services coverage.[90]

Unfortunately, these rules did not strike a balance. Instead, they completely ignored the need for complete coverage for women, and instead provided these organizations with complete autonomy to refuse healthcare coverage for women based on a simple "moral" objection to the healthcare treatment their doctors deemed necessary. President Trump's order significantly broadened the scope of entities exempt from the contraceptive mandate, and now virtually any entity can exempt themselves without providing any notice of their exemption and without any verification process to ensure their exemption is based on a legitimate objection. As a result, employers are able to purposefully evade providing coverage for health care that is specific to women, like birth control pills. This is troublesome because the federal government is privileging entities more than it is valuing the livelihood and well-being of women in the United States.

E. The Response of States to the New Exemptions & the Little Sisters of the Poor *Case*

After the new rules were created, the states of Pennsylvania and New Jersey challenged them in *Pennsylvania v. Trump*.[91] These states were concerned about providing increased funding for their state and local programs to provide contraceptives for low-income women.[92] This was a major concern because the Trump Administration argued that women could simply apply for those programs to secure affordable contraceptive coverage if their employer refused to provide it.[93] These states also argued that the process the departments used in creating the rules violated the Administrative Procedure Act (APA), Title VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and the Establishment Clause of the First Amendment.[94]

The district court recognized that this concern, and the other several arguments the states made regarding the impact lack of coverage will have on women's health, are valid and issued a nationwide preliminary injunction against the new rules.[95] The government appealed and the Little Sisters of the Poor intervened in the case to defend the new religious exemption.[96] The Third Circuit Court of Appeals affirmed the district court's decision.[97] The Third Circuit interpreted the contraceptive mandate to allow the HRSA to decide what shall be covered under the mandate and that it did not have the power to create significant exemptions as it did under the new rules.[98] That court also found that the self-

90. *Id*. 47,793.
91. Pennsylvania v. Trump, 281 F. Supp. 3d 553, 564 (E.D. Pa. 2017).
92. *Id*. at 568.
93. *Id.*
94. *Id*. at 563-64.
95. *Id*. at 583-85.
96. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2379 (2020).
97. *Id.*
98. *Id.*

certification accommodation was not a substantial burden on free exercise of religion and therefore RFRA did not require these exemptions.[99] The Third Circuit was not alone in granting an injunction for the enforcement of the rules. The First and Ninth Circuits also granted injunctions in challenges originating in Massachusetts and California.[100] The Little Sisters of the Poor and the federal government appealed, and the Supreme Court granted certiorari and consolidated the appeals into the case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.[101]

The only issue the Court addressed in this case was "whether the Government created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010[.]"[102] The Court ultimately held that the departments involved in creating the exemption had the power to do so from the regulatory requirements and that it was appropriate for the departments to consider RFRA to create a religious exemption like the new rule.[103]

The Solicitor General argued that: (1) the Affordable Care Act's text "as provided for" gave the HRSA the authority to develop guidelines that took into account sincere conscious-based objections to contraceptive coverage, (2) the RFRA required the departments to create the rules because the self-certification process was a "substantial burden" on employers as stated in *Hobby Lobby*;[104] and (3) the RFRA allows the exemptions "because it applies to 'the implementation' of 'all Federal law.'"[105] The Little Sisters of the Poor argued that the government had a duty to change the rules and not require employer's with religious objections to comply with the self-certification process.[106] They referred to the certification process as "the stingiest of accommodations" and that it is "merely another means of complying with the contraceptive mandate."[107]

The state respondents argued that this was "more than a dispute over 'the appropriate balance between the health and autonomy of women and the religious and moral views of their employers,' because it concerns 'the power of federal agencies to resolve such questions by relying on power never explicitly granted by Congress nor recognized by the courts.'"[108] The states responded to the Government's argument that the text of the ACA grants the HRSA the power to decide "*what* preventive services for women must be covered, not *who* must cover

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99. *Id*. at 2376.

100. Massachusetts v. HHS, 923 F.3d 209, 227 (1st Cir. 2019); California v. HHS, 941 F.3d 410, 429 (9th Cir. 2019).

101. *Little Sisters of the Poor*, 140 S. Ct. at 2379.

102. *Id*. at 2372.

103. *Id*. at 2373, 2383.

104. VICTORIA L. KILLION, CONG. RSCH. SERV., THE FEDERAL CONTRACEPTIVE COVERAGE REQUIREMENT: PAST AND PENDING LEGAL CHALLENGES 19-20 (2020).

105. *Id*. at 20.

106. *Id*. (referencing the Brief for Petitioner at 30-31, Little Sisters of the Poor v. Pennsylvania, No. 19-431 (Mar. 2, 2020)).

107. *Id*. (quoting the Brief for Petitioner at 33, 36, Little Sisters of the Poor v. Pennsylvania, No. 19-431 (Mar. 2, 2020)).

108. *Id*. (quoting the Brief for Respondents at 3, Little Sisters of the Poor, Nos. 19-431, 19-454 (Apr. 1, 2020)).

them."[109] They further argued that because the self-certification accommodation in effect exempted employers from providing contraceptive services, that the RFRA could not give these federal agencies the power to create rules without a violation of the Act itself.[110] The final argument that the respondents made was that "'[n]o party claims that RFRA authorizes the *moral* rule' and its exemption."[111]

The Court responded to the party's argument regarding the plain text of the ACA and what power it granted to the departments in favor of the departments and the Little Sisters of the Poor. The Court concluded "that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions."[112] The Court explained that, "[o]n its face, then, the provision grants sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover. But the statute is completely silent as to *what* those 'comprehensive guidelines' must contain, or how HRSA must go about creating them."[113]

The Court also found that "the contraceptive mandate is capable of violating RFRA."[114] "Under RFRA, the Federal Government 'may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."'"[115] The Court referenced its decision in *Hobby Lobby* in holding that the contraceptive mandate places a substantial burden on an employer's exercise of religion because "if the employer has a sincere religious belief that compliance with the mandate makes it complicit in that conduct, then RFRA requires that the belief be honored."[116] In deciding whether or not the government had a compelling interest within the meaning of RFRA the court ruled that "'[o]nly the gravest abuses, endangering paramount interest' could 'give occasion for [a] permissible limitation' on the free exercise of religion.'"[117] The Court decided to look at whether Congress treated providing contraceptives to women as a compelling interest, and found that it did not, and therefore is not a compelling interest in this case.[118] Finally, the Court concluded that the contraceptive mandate would not be the least restrictive means (even if it served a compelling interest) based on the

109. *Id*. (quoting the Brief for Respondents at 29, Little Sisters of the Poor, Nos. 19-431, 19-454 (Apr. 1, 2020)) (emphasis in original).
110. *Id*.
111. *Id*.
112. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2381 (2020) (emphasis in original).
113. *Id*. at 2380.
114. *Id*. at 2383.
115. *Id*. at 2389 (citing §§ 2000bb 1(a)-(b)).
116. *Id*. (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724-25 (2014)).
117. *Id*. at 2392 (quoting Sherbert v. Verner, 374 U.S. 398 (1963)).
118. *Little Sisters of the Poor*, 140 S. Ct. at 2392-94.

standard in *Hobby Lobby* that the mandate was not the least restrictive means to achieve the goal of providing cost free contraceptives.[119]

In Justice Alito's concurrence, he stated that although the Supreme Court has held that there is a constitutional right to purchase and use contraceptives, it has never held that there is a right to free contraceptives.[120] The concurrence further states that "[a] woman who does not have the benefit of contraceptive coverage under her employer's plan is not the victim of a burden imposed by the rule or her employer. She is simply not the beneficiary of something that federal law does not provide."[121] It is clear by this language that the Court does not see the value in women's equal and affordable access to preventative services. These statements further show that the Court is completely neglecting women's equal protection rights as well as their liberties that have existed in our society for decades. This decision grants entities unlimited power to opt out of laws they dislike based on their "sincerely held religious beliefs" without having a check on their exclusions of women's health.

III. THE COURT IS FORGETTING ABOUT WOMEN'S RIGHTS THAT HAVE LONG EXISTED

A. Introduction

Section III addresses the negative implications the recent *Little Sisters of the Poor* decision has on women's equality rights. The section begins with the history of women's rights in the United States and the individual liberties women have in making decisions regarding their own bodies, such as bearing a child. Understanding the history of women's rights shines a light on how detrimental the *Little Sisters of the Poor* decision is to the progress that has been made in women's equality over the past several decades. The Supreme Court has decided cases in the past dealing with women's right to access contraception and abortions.[122] The same analysis and reasoning the Court applied in those cases should have been applied to the *Little Sisters of the Poor*, but instead the Court disregarded its own precedent. This section also discusses the significance of having access to affordable contraceptives for women whose require treatment involving contraceptives, like birth control.

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119. *Id*. at 2394-95. To satisfy the least-restrictive means standard in *Hobby Lobby*, the government was required to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion . . ." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

120. *Little Sisters of the Poor*, 140 S. Ct. at 2396.

121. *Id*.

122. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (married people have the right to use contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried people have the right to use contraception); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upheld the right to have an abortion).

B. Reproductive Rights in the United States and Women's Autonomy to Choose Their Course of Life

The right to access contraception, like birth control, has existed since 1965. In *Griswold v. Connecticut*, the Supreme Court held that married couples had a right to privacy which included the right to use contraceptives.[123] The Court acknowledged the significance of a woman's decision of when (and whether) to procreate and how she deserves "equal opportunities to participate in the worlds of education, employment, and politics."[124] Access to contraception assists a woman in making the decisions necessary to direct the course of her life. In *Eisenstadt v. Baird*, the Court expanded women's right to privacy to access contraception to include unmarried women.[125] In *Eisenstadt*, the Court focused not only on equal opportunities for women to participate in society, like *Griswold*, but it applied the *Reed v. Reed* equal protection analysis realizing that equal values were at issue in allowing access to contraception.[126] This Court continued to emphasize these rights in the case of *Planned Parenthood v. Casey*.[127]

In *Casey*, Justice Blackmun stated in his concurrence that the majority confirmed

> [T]he Due Process Clause of the Fourteenth Amendment establishes 'a realm of personal liberty which the government may not enter' . . . [i]ncluded within this realm of liberty is 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'[128]

Justice Blackmun further explained that deciding whether or not to procreate is included in the "*most* intimate and *personal* choices a person may make in a lifetime" and that the Fourteenth Amendment is designed to protect liberties as important as those choices.[129]

Access to contraception has been at issue in the United States for decades, but the country has taken major steps to ensure that women are not discriminated against in accessing health care options that allow them to have control over their own bodies and course of life. The ACA contraceptive mandate was one of the key pieces of legislation that provided equal access to health care coverage for women's preventive services without leaving them to worry about paying large sums out of pocket. The decision of *Little Sisters of the Poor* reverses the progress that has been made in our history to provide sexual equality for women's

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123. *Griswold*, 381 U.S. at 485-86.

124. Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L. J. F. 349, 356 (2014-15).

125. *Eisenstadt*, 405 U.S. at 454.

126. *Id*. at 448 (the Court held in *Reed* that a state statute that gives mandatory preference over members of one sex over the other is unconstitutional).

127. Siegel & Siegel, *supra* note 129, at 356-57.

128. *Casey*, 505 U.S. at 923 (Blackmun, J., concurring) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)) (emphasis in the original).

129. *Id*. at 923-24 (emphasis added).

reproductive health services and their liberties in accessing those services, including contraception.

Although in *Casey* the issue was about women having access to abortion, the same analysis applies to the concerns the entities in *Little Sisters of the Poor* and *Hobby Lobby* had in allowing contraceptive coverage under their health insurance plans. Equal and affordable access to contraception involves the same individual liberties women have in getting an abortion, it is just on the proactive side of avoiding conception versus the reactive. A woman's bodily integrity is a key liberty at issue in the cases dealing with access to contraception, and the government must "respect the liberty and equality concerns of those who might become pregnant or assume caregiving responsibilities."[130]

By deciding to use contraception, a woman is making an "intimate" and "personal" choice; one that if she did not have access to would have to further depend on her right to an abortion, which seems to be the active concern of the religious entities in the cases at issue. In *Casey*, the Court mentioned that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[131] The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."[132] As mentioned above, the same liberties are at stake concerning access to contraception. Women are equally subject to anxieties, physical constraints, and pain that only they must bear that use of contraceptives can relieve. Challenging access to contraception centers on a woman's autonomy to decide her life's course and enjoy equal citizenship stature with her male counterparts.

"It is well established that oral contraceptives are essential health care because they prevent unintended pregnancies . . . [but] there are other important health reasons why oral contraceptives should be readily available to the millions of women who rely on them each year."[133] Synonymous to the anxieties women face by carrying a child to term, about seventy-five percent of women who are not pregnant suffer from premenstrual syndrome (PMS), which includes symptoms of irritability, anger, and tension around the time of their period.[134] Contraceptives are also used to help treat pain women experience while on their period.[135] For example, many women experience frequent migraines, dysmenorrhea, and some suffer from endometriosis.[136]

Endometriosis is an extremely painful disorder where cells that are supposed to line the inside of the uterus grow in other places such as the ovaries and bowel.[137]

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130. Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception,* 47 CONN. L. REV. 1025, 1040 (2015).

131. *Casey*, 505 U.S. at 852.

132. *Id.*

133. *Many American Women Use Birth Control for Noncontraceptive Reasons*, GUTTMACHER INST. (Nov. 11, 2011), https://www.guttmacher.org/news-release/2011/many-american-women-use-birth-control-pills-noncontraceptive-reasons.

134. *Other Reasons to Use Birth* Control, WEBMD (June 8, 2020), https://www.webmd.com/sex/birth-control/ss/slideshow-birth-control-other-reasons.

135. *Id.*

136. *Id.*

137. *Id.*

Doctors will often prescribe birth control pills to help alleviate some of the pain associated with endometriosis in order to limit how many cells build up in the area outside of a woman's uterus.[138] Not only do birth control and other kinds of contraception help relieve pain and anxieties associated with a woman's period, it can also help limit the physical constraints that come with menstruation.[139] Many women suffer from irregular and heavy periods making it difficult to plan when to expect their period. Further, they also struggle to keep their period under control throughout their cycle, often restraining daily life activities. Birth control can help regulate a woman's menstrual cycle to make their lives more bearable.[140]

For these reasons, the ACA contraceptive mandate was powerful in helping women who suffer from these significant symptoms to have affordable and effective access to health care to treat them. Now, as a result of the *Little Sisters of the Poor* decision, women who use contraception to treat actual concerns—something the Court has recognized previously in the realm of abortion and carrying a child to term—will be forced to either pay out of pocket for their treatment, in addition to paying for their health insurance, or go without their prescribed medical treatment and tolerate their symptoms. Meanwhile, the exempt entities reap the benefit of not having to provide health care coverage to their full-time female employees based on their own reporting of their personal views.

The decision of the *Little Sisters of the Poor* promotes the opposite of what the goal of *Griswold*, *Eisenstadt,* and *Casey* seemed to be—sexual equality and women's autonomy over their lives and their bodies. It might not be easy for entities in similar situations to the Little Sisters of the Poor and Hobby Lobby to imagine how these Supreme Court decisions even relate to sexual equality issues because they are too concerned with their own religious beliefs. But as explained above, the effect of this decision absolutely discriminates against women in their equal access to contraception, which in turn affects their autonomy over their lives and deciding whether they want to procreate as well as equal access to health care in general to treat medical symptoms otherwise unrelated to procreation. There is no other group of people in society who experiences the scrutiny women do when it comes to their personal health care choices, and now, a woman's employer essentially has control over those decisions for her.

The intent behind the contraceptive mandate in the ACA was to broaden the scope of women's equality when it comes to health care.[141] The contraceptive mandate helped make a woman's right to procreate more realistic for those who still did not effectively have a choice due to lack of health care coverage, although they technically had the "right to use contraception" from *Griswold* and *Eisenstadt*.[142] The decision in *Little Sisters of the Poor* significantly narrows the original intent of the mandate and instead promotes sex discrimination, lack of autonomy, and intrusion into women's individual rights. The self-certification

138. *Id.*
139. *Id.*
140. *Id.*
141. Galan, *supra* note 23.
142. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

accommodation process did not infringe on religious rights to the extent these holdings have substantially burdened women's rights to access preventative services at no cost.

C. The Result of the Little Sisters of the Poor *Decision Substantially Burdens Women's Right to Access Contraception*

The majority of the Court in *Little Sisters of the Poor* fails to discuss the effect on women's rights and instead focuses only on the religious rights of entities, both non-profit religious organizations and for-profit corporations. Justices Alito and Gorsuch claim in their concurrence that the religious and moral exemptions will not substantially burden women, which is simply incorrect.[143] The Court offers a resolution that the women who will be negatively impacted by their employer's new exemption apply for coverage under Medicaid programs. The likelihood that *all* the women who will be affected by this decision qualifying for coverage under Medicaid is slim. Many working women will not qualify, and even if they do, it is a significant burden for many women to jump through all of the complicated hoops of Medicaid when they already pay for and must manage their employer-provided health insurance. A goal of the ACA was to have seamless health insurance coverage for all. The Court's resolution leads to the opposite result.

In addition to the complicated application and qualification process of Medicaid, the Trump Administration made significant efforts to diminish funding for the Medicaid and other programs the Court suggests women take advantage of in light of their holding.[144] For example, the Trump Administration was adamant about defunding Planned Parenthood, which is one of the largest institutions that women of low and middle income can go to receive health care.[145] In 2019, the Trump Administration imposed a "domestic gag rule" on Title X, which deprived Planned Parenthood clinics from being able to provide contraceptives to low-income women.[146] This resulted in a fifty percent decrease in availability of reproductive health services across the United States.[147] Planned Parenthood serves more than 2.4 million people per year, most of whom have nowhere else to receive affordable health care services and, as a result of the target by the Trump Administration, many will go without any treatment at all.[148]

How can the Court realistically offer these services as the solution to women in need of affordable reproductive care? Over the past four years under the Trump Administration, there was nothing but efforts to make it more difficult for these programs to operate to the extent necessary to offer contraceptives and other

143. *Little Sisters of the Poor*, 140 S. Ct. 2367, 2396 (2020) (Alito, J., concurring).

144. *Trump Administration's Harmful Changes to Medicaid*, CTR ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/health/trump-administrations-harmful-changes-to-medicaid (last updated Feb. 4, 2020).

145. *Tracking Trump*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/tracking-trump/policy/planned-parenthood (last visited Nov. 19, 2021).

146. *A Brief History of Birth Control in the U.S.*, OUR BODIES OURSELVES (Dec. 14, 2013), https://www.ourbodiesourselves.org/book-excerpts/health-article/a-brief-history-of-birth-control.

147. *Id.*

148. *Tracking Trump*, *supra* note 145.

reproductive services free of charge to women. This left women to fend for themselves in finding coverage. Many of these women cannot pay out of pocket for these treatments. This is dangerous for the health of women across this country. History has shown that women who do not have affordable coverage neglect receiving any treatment at all because of other necessary financial obligations such as food, clothing, transportation, childcare, housing, and utilities.[149]

Joe Biden beat Donald Trump in the 2020 election and, as a result, is now the President of the United States.[150] The Biden Administration has already reversed some of the decisions President Trump made to not only give women, but all Americans, a better opportunity to again secure equal, affordable health care in the United States. President Biden already issued several executive orders of which he described as "reversing 'the damage' done by former President Donald Trump[.]"[151] President Biden is currently working on his goal to restore the Affordable Care Act to the way it was before President Trump was in office and target anti-abortion rules the Trump Administration put into place.[152]

CONCLUSION

The self-certification accommodation that was made available to employers with religious exemptions was sufficient for those employers to be removed from making decisions and providing for health care coverage they felt violated their religious rights. The accommodation gave entities an opportunity to not include contraceptive prices in the group health plan cost sharing portion of their insurance plans while still giving female employees affordable access to effective contraceptives. *Little Sisters of the Poor* gives entities the power to invoke one of the exemptions and wipe their hands clean from providing any contraceptive coverage to the women covered under their insurance plans. The Court has stated time and time again that religious objections will not be questioned or doubted and that it is not something the Court is responsible for confirming. *Little Sisters of the Poor* places a substantial burden on women, and the alternatives the Court offers are not easily attainable nor realistic for all women who will be impacted by this decision. The self-certification accommodation provides a balance that is necessary for complying with the requirements of the RFRA, but this new exemption intrudes too far on the individual rights of women in the United States.

Women have a constitutional right to reproductive freedom. This *Little Sisters of the Poor* decision allows a woman's employer to diminish that individual right by making it more difficult for women to obtain contraception. In some cases, women will not be able to exercise this right whatsoever due to the high cost of

149. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 742 (2014) (Ginsburg, J., dissenting). *See, e.g.*, 155 CONG. REC. 28,844 (statement of Sen. Hagan).

150. Mark Sherman, *Electoral College Makes it Official: Biden Won, Trump Lost*, ASSOCIATED PRESS (Dec. 14, 2020), https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e.

151. Melissa Quinn, *Biden Signs Executive Actions on Abortion Policy, Health Care Access*, CBS NEWS (Jan. 29, 2021, 6:46 AM), https://www.cbsnews.com/news/biden-signs-health-care-access-executive-orders/.

152. *Id.*

contraception without health insurance coverage. The self-certification accommodation provided employers a process to forgo being directly involved with providing women contraception so long as the employer met the requirements. This process allowed entities with religious or moral objections to the use of contraception to stay out of the details and allow the insurance company to work with women who needed coverage. Instead, the Court found that the better alternative is to allow entities to invoke an objection, without any check on the process, and avoid providing women with necessary health insurance coverage. Women's equality is significantly impacted by the *Little Sisters of the Poor* decision and the progress that has been made over the past decade to include women in equal access to health care has been undermined by the Court's failure to recognize that an entity is not more of a person than a woman.