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LITTLE SISTERS' SORROW: CONVERSATIONS ABOUT CONTRACEPTION AND REPRODUCTIVE JUSTICE

KATRINA ROZE MYERS*

ABSTRACT

In light of recent political changes in the United States, the future of women's health care has never been so uncertain. Using the debate on contraception access in the United States to frame the discussion, I demonstrate how religious groups and reproductive justice (RJ) activists might engage in constructive dialogue to protect women's rights. I analyze the amicus briefs submitted on behalf of Catholic nuns and the government in *Zubik v. Burwell*, which illustrate that despite differences, RJ advocates and Catholic nuns have much in common—including a commitment to eradicate sex discrimination, ensure economic freedom, and protect women's health. I propose that constructive dialogue between these two groups could bring to light the federal government's failure to take responsibility for providing adequate health care to its citizens, thereby allowing the groups to build an alliance as they work to ensure that people in the United States have access to reproductive health care. I conclude by illustrating how the Supreme Court's remand creates space for compassionate and constructive dialogue, which could advance the RJ movement's aims and ensure reproductive justice for all people.

INTRODUCTION

I. REPRODUCTIVE JUSTICE

- A. *The Reproductive Justice Movement*
- B. *Reproductive Justice, Contraception, and Diverging Views*

II. THE CONTRACEPTIVE MANDATE AND SUPREME COURT PRECEDENT

- A. *The Patient Protection and Affordable Care Act and the Mandate*
- B. *The Mandate and the Religious Freedom Restoration Act*
 - 1. *History of RFRA*
 - 2. *RFRA and Hobby Lobby*
 - 3. *RFRA and Complicity-Based Conscience Claims*

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III. *LITTLE SISTERS OF THE POOR HOME FOR THE AGED*A. *Amicus Briefs*

1. *Eradicating Sex Discrimination*
2. *Ensuring Economic Freedom*
3. *Protecting Women's Health*
4. *Discussion of Amicus Briefs*

B. *Additional Briefing*C. *Per Curiam Decision*

IV. REPRODUCTIVE JUSTICE AND THE MANDATE: GOING FORWARD

A. *Unintended Consequences of the Mandate and the Court's Ruling*B. *Secular and Religious Groups Have Common Concerns and Interests*C. *Opportunity for Conversation and Compromise*

INTRODUCTION

This Article uses a reproductive justice (RJ) framework to analyze current tensions between the Catholic Church and the United States government. I argue that an authentic RJ perspective requires advocates to take the religious views of all women seriously, even when these views appear facially to be in opposition to the RJ movement. Using the debate on contraception access in the United States to frame the discussion, I examine friend of the court briefs (amicus briefs) submitted to the United States Supreme Court on behalf of Catholic nuns and the government in *Zubik v. Burwell*,¹ which consolidated *Little Sisters of the Poor Home for the Aged v. Burwell*² (*Little Sisters*) with six other lower court cases.³ In *Little Sisters*, a group of Catholic nuns (the Sisters) who run a home for the elderly brought action against the U.S. government, alleging that the provisions of the Patient Protection and Affordable Care Act of 2010⁴ (ACA), which required employer-sponsored group health plans to cover contraceptive services for women, violated their rights

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

2. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015).

3. The other cases include: *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013); *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W.D. Pa. 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48 (D.D.C. 2013).

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

under the First Amendment of the U.S. Constitution⁵ and the Religious Freedom Restoration Act of 1993 (RFRA).⁶ The Court heard oral arguments in these cases on March 23, 2016 and issued its opinion two months later on May 16.⁷ In a *per curiam* decision, the Supreme Court remanded the cases back to their respective federal appeals courts, directing the parties to achieve a compromise that addresses the concerns of the Sisters and the other religious nonprofits bringing suit, while also ensuring that birth control is provided to female employees without cost-sharing.⁸

Under an RJ framework, it is necessary to listen to and take seriously the voices and concerns of *all* women, including the Sisters, because genuine RJ can be achieved only when all people have the opportunity to live self-determined lives. Rather than viewing this as a burden, RJ advocates ought to consider how they engage with women, such as the nuns, as an opportunity to further develop its aims. In particular, the recent Supreme Court case provides RJ advocates a unique occasion to engage in a constructive dialogue with the nuns and other marginalized groups to gain better insights as to how to ensure that RJ is achieved. It is also an opportunity to hold the U.S. government accountable for their role in ensuring and protecting RJ.

Following this introduction, Part I of this Article provides an overview of reproductive justice in the United States, highlighting tensions with the Catholic Church. Part II offers a synopsis of the legal issues relevant in *Little Sisters*. Part III surveys the litigation around *Zubik v. Burwell*, which includes a discussion of the amicus briefs submitted to the Supreme Court on behalf of the Sisters and the U.S. government that reveals shared concerns between the supporters of the two parties and RJ advocates.

Finally, Part IV concludes by offering suggestions as to how RJ advocates and the nuns might forge a path forward, as the parties ponder how to accommodate the Sisters' religious exercise, while ensuring that all women receive full health coverage. This final part begins by detailing unintended and often overlooked negative consequences of the contraception mandate of the ACA and the subsequent Court cases. Some progressive rights groups blame conscientious objectors, such as the nuns, for impeding women's access to contraceptives.⁹ However, these accusations merely distract from the federal

5. U.S. CONST. amend. I.

6. *Little Sisters of the Poor Home*, 794 F.3d at 1152.

7. *Little Sisters of the Poor Home for the Aged v. Burwell*, SCOTUSBLOG, <http://scotusblog.com/case-files/cases/little-sisters-of-the-poor-home-for-the-aged-v-burwell/> [<https://perma.cc/5TVN-6EP6>].

8. *Zubik*, 136 S. Ct. at 1560.

9. See, e.g., Liz Fields, *Nuns Are Battling Birth Control Provision at the US Supreme*

government's failure to take responsibility for providing adequate health care to its citizens. While tensions between groups such as the nuns and the RJ movement often appear diametrically opposed, secular and religious groups share many common concerns and interests regarding the Mandate. For instance, both groups would like to eradicate sex discrimination, ensure economic freedom, and protect women's health, and each group wants to ensure that vulnerable people are able to live with dignity and respect.¹⁰ These shared concerns and hopes provide a mutual ground to build upon. Accordingly, the remand of the case creates an opportunity for conversation and compromise that takes advantage of the commonalities between the secular and the religious. The work of legal scholars, such as Martha Minow and Ruth Colker, helps illustrate how to engage religious groups and use compassionate and constructive dialogue in reproductive justice activism.¹¹

I. REPRODUCTIVE JUSTICE

Three interdependent frameworks address reproductive oppression: reproductive health, reproductive rights, and reproductive justice. Reproductive health is the maintenance of an individual's reproductive system.¹² To achieve reproductive health, persons must "have access to safe, effective, [and] affordable . . . methods of fertility regulation" as well as "appropriate health care services" for "pregnancy and childbirth."¹³

Reproductive rights are the legal rights of individuals to achieve the highest available standard of reproductive health.¹⁴ This includes the legal right to decide whether and when to have children and to be able to make that decision "free from discrimination, violence or coercion."¹⁵ In the United States, discussions on reproductive rights often center on the right to privacy, on which the right to access

Court, VICE NEWS (Mar. 24, 2016, 10:07 AM), <https://news.vice.com/article/nuns-are-battling-birth-control-provision-at-the-us-supreme-court> [<https://perma.cc/Q4KJ-7EZH>].

10. *Id.*

11. See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989); Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Law?*, 48 B.C. L. REV. 781 (2007).

12. See *Reproductive health*, WORLD HEALTH ORG., http://www.who.int/topics/reproductive_health/en [<https://perma.cc/TNT9-DZT2>].

13. *Id.*

14. See U.N. POPULATION FUND, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS: A HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 12 (2014), <http://www.ohchr.org/documents/publications/NHRIHandbook.pdf> [<http://perma.cc/J8TA-DUFZ>] [hereinafter REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS].

15. *Id.* at 33.

abortion and contraception is predicated, and has been upheld by the Supreme Court.¹⁶

Reproductive justice broadens the focus from reproductive health care services and legal rights to include “the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, [which is] based on the full achievement and protection of women’s human rights.”¹⁷ RJ requires identification of reproductive oppression followed by efforts to eradicate the cultural, social, and structural inequalities that underlie that oppression.

A. *The Reproductive Justice Movement*

The RJ movement began with the realization that the right to privacy does not guarantee that people are able to attain reproductive health services.¹⁸ Many women—especially women of color, women of low socio-economic status, and those belonging to other marginalized groups—are unable to access the reproductive health care they need and desire.¹⁹ Although abortion and contraception use are legal in United States, numerous obstacles impede access to reproductive health services. For instance, although abortion has been legal in the United States since 1973,²⁰ the paucity of reproductive health care providers²¹ and federal law that prevents federal funding for abortion²² means that many women—including low-income women, women of color, rural women, women in the U.S.

16. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

17. Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4 (2007), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/V4HC-588Z>].

18. *Id.*

19. REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS, *supra* note 14, at 15.

20. *Roe*, 410 U.S. at 166 (holding modified by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

21. See, e.g., Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability In the United States, 2014*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 17, 20 (2017) (finding that from 2011 to 2014, the number of abortion clinics decreased in 25 states. In 2014, five states—Mississippi, Missouri, North Dakota, South Dakota and Wyoming—each had only one clinic that provided abortion services).

22. See Pub. L. No. 94-439, 90 Stat. 1418 (1976) (colloquially known as the Hyde Amendment, holding that “[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”). Furthermore, the day after President Obama signed the ACA into law, he quietly signed an executive action banning federal funds for abortion. Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 75 Fed. Reg. 15597, 15599 (Mar. 24, 2010).

military or Peace Corps, women in prisons or detention centers, and Native American women using the Indian Health Service, amongst others—are unable to achieve meaningful access to reproductive health services. Inequitable access to reproductive health services has disproportionately adverse effects on those who lack the resources to overcome the prohibitive costs of women’s health care.²³ In 2011, the unintended pregnancy rate amongst women whose incomes are below the federal poverty level was more than five times the rate among women who lived at or above 200 percent of the federal poverty level.²⁴ Low-income women that experienced an unintended pregnancy were also more likely to carry the pregnancy to term.²⁵ The rate of unplanned pregnancy for African-American women in that same year was more than double the rate for White women.²⁶ Furthermore, a Latina woman is more than twice as likely as a White woman to have an abortion, while an African-American woman is almost five times more likely.²⁷ Such large discrepancies amongst women of different classes and races are likely not merely a result of personal and cultural factors but are due to differences in access to services and information on reproductive health services and rights.²⁸ An RJ approach to reproductive oppression aims to eliminate the conditions that have enabled the oppression, thus requiring a close examination of how the inequitable conditions of a person’s location, community, and networks have affected her ability to determine her own reproductive destiny.²⁹

Inspired by the United Nations conceptualization of human rights,³⁰ the RJ movement originated in the 1990s.³¹ Following the International Conference on Population and Development held in

23. Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. OF MED. 843, 843 (2016).

24. *Id.* at 846.

25. *Id.* at 843.

26. *Id.* at 846.

27. *Id.* at 848.

28. In fact, more than 99 percent of sexually active women aged 15 to 44 have used at least one form of contraceptive, further suggesting that access to contraception, at least, is more likely a factor in determining whether or not a woman will use birth control. See Kimberly Daniels, William D. Mosher & Jo Jones, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT’L HEALTH STAT. REP. 1, 1 (2013).

29. See Ross, *supra* note 17, at 4.

30. Specifically, Article 3 of the Universal Declaration of Human Rights states: “Everyone has the right to life, liberty and the security of person.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 3 (Dec. 10, 1948).

31. ASIAN COMMUNITIES FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS, AND REPRODUCTIVE JUSTICE 5 (2005), <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf> [<https://perma.cc/L5KY-LRGF>].

Cairo, Egypt, in September 1994, a group of women of color began exploring how to use the human rights framework to advance their reproductive rights activism.³² In November of that year, a Black women's caucus coined the term "reproductive justice."³³ A few years later, sixteen women of color organizations formed the SisterSong Women of Color Reproductive Justice Collective (SisterSong),³⁴ which began popularizing the term "reproductive justice."

As SisterSong has explained, the right to have an abortion is not the only reproductive concern facing many women.³⁵ The reproductive justice framework allows SisterSong and other RJ advocates to address the systematic and interconnecting oppressions—such as domestic violence, inadequate wages, the paucity of affordable housing, education disparities, and racial inequalities—that obstruct women's and girls' full participation in society. According to SisterSong, "liberation is possible only when those who are the most vulnerable are able to exercise all of their human rights without fear, discrimination, or retaliation. Our most marginalized communities must have the access, resources, and power necessary to live self-determined lives; only then can we call our society 'free.'"³⁶

RJ began as, and remains, a grassroots movement led by women of color to protect the basic human right of bodily autonomy from all reproductive oppressions.³⁷ Essential to this notion is that every person, regardless of her social or economic status, must be able to decide whether and how to form a family.³⁸ If one chooses to have a child, she must be able to parent that child in a healthy, safe environment.³⁹ To achieve this aim, the RJ movement continues to "organiz[e] women, girls and their communities to challenge structural power inequalities in a comprehensive and transformative process of empowerment."⁴⁰

32. *Id.*

33. *Id.*

34. "SisterSong is a Southern based, national membership organization," with the purpose of "build[ing] an effective network of individuals and organizations to improve institutional policies and systems that impact the reproductive lives of marginalized communities." See SISTERSONG, <http://sistersong.net> [<https://perma.cc/7R9B-JEJR>].

35. *Reproductive Justice*, SISTERSONG, <http://sistersong.net/reproductive-justice> [<http://perma.cc/WF55-CHD3>].

36. *Christians Vote for Reproductive Justice*, BELIEVE OUT LOUD (Nov. 5, 2016), <http://www.believeoutloud.com/latest/christians-vote-reproductive-justice> [<http://perma.cc/LRG6-C33S>].

37. *Reproductive Justice*, *supra* note 35.

38. *Id.*

39. Ross, *supra* note 17, at 4; see also Kimala Price, *What is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 56 (2010).

40. Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14, 14 (2006).

Loretta Ross, co-founder of SisterSong and a leader in the RJ movement,⁴¹ calls for solidarity between the mainstream and the marginalized in order to drive political and legal decision-making toward broad social change.⁴² Ross explains:

In order to address the needs and issues of a diverse group of women while acknowledging the layers of oppressions that our communities face, particularly those who do not have access to privilege, power, and resources, we must build a new movement for Reproductive Justice in the United States. This movement must work to protect everyone⁴³

According to Ross, all people must have the access, capability, and resources necessary to live self-sufficient lives.⁴⁴

B. Reproductive Justice, Contraception, and Diverging Views

Reproductive justice requires access to reproductive health services and resources, including: contraception, abortion services, STI prevention and treatment, sufficient prenatal and pregnancy care, alternative birthing options, and comprehensive sex education. However, because the United States does not have universal health care provided by the government—instead, relying mostly on private insurance plans often provided by employers—obtaining health care, especially reproductive health care, can be arduous or even impossible.⁴⁵ Even after the Patient Protection and Affordable Care Act was signed into law, easing the burden of obtaining health insurance for millions of Americans, access to basic reproductive health care has remained a topic of contention, as people disagree about what reproductive services should be covered by health insurance policies.⁴⁶ Because people have diverging political, socio-cultural, religious, and economic views about reproductive health care, sometimes the reproductive privileging of one group results in the reproductive penalizing of another, leaving us RJ advocates to question: *what is an authentic RJ perspective?*

41. *Biography*, LORETTAROSS.COM, <http://www.lorettaross.com/Biography.html> [https://perma.cc/6QPR-KGNW].

42. Ross, *supra* note 40, at 15.

43. *Id.* at 19.

44. *Id.*

45. DEP'T FOR PROF'L EMP., THE U.S. HEALTH CARE SYSTEM: AN INTERNATIONAL PERSPECTIVE, <http://dpeafcio.org/wp-content/uploads/US-Health-Care-in-Intl-Perspective-2016.pdf> [https://perma.cc/M27W-7F69].

46. *See infra* Part II.

Access to contraception is a principle concern for the RJ movement, especially because there are complex consequences of unintended pregnancies.⁴⁷ Though it is difficult to measure causal relationships between unintended pregnancy and the effects on women's lives,⁴⁸ a number of studies indicate a link between unintended pregnancies and "an array of negative health, economic, social, [political,] and psychological outcomes for women and children."⁴⁹ Access to contraception can thus greatly reduce the number of unintended pregnancies,⁵⁰ which may augment a woman's ability to live a self-determined life.⁵¹ For example, in addition to reducing pregnancy-related risks like disease and illness, preventing unwanted pregnancies with contraception also correlates to gains in female education and household income.⁵² Accordingly, access to reproductive health services helps women achieve full participation in social, economic, and political institutions.⁵³ Thus, one component of RJ work is eliminating obstacles that encumber access to these services.

In the United States, contraception access is a point of tension, because certain religious groups argue that using or providing contraception violates their religious beliefs.⁵⁴ In particular, the Catholic Church's official position is that contraception is morally wrong and intercourse should be reserved solely for reproduction, even within marriage.⁵⁵ For this reason, high-ranking officials in the Catholic Church do not want the Church to be involved with providing contraception to women.⁵⁶ Because employers often provide health

47. Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 *STUD. IN FAM. PLANNING* 18, 18 (2008).

48. *Id.* at 20.

49. Gilda Sedgh et al., *Intended and Unintended Pregnancies Worldwide in 2012 and Recent Trends*, 45 *STUD. IN FAM. PLANNING* 301, 301 (2014). See Gipson et al., *supra* note 47, at 29–30.

50. WORLD HEALTH ORG. DEPT OF REPROD. HEALTH & RESEARCH, FAMILY PLANNING: A GLOBAL HANDBOOK FOR PROVIDERS 319 (2011), http://www.ippf.org/sites/default/files/family_planning_a_global_handbook_for_providers.pdf [<https://perma.cc/YK2Q-YEQ9>].

51. See Eleanor Bimla Schwarz et al., *Measuring the Effects of Unintended Pregnancy on Women's Quality of Life*, 78 *CONTRACEPTION* 204, 204 (2008).

52. Nancy Felipe Russo & Julia R. Steinberg, *Contraception and Abortion: Critical Tools for Achieving Reproductive Justice*, in *REPRODUCTIVE JUSTICE: A GLOBAL CONCERN* 145, 145 (Joan C. Chrisler ed., 2012).

53. *Id.*

54. David Masci, *5 Questions about the contraception mandate*, PEW RESEARCH CTR. (Aug. 5, 2015), <http://www.pewresearch.org/fact-tank/2015/08/05/contraception-mandate-questions> [<http://perma.cc/Z5WF-NXAV>].

55. See Pope Paul VI, *Humanae Vitae: Encyclical of Pope Paul VI on the Regulation of Birth (July 25, 1968)*, in 13 *THE POPE SPEAKS* 329–35 (1969).

56. See Timothy Dolan, *HHS Proposal Falls Short In Meeting Church Concerns; Bishops Look Forward To Addressing Issues With Administration*, U.S. CONFERENCE OF CATHOLIC BISHOPS (Feb. 7, 2013), <http://www.usccb.org/news/2013/13-037.cfm> [<https://perma.cc/69F9-454A>].

insurance, the Church's refusal to ensure contraceptive coverage could create insurmountable obstacles for over one million people in the United States who are employed by Catholic institutions.⁵⁷

RJ organizations may be inclined to dismiss the religious concerns of Catholic institutions as antiquated and insist that they provide contraception for their employees.⁵⁸ However, as discussed below, dismissing the concerns of the nuns could have unintentional and severe consequences on already marginalized groups. Moreover, although some Catholic institutions do not want to be involved with providing contraception to women, these institutions do share many common concerns about the oppression of marginalized persons and could actually be valuable partners in efforts to promote RJ. To better understand what is at issue, I turn to the ACA and the legal battle over contraception coverage.

II. THE CONTRACEPTIVE MANDATE AND SUPREME COURT PRECEDENT

Since passing the Patient Protection and Affordable Care Act of 2010, U.S. law on birth control coverage has undergone major changes. For the first time in U.S. history, insurance companies are required to provide contraceptive coverage to women without cost-sharing, under the ACA's Contraceptive Mandate (the Mandate).⁵⁹ This is significant because "nearly 99 percent of all women have used contraception at some point in their lives, but more than half of all women between the ages of 18–34 struggle to afford it."⁶⁰ The Mandate eliminates a huge barrier to birth control access, which is necessary for persons capable of pregnancy to be able to achieve bodily autonomy and live self-sufficient lives.

A. The Patient Protection and Affordable Care Act and the Mandate

The ACA is viewed as a major victory for women and reproductive rights.⁶¹ It lessens the burden of obtaining health insurance and

57. *Earthly concerns*, THE ECONOMIST (Aug. 18, 2012), <http://www.economist.com/node/21560536> [<https://perma.cc/4E67-QXUE>].

58. See *infra* Part III.

59. See U.S. DEP'T OF HEALTH & HUMAN SERVS., PA-FPH-16-023, ANNOUNCEMENT OF ANTICIPATED AVAILABILITY OF FUNDS FOR ENSURING ACCESS TO QUALITY FAMILY PLANNING SERVICES (2016).

60. Office of the Press Secretary, *Fact Sheet: Women's Preventive Services and Religious Institutions*, THE WHITE HOUSE (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions> [<http://perma.cc/2JST-E4ND>].

61. See, e.g., *Victory for Women as Affordable Care Act Upheld by U.S. Supreme Court*, CTR. FOR REPROD. RIGHTS (June 6, 2012), <https://www.reproductiverights.org/press>

requires that most U.S. citizens be covered by a plan.⁶² Under the new law, insurance plans must cover four types of preventative care without cost-sharing by patients.⁶³ Specifically “with respect to women,” insurances plans must cover “such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration” (HRSA),⁶⁴ which is an agency within the U.S. Department of Health and Human Services (HHS). HHS is responsible for implementing the parts of the ACA that deal with public and private health insurance, including the preventative care guidelines.⁶⁵

In the text of the ACA, there is no mention of women’s contraceptives.⁶⁶ In fact, “[b]irth control barely came up in the health care reform debate” that happened in Congress.⁶⁷ Rather, the details of what would be covered as a part of women’s preventative health was left to HHS.⁶⁸ After the ACA was signed into law, HRSA asked the Institute of Medicine (IOM) to develop a list of what should be included as preventative care and screenings for women.⁶⁹ The IOM recommended eight services to be provided, including all Food and Drug Administration (FDA) approved contraceptive methods and contraceptive counseling.⁷⁰ Taking up these recommendations, on August 1, 2011, HHS promulgated the Contraceptive Mandate, under which all FDA approved contraceptive methods (including diaphragms and sponges, birth control pills and vaginal rings, intrauterine devices

-room/victory-for-women-as-affordable-care-act-upheld-by-us-supreme-court [<http://perma.cc/24G8-R7DB>]; see also Hannah Levintova, *Two Days, Four Major Victories for Reproductive Rights at the Supreme Court*, MOTHER JONES (June 29, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/06/two-days-four-victories-reproductive-rights-supreme-court> [<http://perma.cc/2Y7Z-4D4Z>].

62. *Summary of the Affordable Care Act*, FOCUS ON HEALTH REFORM (Apr. 23, 2013), <http://files.kff.org/attachment/fact-sheet-summary-of-the-affordable-care-act> [<http://perma.cc/SE28-F6T8>].

63. 42 U.S.C.A. §§ 300gg-13(a)(1)–(4) (West 2010).

64. 42 U.S.C.A. § 300gg-13(a)(4) (West 2010).

65. Office of the Inspector General, U.S. Department of Health & Human Services, *Management Issue 1: Implementing the Affordable Care Act*, HHS.GOV, <https://www.oig.hhs.gov/reports-and-publications/top-challenges/2012/issue01.asp> [<https://perma.cc/4PL8-LSD6>].

66. Sarah Kliff, *Trump can end Obamacare’s free birth control—and he doesn’t need Congress’s help*, VOX (Nov. 10, 2016, 9:20 AM), <https://www.vox.com/2016/11/10/13578550/trump-obamacare-birth-control-iuds> [<http://perma.cc/B7GR-CCTS>].

67. Sarah Kliff, *Free birth control under health care?*, POLITICO (June 1, 2010, 4:36 AM), <http://www.politico.com/story/2010/06/free-birth-control-under-health-care-037980> [<http://perma.cc/NH59-AVR8>].

68. Rebekah E. Gee et al., *Recommendations of the IOM Clinical Preventive Services for Women Committee: implications for obstetricians and gynecologists*, 23 CURRENT OPINION IN OBSTETRICS & GYNECOLOGY 471, 471–72 (2011).

69. *Women’s Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/womens-guidelines/index.html> [<http://perma.cc/KB4N-VZYH>].

70. Gee et al., *supra* note 68, at 471, 476.

(IUDs), and emergency contraception), sterilization procedures, and patient education and counseling for women with reproductive capacity must be provided “without cost sharing.”⁷¹

That same day, HHS announced that religious organizations—including churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order⁷²—would be exempt from the coverage requirements.⁷³ In its place, a third party—i.e., the insurance company—must offer contraception coverage to employees of religious organizations free of charge.⁷⁴

In June 2013, following revisions to the religious exemption, HHS issued final rules for the Mandate.⁷⁵ In addition to providing an exemption to the group health plans of religious employers, the final rules included an additional accommodation for other non-profit religious organizations.⁷⁶ Under the 2013 rules, an eligible organization that holds itself out as a religious organization and “opposes providing coverage for some or all of any contraceptive items or services required to be covered . . . on account of religious objections” qualifies for the same accommodation provided other religious employers.⁷⁷ To obtain the exemption, the non-profit employer must provide notice to their employees that contraceptive coverage will not be provided and file a self-certification as to those factors, that it is such an organization and that it will not be paying for employees’ contraceptive coverage.⁷⁸ The employees of exempt non-profits would

71. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 59; *Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost*, DEP’T OF HEALTH & HUMAN SERVS. (Aug. 1, 2011), <http://www.mohealthalliance.org/affordable-care-act-ensures-women-receive-preventive-services-at-no-additional-cost> [<http://perma.cc/BK3Y-HX3Y>].

72. For purposes of the exemption, a religious employer is one that:

(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.

Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39871 (July 2, 2013).

73. 45 C.F.R. § 147.131(a); *Women’s Preventive Services Guidelines*, *supra* note 69.

74. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870-01; *see also* Kliff, *supra* note 67.

75. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870 (July 2, 2013).

76. *Id.*

77. 45 C.F.R. § 147.131(b)(1).

78. 45 C.F.R. §§ 147.131(b)(2)–(3).

then receive contraceptive coverage without cost-sharing from their insurance company.⁷⁹

B. The Mandate and the Religious Freedom Restoration Act

Even after the accommodations provided by HHS, the Mandate remains a source of consternation for some religious organizations. Arguing that the Mandate places an undue burden on their religious practice, various religious non- and for-profit companies have brought suits in court, claiming that the Mandate and its accommodation violate their rights under the Religious Freedom Restoration Act of 1993 (RFRA).⁸⁰

1. History of RFRA

RFRA was signed into law in 1993, following the 1990 Supreme Court case, *Employment Division v. Smith*.⁸¹ In this case, the Court ruled that the free exercise clause of the First Amendment does not prohibit the Oregon government from denying unemployment benefits to two Native Americans who had been fired from their jobs for work-related misconduct after testing positive for peyote, which they had ingested as a part of their religious practice.⁸² Sacramental peyote use violates Oregon drug laws.⁸³ According to some, “[t]his unexpectedly broad and severe opinion of the Court galvanized a large number of diverse religious groups as well as various civil rights organizations and the eventual result of their efforts was the Religious Freedom Restoration Act (RFRA).”⁸⁴

The aim of RFRA is to prevent the government from burdening a person’s free exercise of religion.⁸⁵ Under the statute, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”⁸⁶ RFRA provides, “[a] person whose religious exercise has been burdened in

79. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39871 (July 2, 2013).

80. See Jaime Fuller, *Here’s what you need to know about the Hobby Lobby case*, WASH. POST (Mar. 24, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/24/heres-what-you-need-to-know-about-the-hobby-lobby-case/?utm_term=.810287fc207a [<https://perma.cc/Z8ZC-LNQQ>].

81. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

82. *Id.* at 890.

83. *Id.* at 874.

84. Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J. L. & RELIGION 531, 531 (1993–94).

85. Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb.

86. *Id.* § 2000bb-1(a).

violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”⁸⁷ The statute provides two exemptions from RFRA but only in very narrow circumstances. To be exempt, the government must “demonstrate[] 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.”⁸⁸ As interpreted by the Supreme Court, “[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law”⁸⁹—i.e., courts must apply strict scrutiny when adjudicating RFRA cases.

Most RFRA claims address the right of members of a religious sect to practice their religion without interference by the government. For example, in a landmark RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (UDV),⁹⁰ the Court ruled unanimously in favor of UDV—a Christian Spiritist sect based in Brazil—holding that UDV can continue to receive communion through *hoasca*, which is a sacramental tea made of ingredients that are prohibited in Schedule I of the Controlled Substances Act.⁹¹ In this case, the government was unable to show that they had a compelling interest in prohibiting UDV’s use of *hoasca*.⁹² Until recently, RFRA claims, like the one in this case, “were advanced by religious minorities who sought exemptions based on unconventional beliefs generally not considered by lawmakers when they adopted the challenged laws; the costs of accommodating these claims were minimal and widely shared.”⁹³

2. RFRA and Hobby Lobby

In 2014, the Supreme Court heard a distinctive RFRA case: *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*.⁹⁴ In *Hobby Lobby*, the religious entity—a closely held for-profit that was owned and operated by people who also happened to be religious—asked for a religious exemption from doing something the government compelled.⁹⁵

87. *Id.* § 2000bb-1(c).

88. *Id.* § 2000bb-1(b).

89. *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (internal citations omitted).

90. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

91. *Id.* at 425.

92. *Id.* at 419.

93. Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L. J.* 2516, 2520 (2015).

94. *See generally* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

95. *Id.* at 2754–55.

Specifically, Hobby Lobby Stores wanted to be exempt from the Contraceptive Mandate.⁹⁶ The plaintiffs argue that providing their employees with contraceptive coverage violated their religious beliefs.⁹⁷

With a 5–4 majority, the Court held that the Mandate substantially burdened the exercise of religion of the closely held, for-profit corporation and failed to satisfy RFRA's least restrictive means requirement.⁹⁸ The Court explained that there were other ways—such as the exemption already provided to religious institutions—in which the government could easily ensure that every woman has cost-free access to all FDA-approved contraceptives that would have “precisely zero” effect on women seeking contraception.⁹⁹ Following this case, the government must provide exemptions for closely held, for-profit corporations that do not want to provide contraceptive coverage in their health care plan, while ensuring that women have access to contraception.¹⁰⁰ The Court did not decide whether the exemption procedure violates RFRA.¹⁰¹

In her dissent to *Hobby Lobby*, Justice Ruth Bader Ginsburg opines that the Court “has ventured into a minefield,”¹⁰² observing that the ruling creates space for requests for all types of exemptions. She writes:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?¹⁰³

In the majority opinion, Justice Alito dismisses Justice Ginsburg's concerns, arguing that the “holding is very specific” and insisting that the Court does not find “that such corporations have free rein to take steps that impose ‘disadvantages . . . on others’ or that require ‘the general public [to] pick up the tab.’”¹⁰⁴ Justice Alito also rejects Justice Ginsburg's suggestion that under the majority holding “RFRA

96. *Id.* at 2755.

97. *Id.*

98. *Id.* at 2759.

99. *Id.* at 2760.

100. *Hobby Lobby*, 134 S. Ct. at 2755–60.

101. *Id.*

102. *Id.* at 2805.

103. *Id.*

104. *Id.* at 2760 (citing Ginsburg's dissent at *id.* at 2787).

demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby," emphasizing that women still have full access to contraceptives.¹⁰⁵

Following *Hobby Lobby*, HHS issued a statement revealing new policies on the Mandate.¹⁰⁶ At the time of the ruling, HHS exempted places of worship from the Mandate and had been planning to make an accommodation available to religious non-profits.¹⁰⁷ After the case, the government extended the accommodation to certain closely held for-profits.¹⁰⁸ As of July 2015, qualified, closely held, for-profit organizations can use the same process as non-profit organizations to obtain an exemption.¹⁰⁹ Namely, they must fill out a form provided to them by the Department of Labor or simply notify HHS in writing of their religious objection to providing contraception coverage.¹¹⁰ After receiving self-certification from the employer, the Department of Labor notifies insurers and necessary third party administrators of the organization's objections.¹¹¹ This triggers a separate payment for the contraceptive services and allows the objecting employer to remove itself from the process of providing contraception to its employees.¹¹² When this exemption is employed, there is no extra cost or involvement by the organization or for the individual who holds the insurance policy.¹¹³

3. RFRA and Complicity-Based Conscience Claims

Hobby Lobby can be distinguished from previous RFRA cases because the employers were not seeking an exemption so they could partake in their own religious practice; rather, the owners of Hobby Lobby were making, what legal scholars Douglas NeJaime and Reva Siegel have labeled, "complicity-based conscience claims."¹¹⁴ Complicity-based conscience claims "are faith claims about how to live in community

105. *Id.*

106. Press Release, U.S. Dep't of Health & Human Servs., Administration issues final rules on coverage of certain recommended preventive services without cost sharing (July 10, 2015), <http://www.hhs.gov/about/news/2015/07/10/administration-issues-final-rules-on-coverage-of-certain-recommended-preventive-services-without-cost-sharing.html> [<https://perma.cc/N9QM-SX2V>].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. Press Release, *supra* note 106.

113. *Id.*

114. See NeJaime & Siegel, *supra* note 93, at 2519.

with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful."¹¹⁵ In their petition, Hobby Lobby owners claim that providing birth control to their employees makes them complicit in a sinful act.¹¹⁶ This complicity, they argue, violates their free exercise of religion.¹¹⁷ These claims differ from other conscience claims, such as the one made in *Gonzales*,¹¹⁸ because they "are explicitly oriented toward third parties."¹¹⁹ For instance, Hobby Lobby's request for exemption could limit the access to contraception of *other* employees, who may or may not share the owners' beliefs. In particular, "[a]ccommodating *these* religious liberty claims will have social meaning and material consequences for the law-abiding persons who the claimants say are sinning."¹²⁰ Proving exemptions for complicity-based claims can be especially complicated, as it is difficult to determine how indirectly involved does one have to be to experience a violation of their conscience.

III. *LITTLE SISTERS OF THE POOR HOME FOR THE AGED*

As Justice Ginsburg predicted, *Hobby Lobby* was not the last challenge to the Contraceptive Mandate the Supreme Court would hear. Less than two years after the Court released its decision on *Hobby Lobby*, another complicity-based conscience exemption claim was brought before the Court. On March 23, 2016, the Court heard oral arguments for *Zubik v. Burwell*.¹²¹ This case consolidates cases brought by the Little Sisters of the Poor Home for the Aged, Denver, Colorado; Little Sisters of the Poor, Baltimore; and other religious non-profits against the federal government.¹²² Little Sisters of the Poor Home for the Aged is a "religious non-profit organization that provides health care to employees through the Christian Brothers Employee Benefit Trust."¹²³ The nuns who run the non-profit operate homes for elderly persons claimed that the Mandate violates their religious freedom because it forces them to either provide contraception to their employees or fill out a form that would require the insurer to provide contraception to the employee.¹²⁴ Both of these

115. *Id.*

116. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2764–65.

117. *Id.* at 2765.

118. *See Gonzales*, 546 U.S. at 418.

119. NeJaime & Siegel, *supra* note 93, at 2519.

120. *Id.* at 2520.

121. *Zubik v. Burwell*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/zubik-v-burwell> [<https://perma.cc/E38Z-RNFF>].

122. *Id.*

123. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1158 (2015).

124. *Id.* at 1167–68.

options, the nuns argue, would make them complicit in an act—the providing of contraception—that they consider sinful.¹²⁵

The nuns have long provided health insurance to their employees at the Homes; however, their health care plan “always excluded coverage of sterilization, contraception, and abortifacients . . . in accordance with [the nun’s] religious belief that deliberately avoiding reproduction through medical means is immoral.”¹²⁶ Citing “well-established Catholic teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion,” the nuns “believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services.”¹²⁷ Because of these sincere beliefs:

The Little Sisters contend they “cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government’s delivery scheme,” as the mere appearance of condoning these services “would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public.”¹²⁸

There is little question as to whether the Sisters would be eligible for an exemption, if they followed the prescribed procedure provided by HHS.¹²⁹ The nuns claimed that their rights under RFRA were being violated, because the government was requiring them to fill out a form, or otherwise request, an exemption from the Mandate.¹³⁰ If the Sisters did not comply with the Mandate—by either providing contraception in their health insurance plans or filling out the form for an exemption—they alleged that they would be subject to fines of up to \$2.5 million per year.¹³¹

Specifically, at issue in the case was:

(1) [Whether] the availability of a regulatory method for non-profit religious employers to comply with [the Department of Health and Human Services’] contraceptive mandate eliminate[s] either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.* [; and]

125. *Id.* at 1167.

126. *Id.*

127. *Id.*

128. *Id.* at 1167 (internal citations omitted).

129. *Little Sisters of the Poor*, 794 F.3d at 1167.

130. *Id.* at 1167–68.

131. *Id.* at 1167.

(2) [Whether] HHS satisf[ies] RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees[.]¹³²

A. *Amicus Briefs*

Leading up to oral arguments, organizations and individuals advocating either side of the debate submitted amicus briefs in support of their respective positions.¹³³ One brief written by a diverse group of RJ and affiliated organizations—including California Latinas for Reproductive Justice; In Our Own Voice: National Black Women's Reproductive Justice Agenda; and Law Students for Reproductive Justice—that “work to achieve reproductive justice and civil rights for people of color, LGBTQ individuals, people living with HIV, young people, undocumented persons, and other marginalized groups and communities”¹³⁴ made the case that the Contraceptive Mandate is necessary for the achievement of RJ. They highlight the importance of the Mandate for eradicating a myriad of social inequalities.¹³⁵ They explicate:

[The Mandate] enables people capable of pregnancy to participate in their lives and communities as they decide. It increases birth intervals and facilitates family planning, both of which are critical to the health, equality, and dignity of pregnancy-capable people and their children and families. Contraception also facilitates educational advancement and corresponding advancement in labor markets. Contraception is essential to the well-being of young people ages fifteen to twenty-four, who are more likely to experience unintended pregnancy. Lesbian, gay, and bisexual youth may experience unintended pregnancies at an even higher

132. Petition for Writ of Certiorari, *Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 446 (2015) at ii. There is a third question presented in this case, but it is not addressed in this Article.

133. An RJ analysis, I believe, must listen to the voices of women. Thus, for my analysis, I examined briefs that were written by or on behalf of women. Of at least 70 briefs filed on behalf of the Petitioners or Respondents in *Little Sisters*, I closely examined 15 that spoke specifically to the concerns of the Sisters or other women who will be impacted by the ruling, focusing on how they spoke about RJ issues. Many of the other briefs focused more on the technical and legal aspects of the case, which, while interesting, are not the main focus of this analysis.

134. Brief of National Latina Institute for Reproductive Health et al., as Amici Curiae in Support of Respondents at 1, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105) [hereinafter Brief of National Latina Institute].

135. *Id.* at 23–26.

rate than their heterosexual peers. Women living with HIV also need but struggle to access contraception through their HIV-related services. Within each of these communities, people of color are additionally burdened by differential treatment borne of racist biases.¹³⁶

They argue that the Mandate helps bring about “equal access to economic, political, social, and private life, as well as the basic infrastructure—including healthcare” that have long been denied to marginalized communities.¹³⁷

Though RJ advocates and supporters situate themselves on the side of the government, explaining why access to contraception is necessary to promote gender equality, an analysis of amicus briefs for both the government and the Sisters reveals common anxieties over the oppression of women.¹³⁸ For instance, each side is concerned with the interrelated matters of eradicating sex discrimination, ensuring economic freedom, and protecting women’s health.¹³⁹ The two sides diverge, however, with respect to how these aims should be achieved.

1. *Eradicating Sex Discrimination*

Amici in support of Respondents and Petitioners each raise issues about the Mandate and sex discrimination. *Amici* in support of the government argue that the Mandate is necessary because it “addresses a remaining vestige of sex discrimination.”¹⁴⁰ In their brief, the American Civil Liberties Union (ACLU) elucidates:

[W]omen’s ability to control their reproductive capacities is essential to their participation in society. Contraception is not simply a pill or a device; it is a tool, like education, essential to women’s equality. Without access to contraception, women’s ability to complete an education, to hold a job, to advance in a career, to care for children, or to aspire to a higher place, whatever that may be, may be significantly compromised. By making

136. *Id.* at 27–28 (internal citations omitted).

137. *Id.* at 16.

138. See Brief *Amicus Curiae* of the American Civil Liberties Union et al., in Support of Respondents at 12, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-505) [hereinafter Brief of the American Civil Liberties Union et al.]; Brief *Amicus Curiae* of Concerned Women for America in support of the Petitioners and supporting reversal at 7, 11, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-505) [hereinafter Brief of Concerned Women].

139. See Brief of the American Civil Liberties Union et al., *supra* note 138, at 12, 29–30; Brief of Concerned Women, *supra* note 138, at 2, 7, 11.

140. Brief of the American Civil Liberties Union et al., *supra* note 138, at 12.

access to contraception meaningful for many women, the contraception rule takes a giant and long overdue step to level the playing field.¹⁴¹

This amicus and others put forth by RJ advocates view the Mandate as a valuable tool for eliminating sex discrimination.¹⁴²

Meanwhile, briefs filed on behalf of the nuns highlight how sex discrimination within the church is preserved by the Mandate and exemptions and call for the policy to be changed to be equal to male and female religious leaders across the myriad of religious organizations.¹⁴³ In their Brief, Carmelite Sisters of the Most Sacred Heart; Religious Sisters of Mercy; and School Sisters of Christ the King make this point:

Although some organizations (“churches” and their “integrated auxiliaries”) are exempt from the mandate, other religious organizations that have the same religious objections to providing contraceptive coverage are not . . . [R]eligious non-profit organizations [that actively serve the community—] like *amici* are [forced] to implement the mandate . . .¹⁴⁴

Amici point out that because churches are excused automatically, while non-profits are required to fill out forms, the exemption adversely and disproportionately affects women, because women are the ones who most often serve as leaders in non-profits, such as schools, hospitals, and nursing homes.¹⁴⁵ Concerned Women for America (CWA) make the case:

Women have a long history of fighting for religious liberty and of providing ministry and services as part of the free exercise of their religion for which they have fought. Yet, these efforts all too often fall into the category of being “not religious enough” or of being a “junior varsity” free religious exercise.¹⁴⁶

CWA emphasizes that “[t]his indictment is especially relevant because the Catholic Church *and* many of the Protestant denominations . . . limit certain leadership roles to men, but allow women to engage in

141. *Id.*

142. See also Brief of National Latina Institute, *supra* note 134, at 29–30.

143. See Brief of Concerned Women, *supra* note 138, at 8.

144. Brief for Carmelite Sisters of the Most Sacred Heart of Los Angeles et al. as *Amici Curiae* in Support of Petitioners at 12, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105).

145. See *id.* at 22. See also Brief of Concerned Women, *supra* note 138, at 7.

146. Brief of Concerned Women, *supra* note 138, at 6.

various other forms of ministry,” such as “charity, service, and education.”¹⁴⁷ *Amici* explain that “[t]hrough this Mandate has been promoted as benefiting women, it cannot escape this Court’s attention that many *women* are also represented by Petitioners.”¹⁴⁸ According to *amici* for the petitioners, the Court should be concerned with this case precisely because of the discriminatory effect that denying the exemption will have on religious women who are trying to follow their conscience.¹⁴⁹

2. Ensuring Economic Freedom

Amici for both sides also want to ensure women’s economic freedom. *Amici* writing in support of the Mandate—including RJ organizations—underscore the burden that an exemption would place on low-income and other marginalized women and girls who may be unable to obtain contraception without the benefits of the Mandate.¹⁵⁰ *Amici* caution that any exemption would thwart seamless access to women’s contraceptives.¹⁵¹ One amicus argues that an exemption “would most likely require the affected women to find new providers and disrupt the continuity of care, shoulder the upfront costs for contraception and related education and counseling, and/or would not guarantee availability of the full range of contraceptive methods.”¹⁵²

One amicus explains, “[h]ealth insurance helps remove cost barriers to health care access.”¹⁵³ Expressly, affordable and effective contraceptive use “reduces the number of unintended pregnancies and abortions, . . . dramatically expands women’s educational and professional opportunities, and . . . improves women’s health.”¹⁵⁴ Not only is this empirically true, but, as *amici* contend:

The link between contraception and women’s economic security and future opportunities is widely recognized by women. In one study, when asked why they use contraceptives, a majority of

147. *Id.* at 7–8.

148. *Id.* at 4.

149. *Id.* at 3, 14–15.

150. See Brief of National Latina Institute, *supra* note 134, at 25, 31–32.

151. See Brief of National Women’s Law Center and 68 Other Organizations as *Amici Curiae* Supporting Respondents and Affirmance at 21, 25, 36, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105) [hereinafter Brief of National Women’s Law Center].

152. *Id.* at 34.

153. Brief of the National Health Law Program et al. as *Amici Curiae* in Support of Respondents at 4–7, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105) [hereinafter Brief of the National Health Law Program].

154. Brief of 240 Students, Faculty, and Staff at Religiously Affiliated Universities as *Amici Curiae* in Support of Respondents at 6, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105).

women reported that “over the course of their lives, access to contraception had enabled them to take better care of themselves or their families, support themselves financially, complete their education, or get or keep a job.”¹⁵⁵

Additionally, *amici* explicate, contraception use reduces the frequency of abortions,¹⁵⁶ which is significant, because insurance providers are not required to provide abortion coverage. Abortions can be expensive and difficult to obtain, especially given the many new Targeted Regulation of Abortion Providers (TRAP) laws in many states.¹⁵⁷

Moreover, *amici* in support of the Mandate argue that an exemption would adversely affect historically marginalized groups, especially women of color.¹⁵⁸ The Black Women’s Health Imperative, another RJ group, explain how “Black women will be uniquely impacted by the outcome of this case.”¹⁵⁹ Specifically:

Black women . . . are disproportionately impacted by certain health issues, tend to be less economically advantaged, and have high levels of religious commitment. These realities build on the historic lack of control that Black women have had over their reproductive health. If petitioners are exempted from the mandate, the Court will have given nonprofit religious organizations its seal of approval to infringe on individual women’s religious liberty by denying those women equal access to the same contraceptive coverage granted to other women.¹⁶⁰

Accordingly, “[d]enying access to seamless contraceptive coverage . . . perpetuates the exclusion and economic subordination of women,

155. See Brief of National Women’s Law Center, *supra* note 151, at 18.

156. See, e.g., *id.* at 11, 14.

157. According to the Center for Reproductive Rights, TRAP laws:

[S]ingle out the medical practices of doctors who provide abortions and impose on them requirements that are different and more burdensome than those imposed on other medical practices. . . . Compliance with these requirements may require costly and unnecessary facility modifications, which may not even be feasible in existing facilities, or impose unnecessary staffing requirements that are expensive or impossible to meet. Another example is TRAP laws requiring that physicians who perform abortions have admitting privileges in a local hospital, a requirement that is not medically justified and severely reduces women’s access to abortion services.

Targeted Regulation of Abortion Providers (TRAP), CTR. FOR REPROD. RIGHTS (Aug. 28, 2015), <http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap> [<http://perma.cc/K9XB-TKQP>].

158. See Brief of *Amicus Curiae* Black Women’s Health Imperative in Support of Respondents at 2–3, *Zubik v. Burwell*, 578 U.S. 1557 (2016) [hereinafter Brief of Black Women’s Health Imperative].

159. *Id.* at 2.

160. *Id.* at 2–3.

and in particular women of color.”¹⁶¹ Thus, without access to affordable health care, *amici* note, difficulties for low-income and other marginalized women will likely persist.¹⁶²

On the other hand, *amici* supporting the nuns claim that without an exemption, the nuns will be unable to pay the fines that they will accrue for violating the Mandate.¹⁶³ They will then be forced to close the Homes, which will leave many vulnerable older residents without care, many nuns without their vocation, and many other employees without jobs.¹⁶⁴ Paradoxically, one amicus explains that although “[m]ost of the residents are too poor to pay for their care, . . . the Sisters provide everything possible to make them comfortable, far above and beyond the basic care at any nursing home.”¹⁶⁵ To cover costs the Sisters must sometimes beg.¹⁶⁶ One brief expounds that the nuns “seek neither money nor acclaim.”¹⁶⁷ Yet, without the benefit of an exemption, the “outlook . . . is bleak,” because the Sisters “do not intend to violate their consciences [by providing contraception]” nor do they “have unlimited funds to pay massive fines to Big Brother.”¹⁶⁸ Without the benefit of an exemption, it may be cost-prohibitive for the Homes to remain open, which will adversely impact the nuns, their employees, and the residents living in poverty who rely on the Sisters’ generosity.¹⁶⁹

3. *Protecting Women’s Health*

Women’s health is another shared priority of the nuns and the RJ movement. *Amici* writing in support of the Mandate maintain that contraceptive use has greater benefits for women than just preventing pregnancy.¹⁷⁰ For instance, in their brief, the Ovarian Cancer Research Fund and its partners explain that “[o]ral contraceptives and intrauterine devices (IUDs) are widely recognized preventive therapies for reducing the risk of ovarian, endometrial, and other gynecologic cancers.”¹⁷¹ Broadly speaking, “[a]n extraordinary amount

161. Brief of National Latina Institute, *supra* note 134, at 23–24.

162. *Id.* at 24–25.

163. See Brief of *Amici Curiae* Residents and Families of Residents at Homes of the Little Sisters of the Poor in Support of Petitioners at 22, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105) [hereinafter Brief of Residents and Families].

164. *Id.*

165. *Id.* at 21.

166. *Id.*

167. *Id.* at 9.

168. *Id.* at 22.

169. See Brief of Residents and Families, *supra* note 163, at 22.

170. See Brief of the Ovarian Cancer Research Fund Alliance et al. as *Amici Curiae* in Support of Respondents at 2, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105).

171. *Id.* at 3–4.

of medical research shows that for many women at higher risk of developing ovarian cancer, oral contraceptive use can be the difference between developing this deadly cancer and not developing it.”¹⁷² Certain groups of women, such as Black women, “are disproportionately affected by a variety of health issues which contraception either alleviates or for which pregnancy is contraindicated. Some of the most relevant of these are diabetes, heart disease, lupus, and HIV/AIDS.”¹⁷³ Moreover, *amici* argue that prior to the passing of the ACA, “[c]ompared to men, women were ‘more likely to forgo needed care because of cost and to have problems paying their medical bills, accrue medical debt, or both.’”¹⁷⁴ It is possible that this was because “[w]omen of childbearing age spent 68% more in out-of-pocket health care costs than men.”¹⁷⁵ *Amici* highlight that “[h]ealth insurance helps remove cost barriers to health care access.”¹⁷⁶

On the other hand, briefs filed on behalf of the petitioners challenge the very premises behind the Mandate, suggesting instead that other means would be more productive for protecting women’s health.¹⁷⁷ For example, Women Speak for Themselves, a group that claims to be “bring[ing] fact-based and nonpartisan arguments about women’s freedom and about religious freedom to their local communities, and to the federal government,”¹⁷⁸ dismisses the need for universal access to contraceptives, arguing that “contraception is ubiquitous, widely used and relatively inexpensive.”¹⁷⁹ The group further contends that provisions at issue in the Mandate itself are not going to provide contraception to those unable to afford it; according to their Brief:

[B]ecause the Mandate is directed to employed women and daughters of the employed, it will largely affect women who already have relatively easy access to contraception and use it. Women above 150% of the poverty line and more educated women are more likely to use contraception than are less-advantaged women. On these facts, it is difficult to imagine how the Mandate could increase the usage rates of its target audience much if at all.¹⁸⁰

172. *Id.* at 2.

173. Brief of Black Women’s Health Imperative, *supra* note 158, at 18.

174. Brief of the National Health Law Program, *supra* note 153, at 3–4 (internal citations omitted).

175. Brief of National Women’s Law Center, *supra* note 151, at 15.

176. Brief of the National Health Law Program, *supra* note 153, at 4–7.

177. Brief of *Amicus Curiae* Women Speak for Themselves in Support of Petitioners at 10, *Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 446 (2015) (No.15-105).

178. *Id.* at 1.

179. *Id.* at 13.

180. *Id.* at 15–16.

Rather, as Women Speak for Themselves propose, “[t]he government could devote more resources, for example, to addressing the leading causes of women’s premature death,” which are not related to contraception availability.¹⁸¹ Or, “[i]t could promote better coverage of maternity costs—a leading driver of differential health costs between males and females of childbearing ages—or even of children’s health care costs, given women’s vastly higher rates of single parenting.”¹⁸² Other *amici* for the petitioners, such as the Breast Cancer Prevention Institute (BCPI), challenge even the assertion that contraception is good for women’s health.¹⁸³ To rebut this presumption, BCPI presented “a partial survey of [the] robust body of relevant evidence showing that the mandated contraceptives . . . have biological properties that significantly increase women’s risks of breast, cervical, and liver cancer, stroke, and a host of other diseases, including the acquisition and transmission of [HIV].”¹⁸⁴ BCPI proposes that “the incidence of the cancers that combined oral contraceptives may *cause* far exceed the incidence of cancers that they may *prevent*,” which suggests that the Mandate may have the opposite of its intended effect.¹⁸⁵ Accordingly, BCPI concludes, the Mandate “fails the ‘furtherance’ test of any purported interest in preventive medicine because it *increases* risk of cancer and other serious disease instead of decreasing it.”¹⁸⁶ Scientific accuracy aside, *amici* in support of both sides share concern over women’s health and want to ensure that women are able to achieve safe, affordable health care.

4. Discussion of Amicus Briefs

It is unsurprising that RJ advocates¹⁸⁷ support the Mandate. In amicus briefs, advocates argue that the Mandate is good not only for marginalized women but also is advantageous for society as a whole and necessary for reproductive justice.¹⁸⁸ An analysis of the issues of concern, however, reveals that the nuns and other similarly situated women’s situations could also be diminished if the Little Sisters are denied an accommodation. Thus, eradicating the Mandate could

181. *Id.* at 10.

182. *Id.* at 10–11 (internal citations omitted).

183. Brief *Amicus Curiae* of the Breast Cancer Prevention Institute in Support of Little Sisters of the Poor Home for the Aged, Denver, CO, et al. at 20, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 15-105).

184. *Id.* at 3.

185. *Id.* at 5.

186. *Id.* at 2.

187. *See, e.g.*, Brief of Black Women’s Health Imperative, *supra* note 158, at 2; Brief of National Latina Institute, *supra* note 134, at 1–2.

188. *See, e.g.*, Brief of Black Women’s Health Imperative, *supra* note 158, at 7–12.

have tremendous consequences for marginalized women who might in its absence be unable to procure birth control. Yet, if the Mandate is imposed, other people—including the nuns, employees, and residents of the Homes—could face their own consequential outcomes. This put courts in the precarious position of determining whose burden matters the most under U.S. law.

B. Additional Briefing

Equipped with over seventy amicus briefs filed on behalf of either side, the Supreme Court heard oral arguments on March 23, 2016.¹⁸⁹ Just six days following the oral arguments, however, the Court “requested supplemental briefing from the parties addressing ‘whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies, without any such notice from petitioners.’”¹⁹⁰ In its request, the Court appears to be searching for a means of compromise.¹⁹¹

In its supplemental brief, the government advanced that the self-certification process, which the Sisters were seeking an exemption from, is “a simple, minimally intrusive process that provides clarity and certainty for all parties affected by the accommodation.”¹⁹² The government conceded that “the accommodation for employers with insured plans could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”¹⁹³ The U.S. government also acknowledged that insurers already have a legal obligation to provide contraception to employees whose employers fill out the self-certification form.¹⁹⁴ It further recognized that instead of the legal obligation being triggered when the employer fills out the self-certification form, the legal obligation to provide no-fee contraceptive coverage could “in theory” be triggered whenever the insurer provides a plan that does not offer contraceptive coverage.¹⁹⁵ Under this alternative, an insurer would recognize that a plan did not offer contraception, and then it

189. *Zubik v. Burwell*, *supra* note 121.

190. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559–60 (2016).

191. See Noah Feldman, *Can the Supreme Court Demand a Compromise? It Just Did*, BLOOMBERG (Mar. 30, 2016, 9:44 AM), <https://www.bloombergvew.com/articles/2016-03-30/can-the-supreme-court-demand-a-compromise-it-just-did> [http://perma.cc/AWY6-T5BD].

192. Supplemental Brief for the Respondents at 8, *Zubik v. Burwell*, 578 U.S. 1557 (2016).

193. *Id.* at 14–15.

194. *Id.* at 15.

195. *Id.*

would automatically offer no-cost contraceptive coverage to all persons enrolled in that plan.¹⁹⁶ In their reply to the government's brief, petitioners affirmed:

Petitioners have made crystal clear that they do *not* object to every regulatory scheme in which the same insurance companies with which they contract provide contraceptive coverage to their employees. If petitioners were *truly* exempt from the mandate, and those companies were to offer their employees the kind of *truly* separate coverage that petitioners have described—*i.e.*, “a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and offered to individuals through a separate communication”—then petitioners would no longer have a RFRA objection.¹⁹⁷

In their supplemental briefs, the two sides paved the way for a compromise wherein both sides achieved their desired outcomes.

C. Per Curiam Decision

Following a review of the supplemental briefs, the Court issued a *per curiam* decision.¹⁹⁸ In its terse, six-page decision, the Court declines to answer whether the Mandate violates RFRA, thereby circumventing decisions on whether petitioners' religious exercise is substantially burdened; whether the government has a compelling interest; or whether the current regulations are the least restrictive.¹⁹⁹

Rather, the Court vacates the prior holdings in the seven lower court cases and remands the nuns' case, along with the other consolidated cases, back to their respective Courts of Appeals, where “the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans ‘receive full and equal health coverage, including contraceptive coverage.’”²⁰⁰ In its decision, the Court notes that it “anticipate[s] that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues between them.”²⁰¹ Though the Court instructs the government to arrive at a solution

196. *Id.* at 1.

197. Supplemental Reply Brief for Petitioners at 5–6, *Zubik v. Burwell*, 578 U.S. 1557 (2016).

198. *Zubik*, 136 S. Ct. at 1560. The decision was 8–0, as the Court had only eight members following the death of Justice Antonin Scalia earlier that year.

199. *See, e.g., id.*

200. *Id.*

201. *Id.*

that accommodates the petitioners, it assures that “[n]othing in this opinion, or in the opinions or orders of the courts below, is to affect the ability of the Government to ensure that women covered by petitioners’ health plans ‘obtain, without cost, the full range of FDA approved contraceptives.’”²⁰²

In a concurring opinion, Justice Sonia Sotomayor, joined by Justice Ginsburg, cautions lower courts that they “should not construe [this decision] . . . as [a] signal[] of where this Court stands.”²⁰³ She underscores that the opinion “expresses no view on the merits of the cases,” nor does it “endorse the petitioners’ position that the existing regulations substantially burden their religious exercise or that contraceptive coverage must be provided through ‘a separate policy, with a separate enrollment process.’”²⁰⁴ She stresses:

Today’s opinion does only what it says it does: “afford[s] an opportunity” for the parties and Courts of Appeals to reconsider the parties’ arguments in light of petitioners’ new articulation of their religious objection and the Government’s clarification about what the existing regulations accomplish, how they might be amended, and what such an amendment would sacrifice. As enlightened by the parties’ new submissions, the Courts of Appeals remain free to reach the same conclusion or a different one on each of the questions presented by these cases.²⁰⁵

When President Donald Trump took office in January 2017, per the Supreme Court’s ruling, the cases were being worked out in their respective lower courts.

Though HHS had not yet posted the new rules on the Mandate,²⁰⁶ on May 4, 2017, President Trump issued the Presidential Executive Order Promoting Free Speech and Religious Liberty.²⁰⁷ Under the Order, “[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.”²⁰⁸

202. *Id.* at 1560–61 (quoting *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014)).

203. *Id.* at 1561.

204. *Zubik*, 136 S. Ct. at 1560–61 (internal citations omitted).

205. *Id.* at 1562 (internal citations omitted).

206. See U.S. Dep’t of Health & Human Servs., *About the Affordable Care Act*, HHS.GOV (July 3, 2017), <https://www.hhs.gov/healthcare/about-the-aca/index.html> [<http://perma.cc/6YGC-ZR2L>].

207. Press Release, The White House Office of the Press Sec’y, Presidential Executive Order Promoting Free Speech and Religious Liberty (May 4, 2017), <https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty> [<https://perma.cc/6L3H-H6LS>].

208. *Id.*

Explaining the Order in a press conference, President Trump lamented, “[w]e know all too well the attacks against the Little Sisters of the Poor, . . . incredible nuns who care for the sick, the elderly, and the forgotten.”²⁰⁹

Before he signed the order, President Trump asked for applause for nuns from the Little Sisters of the Poor Homes who were present for the signing, telling them that “[their] long ordeal [would] soon be over.”²¹⁰ President Trump went on addressing the nuns, stating, “[w]ith this executive order we are ending the attacks on your religious liberty, and we are proudly re-affirming America’s leadership role as a nation that protects religious freedom for everyone.”²¹¹ Of the statement by the President, counsel for the Becket Fund for Religious Liberty, which represented the Little Sisters of the Poor in court, stated on Twitter that he was “encouraged by the promise of the protection . . . coming from the White House.”²¹²

On June 1, 2017, the *New York Times* reported on the Trump administration’s drafted revision of the Mandate, which “could deny birth control benefits to hundreds of thousands of women who now receive them at no cost under the Affordable Care Act.”²¹³ “The new rule . . . greatly expands the number of employers and insurers that could qualify for exemptions from the mandate by claiming a moral or religious objection, including for-profit, publicly traded corporations.”²¹⁴ Although previous exemptions required health insurance providers to provide contraceptives to women working for religious employers at no cost, under the new guidelines, many women will not receive the same benefits.²¹⁵ The 34,000 word explanation of the policy is explicit about the consequences the new rule could have for women: “[t]hese interim final rules will result in some enrollees in plans of exempt entities not receiving coverage or payments for contraceptive services.”²¹⁶ The new rule could go into effect as soon as it is published in the Federal Register.²¹⁷

209. Jonathan M. Pitts, *Little Sisters of the Poor approve Trump order on religion*, BALTIMORE SUN (May 4, 2017, 6:50 AM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-little-sisters-trump-exec-order-20170504-story.html> [<http://perma.cc/5AN9-7RUK>].

210. *Id.*

211. *Id.*

212. BECKET (@BecketLaw), TWITTER (May 3, 2017, 9:15 PM), <https://twitter.com/BecketLaw/status/859984887016828933> [<http://perma.cc/W4C7-BDS8>].

213. Robert Pear, *Trump Rule Could Deny Birth Control Coverage to Hundreds of Thousands of Women*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/us/politics/birth-control-women-trump-health-care.html> [<https://perma.cc/N3LM-EVXL>].

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

On October 6, 2017, the Trump administration “announc[ed] two companion interim final rules that provide conscience protections to Americans who have a religious or moral objection to paying for health insurance that covers contraceptive/abortifacient services.”²¹⁸ According to the press release:

Under the first of two companion rules released today, entities that have sincerely held religious beliefs against providing such services would no longer be required to do so. The second rule applies the same protections to organizations and small businesses that have objections on the basis of moral conviction which is not based in any particular religious belief.²¹⁹

The Trump administration insists that the “rules will not affect over 99.9% of the 165 million women in the United States.”²²⁰ Following the release of the new rules, the Center for Reproductive Rights and other civil rights organizations filed a series of lawsuits claiming that the interim rules “violate the Administrative Procedures Act by inappropriately circumventing normal rulemaking procedures that require public input before implementing a new rule.”²²¹ The new rules went into effect immediately.²²²

IV. REPRODUCTIVE JUSTICE AND THE MANDATE: GOING FORWARD

When the Supreme Court granted *certiorari* on the Little Sisters’ case, many believed it would be the next landmark case regarding the ACA and women’s health.²²³ When less than a week after oral

218. Press Release, U.S. Dep’t of Health & Human Servs., Trump Administration Issues Rules Protecting the Conscience Rights of All Americans (Oct. 6, 2017), <https://www.hhs.gov/about/news/2017/10/06/trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html> [<https://perma.cc/2TMH-4MRP>].

219. *Id.*

220. *Id.*

221. Press Release, Ctr. for Reprod. Rights, Center for Reproductive Rights Announces Challenge to Trump Administration’s Contraceptive Coverage Rules (Oct. 10, 2017), <https://www.reproductiverights.org/press-room/center-for-reproductive-rights-announces-challenge-to-trump-Contraceptive-Coverage-Rules> [<https://perma.cc/LYL5-3T9Z>].

222. *Id.*; see also Press Release, *supra* note 218.

223. See, e.g., Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, THE ATLANTIC (Nov. 6, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729> [<http://perma.cc/C3TP-C4BJ>] (“This is culmination of the third major round of legal challenges to this portion of the ACA: the initial wave of pushback from religious organizations; the challenge from for-profit employers, which culminated in *Hobby Lobby*; and now, objections from a number of religious non-profits.”); see also Dahlia Lithwick, *The Little Sisters of the Poor Get Their Day at the Supreme Court*, SLATE (Nov. 6, 2015, 5:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/supreme_court_grants_little_sisters_of_the_poor_cert_on_aca.html [<http://perma.cc/GW7V-PNMD>] (“In addition to being the fourth major challenge to Obamacare to be heard at the Supreme Court, the

arguments the Court directed the parties to file supplemental briefs, however, scholars and legal commentators began foreshadowing the Court's terse May ruling.²²⁴ Some expressed disappointment with the outcome because it failed to rule on the legality of the Mandate.²²⁵ RJ advocates, in particular, view the Mandate as necessary to bring about "equal access to economic, political, social, and private life, as well as the basic infrastructure—including healthcare" that has long been denied to marginalized communities.²²⁶ Even though advocates may be grateful that the Court demanded compromise rather than ruling that the Mandate was an outright violation of RFRA, in the absence of a clear ruling cementing the legality of the Mandate, RJ advocates may be frustrated, fearing that the Court may be continuing in the minefield that Justice Ginsburg admonished in her *Hobby Lobby* dissent.²²⁷

Closer examination reveals that the ruling could have resulted in a comprehensive and sustainable solution that protected the rights advocated for by RJ promoters, while also addressing the concerns of conscientious objectors, such as the nuns. When the Court declined to rule on the merits and ordered the parties to find a compromise, the Court opened the door for discussion between the government and interested parties that could have resulted in a communally beneficial outcome. The additional time afforded an opportunity for interested parties, such as RJ advocates, to hold the government accountable for ensuring that its people have access to health care; to recognize the shared concerns and interests of secular and religious groups; and to embrace the opportunity for conversation and mutually beneficial compromise. Whether the Mandate will continue to assist with the procurement of RJ in the United States, despite recent setbacks introduced by the Trump administration, will depend on the response to the Court's most recent ruling.

A. Unintended Consequences of the Mandate and the Court's Ruling

The May 2016 Supreme Court ruling elicits mixed reactions. Some pundits are skeptical of the Court's decision. In a piece for the

seven consolidated cases also become an emblem of what is sure to be one of the biggest themes of the coming years at the court: the clash between religious freedom claims and the rights of secular Americans.”).

224. See, e.g., Michael McGough, *The Supreme Court floats a contraception compromise*, L.A. TIMES (Mar. 29, 2016, 3:10 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-contraception-little-sisters-20160329-story.html> [<http://perma.cc/X8D9-JEH6>].

225. See Charles F. Webber & Jane Dall Wilson, *Zubik v. Burwell: The Supreme Court as Mediator?*, LAW360 (June 1, 2016, 11:15 AM), <https://www.law360.com/articles/801585> [<http://perma.cc/RRF9-NPNC>].

226. Brief of National Latina Institute, *supra* note 134, at 16.

227. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2805 (2014).

New York Times, legal scholar Linda Greenhouse questions, “[w]as it a sign of a new appetite for compromise or of institutional dysfunction?”²²⁸ Responding to her own question, she posits, “I’d like to believe the former. But I fear the latter. I think the court is engaged in an exercise of understandable but fruitless wishful thinking.”²²⁹ In a similarly pessimistic vein, an article in the *Washington Post*, written four months after the decision was released, describes the ruling as a “punt,” which “saddled the lower courts with an intractable task.”²³⁰

While some are cynical about the Court’s holding, others declare the ruling a victory, though there is no consensus on which side must be declared the victor. An article in the *Los Angeles Times* states, “[the] Supreme Court . . . announced a compromise [ruling on contraceptives] designed to clear the way for women working for religious organizations to receive the free birth control promised under the Affordable Care Act”;²³¹ the article then proceeds to call the outcome a win for the U.S. government. Moreover, the vice president for reproductive rights at the National Women’s Law Center, proclaims, “[t]his outcome is good for women The government can now move forward to assure women have seamless access to the contraceptive coverage. We’re not happy there will still be more litigation, but this should pave the way for women to get full coverage.”²³²

Meanwhile, an article in the *National Review* declares: “The Little Sisters of the Poor Just Beat the Obama Administration at the Supreme Court,” justifying that “when the court vacates the ruling you’re challenging, that’s a win.”²³³ The Becket Fund for Religious Liberty announced:

The unanimous decision by the Supreme Court was a big win for the Little Sisters. But that does not mean anyone lost. As the

228. Linda Greenhouse, *The Supreme Court’s Wishful Thinking About Compromise*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/26/opinion/the-supreme-courts-wishful-thinking-about-compromise.html> [http://perma.cc/WUF8-2DLL].

229. *Id.*

230. Josh Blackman, *The Supreme Court’s punt on the Little Sisters of the Poor cannot be returned*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/23/the-supreme-courts-punt-on-the-little-sisters-of-the-poor-cannot-be-returned/?utm_term=.0ada33dce2f9 [http://perma.cc/2J8G-C5JL].

231. David G. Savage, *Supreme Court ruling should clear the way to free birth control for women with religious employers*, L.A. TIMES (May 16, 2016, 2:52 PM), <http://www.latimes.com/nation/nationnow/la-na-supreme-court-contraceptives-20160516-snap-story.html> [http://perma.cc/W2S3-CTCM].

232. *Id.*

233. David French, *The Little Sisters of the Poor Just Beat the Obama Administration at the Supreme Court*, NAT’L REVIEW (May 16, 2016), <http://www.nationalreview.com/corner/435446/little-sisters-poor-just-beat-obama-administration-supreme-court> [http://perma.cc/XA9A-S6Y7].

Little Sisters have argued all along, the ruling in no way bars the government from providing these services to women who want them as long as the government stops trying to take over the Little Sisters' health plan. In fact, any alternative delivery method the government chooses would likely be able to be applied—not only to women in religious plans—but to the tens of millions of women in corporate and government plans HHS had previously exempted from the mandate.²³⁴

An article in *Slate* sums up the ruling, stating: “[b]oth sides will claim victory Monday. Women will not lose the right to contraception and the Little Sisters will not pay massive fines. The real winner is the high court, which will not dissolve in a mess of partisan bickering as it did after *Hobby Lobby*.”²³⁵

Celebrations over each side's self-proclaimed victory and ridicule over the perceived defeat of the other side distract from what is really at issue in this ruling—specifically, the government's duty to establish laws and policies that protect all citizens, especially vulnerable and marginalized people. In sidestepping the legal question, the Court effectively removes itself from the equation. Furthermore, in ordering a compromise, the Court bestowed upon HHS the opportunity to placate religious people, which it will be able to do without providing any real protections for the women who benefit from the Mandate.²³⁶ Yet, with each side declaring victory, there may be insufficient motivation for Congress to pass an amendment to the ACA that enshrines the Mandate into federal law, while also sufficiently responding to the concerns of the nuns. In the end, HHS may continue to regulate what is covered under the Mandate, and women in the United States will remain subject to the whims of each new administration.

As noted in an article in the *New England Journal of Medicine*, the Court is correct in one thing in its *Hobby Lobby* decision: “if universal access to contraceptives is a compelling societal interest, then the provision of such access ought to fall first and foremost on the national government and only secondarily be transferred to private parties.”²³⁷ Following *Hobby Lobby*, however, the federal

234. *Supreme Court Rules Unanimously in Favor of Little Sisters*, LITTLE SISTERS OF THE POOR, <http://thelittlesistersofthepoor.com/#supreme-court-ruling> [http://perma.cc/DSC9-P8D8].

235. Dahlia Lithwick, *Supreme Court on Contentious Contraception Case: We're Not Gonna Decide*, SLATE (May 16, 2016, 1:33 PM), http://www.slate.com/blogs/the_slatest/2016/05/16/supreme_court_kicks_zubik_v_burwell_back_to_lower_courts.html [http://perma.cc/P8NX-QXG6].

236. *See id.*

237. George J. Annas et al., *Money, Sex, and Religion—The Supreme Court's ACA Sequel*, 371 NEW ENG. J. MED. 862, 865 (2014).

government did not take steps to ensure universal access to contraceptives; rather, it left the burden on employers and insurance companies to guarantee that employees were able to obtain contraceptive coverage.²³⁸ It is likely that *Little Sisters* made it to court because the government required the nuns to fill out a form so the insurance company would then provide contraceptives to their employees, rather than using a more streamlined and neutral way of ensuring that all persons capable of pregnancy had access to no-cost contraception.²³⁹ This could have been done, perhaps, by mandating that whenever a person had an insurance policy that did not cover contraceptives—including policies such as the ones the nuns offered to their employees before the ACA was passed—that insurance providers had to provide birth control with no cost-sharing.²⁴⁰ Alternatively, the government itself could have allocated federal funding to organizations—such as Planned Parenthood, for example—to provide contraceptives to women without co-payment.

Although cases such as *Hobby Lobby* and *Zubik* may appear to threaten central aims of the ACA, framing the issue as a fight between conscientious objectors and women's rights organizations obfuscates the national government's failure to take responsibility for the Mandate. It instead allows for religious people to take the blame. Holding the government accountable for ensuring health care coverage of millions of people in the United States is supremely important under the administration of U.S. President Donald Trump, who assumed office in January 2017. Under President Trump, the threat to the Mandate and women's health has become increasingly pronounced, as the President has already begun to weaken the Contraceptive Mandate.²⁴¹ On the campaign trail, then-candidate Trump repeatedly promised that he would repeal the ACA, giving no indication that the Mandate would be preserved in any way.²⁴² Before President Trump assumed office, the demand for reversible birth

238. *Hobby Lobby*, 134 S. Ct. at 2799–2800.

239. *Supreme Court Rules Unanimously in Favor of Little Sisters*, *supra* note 234, at 5.

240. Not only would this streamline the process for providing contraceptives, but it would also be good for insurance companies, because “all methods [of birth control] are cost saving after accounting for the costs of unintended pregnancies and births.” Mary C. Politi, Adam Sonfield & Tessa Madden, *Addressing Implementation of the Contraceptive Coverage Guarantee of the Affordable Care Act*, 315 JAMA 653, 653 (2016).

241. See Kliff, *supra* note 66; Pear, *supra* note 213; Press Release, *supra* note 221.

242. See Nolan D. McCaskill, *Trump wants 'special session' to repeal Obamacare*, POLITICO (Nov. 1, 2016, 1:05 PM), <http://www.politico.com/story/2016/11/trump-obama-care-special-session-230588> [<http://perma.cc/FA68-C499>]; see also Oliver Laughland et al., *What will President Donald Trump do? Predicting his policy agenda*, THE GUARDIAN (Nov. 9, 2016, 10:58 PM), <https://www.theguardian.com/us-news/2016/nov/09/donald-trump-president-policy-immigration-agenda-healthcare> [<http://perma.cc/VH49-F292>].

control, such as IUDs, increased dramatically, as many feared that under the new administration the Mandate, as well as the ACA as a whole, would be in jeopardy.²⁴³ Though it is proving difficult for the Republican-led House and Senate to repeal the ACA outright,²⁴⁴ the Trump administration has already begun cutting back the protections previously provided by the Mandate.²⁴⁵ Two policies that were introduced in October 2017 allow any employer to claim religious or moral objection to the Mandate.²⁴⁶

Rather than spending time and money²⁴⁷ debating whether nuns should be forced to sign a form, RJ advocates should focus on the more pressing work of preventing the Trump administration from eliminating the Mandate. In the short term, this requires people to be vocal about their desire for the Mandate, pressuring the Trump administration to allow the Mandate to stand. In the long term,

243. See Kliff, *supra* note 66; see also RafI Letzter, *Women are encouraging each other to get IUDs before Trump becomes president*, BUS. INSIDER (Nov. 9, 2016, 3:00 PM), <http://uk.businessinsider.com/trump-could-be-a-threat-to-the-iud-2016-11> [<http://perma.cc/5V9H-BM52>].

244. After months of working on bills in the House and the Senate, the Republican-led Senate was unable to pass the GOP health care bill that would repeal and replace the ACA, as the effort again collapsed on July 17, 2017. The following week, Senator John McCain, who had recently been diagnosed with aggressive brain cancer, joined two moderate Republicans, two independents, and every Democrat in voting against the “skinny repeal” of the ACA, which would get rid of the individual and employer mandates and a tax on medical devices, while leaving everything else in the ACA intact. As a result, the repeal failed. In a written statement from Senate Majority Leader, Mitch McConnell’s office after the vote on the so-called skinny repeal, Senator McConnell hinted that the GOP-only effort on health care may be dead, Republicans then made one last ditch attempt to repeal the ACA with the so named Graham-Cassidy bill. Despite a Republican majority in the Senate, the bill could not garner enough support to pass the House with the simple majority before the September 30 deadline. After September 30, any health care bill will need 60 votes, including votes from the Senate Democrats. See Burgess Everett & Jennifer Haberkorn, *GOP health care bill collapses*, POLITICO (July 18, 2017, 12:12 AM), <http://www.politico.com/story/2017/07/17/obamacare-senators-turn-on-mcconnell-240646> [<http://perma.cc/C6V4-M5WU>]; Susan Davis & Domenico Montanaro, *McCain Votes No, Dealing Potential Death Blow To Republican Health Care Efforts*, NPR (July 27, 2017, 11:46 PM), <http://www.npr.org/2017/07/27/539907467/senate-careens-toward-high-drama-midnight-health-care-vote> [<http://perma.cc/ML8R-7S8H>]; Thomas Kaplan & Robert Pear, *Senate Republicans Say They Will Not Vote on Health Bill*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/politics/mcconnell-obamacare-repeal-graham-cassidy-trump.html> [<https://perma.cc/56X5-T4ZC>].

245. Brianna Ehley, *Trump rolls back Obamacare birth control mandate*, POLITICO (Oct. 6, 2017, 1:02PM), <http://www.politico.com/story/2017/10/06/trump-rolls-back-obama-cares-contraception-rule-243537> [<https://perma.cc/9CFD-U94S>].

246. *Id.*

247. Litigating at the Supreme Court is very expensive. A 2011 estimate shows that one case costs more than \$1,144,600 to litigate. See Robert Barnes, *A priceless win at the Supreme Court? No, it has a price*, WASH. POST (July 25, 2011), https://www.washingtonpost.com/politics/a-priceless-win-at-the-supreme-court-no-it-has-a-price/2011/07/25/gIQAvoSPZI_story.html?utm_term=.e6d1629dd9ba [<http://perma.cc/FTR9-AJQ4>].

advocates must help write and pass legislation that establishes more permanent solutions for ensuring lifelong reproductive health care for women and girls.

B. Secular and Religious Groups Have Common Concerns and Interests

To achieve their goals, RJ advocates and partners must work together to pressure the executive branch of the government to let the Mandate stand and also compel the legislative branch to pass such legislation that will ensure that marginalized women's rights are preserved and protected even after political changes. In this especially precarious time for women's health, it is important that RJ advocates build a large, strong alliance of people across race, class, ethnic, gender, and religious lines. RJ advocates should focus on building alliances, rather than being distracted by loud squabbles with nuns.

Building alliances can be difficult, especially when groups appear to have competing aims. Intragroup conflict is not uncommon. For instance, within the Catholic Church there is disagreement about contraception. While the Sisters argue that the Mandate violates their conscience because of their religious faith, a brief submitted on behalf of another group of Catholic organizations insists that the Mandate is not a problem in the practice of their Catholic faith.²⁴⁸ Rather:

Amici believe as a matter of their deep Catholic faith that all employees are equally entitled to coverage of contraceptive services under the ACA, no matter where they work or what they believe. They also believe that the least restrictive means of advancing the critical ideals of religious liberty and women's equality would be to require all employers, including churches and their integrated auxiliaries, to provide access to contraception.²⁴⁹

These *amici* argue that an exemption would involve the government "unduly restrict[ing] Catholic and non-Catholic women employees and their dependents from protecting their own compelling interests in religious and reproductive freedom."²⁵⁰ By juxtaposing their own

248. Compare *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1168 (10th Cir. 2015) with Brief of Amici Curiae Catholics for Choice et al. in Support of Respondents at 6–7, 10, 34, *Zubik v. Burwell*, 578 U.S. 1557 (2016) (No. 15-105) [hereinafter Brief of Catholics for Choice et al.].

249. Brief of Catholics for Choice et al., *supra* note 248, at 10.

250. *Id.* at 8.

religious ideals with those of the Sisters, *amici* highlight a key tension in this debate.²⁵¹ It would be easy to focus on whose religious freedom should be preserved: these Catholic people or those nuns, for example. Focusing on this tension, however, again distracts from the real issues: whether women can obtain cost-free contraception, and whether religious people can practice their faith in the way that they believe appropriate.

Instead of concentrating on differences, RJ advocates and religious groups should consider their shared aims. Women of color founded the reproductive justice movement by criticizing the reproductive rights movement's failure to address the systemic oppressions that impeded most women's ability to choose whether and how to form families, especially the ability of those who are marginalized and oppressed.²⁵² RJ advocates work to protect "the complete physical, mental, spiritual, political, social, and economic well-being of women and girls."²⁵³ To address systematic oppressions, advocates take a holistic approach that necessarily considers the spiritual well-being of the people that it is trying to help.²⁵⁴

Not so differently, the Sisters' work is centered on serving vulnerable older people, who might not otherwise have had a place to live their remaining days with dignity.²⁵⁵ For instance, some *amici* writing in support of the Sisters focuses on the relationship between the Sisters' faith and their work.²⁵⁶ Under the Sisters' philosophy of care, the Sisters "welcome the elderly as [they] would Jesus Christ Himself, and serve them with love and respect until death."²⁵⁷ A Brief submitted by the Residents and Families at the Homes of the Little Sisters of the Poor illustrates how the Nuns embody these Christian principles of service and charity.²⁵⁸ A family member of one resident described admiration for "how happy the sisters seemed and how they tried to spread that happiness to others."²⁵⁹ He further explained:

Watching the dining room staff when someone had difficulty eating was just incredible: one of the nuns or staff would sit with them and feed them. One nun would be on her knees to feed a

251. *Id.*

252. Ross, *supra* note 17, at 4.

253. *Id.*

254. *Id.*

255. *Our Philosophy*, LITTLE SISTERS OF THE POOR, MULLEN HOME FOR THE AGED, <http://www.littlesistersofthepoordenver.org/our-philosophy> [<http://perma.cc/SJ5K-W2BL>].

256. Brief of Residents and Families, *supra* note 163, at 11.

257. *Our Philosophy*, *supra* note 255.

258. Brief of Residents and Families, *supra* note 163, at 9.

259. *Id.* at 18.

woman because the bed was too low to do it from a chair. On each visit we witnessed their care, kindness, gentleness, and respect. You saw the respect in the way the place was maintained. The Sisters simply want to live their faith and they do.²⁶⁰

Concerned Women for America explain that “[f]or many Christians, service to their neighbors is perhaps the highest form of worship.”²⁶¹ Those familiar with the Sisters’ work is viewed as being a continuation of a long history of charitable service.²⁶² CWA contend that this “contribution of so many women of faith to the poor and needy, through religious ministry, in our country cannot be overestimated.”²⁶³ Stressing the importance of the charitable work to both the Sisters and the community that they serve, *amici* implore an exemption that would allow the Nuns to continue the work that purportedly brings joy to the Sisters and benefit’s the older persons that they serve.²⁶⁴

Amici for the Sisters also rebut the claim that the Sisters are merely foisting their religious views on others, averring that this is not consistent with the experiences of those who have lived under the care of the Sisters.²⁶⁵ One resident of the Homes stresses that at the Homes—which serve religious and non-religious people—“[r]eligion is central but not mandatory; there is no preachiness, no evangelism, no religious pressure of any sort.”²⁶⁶ According to a couple of siblings whose parents lived in one of the Homes:

[T]he Little Sisters do not hide their Catholic identity but they don’t force it on others, either: The religion is there for you to take part in but they don’t push it on you at all. They are amazingly open-minded in that sense. They have a strong focus on human dignity and they wouldn’t dream of imposing themselves on someone or forcing someone to believe. They leave it up to the individual.²⁶⁷

According to the Sisters and those who support them, the case was not about imposing religious beliefs on others but about allowing some to practice their religion, as they choose.²⁶⁸ *Amici* continue to stress

260. *Id.*

261. Brief of Concerned Women, *supra* note 138, at 14.

262. Indeed, “[f]or almost 150 years, the Little Sisters of the Poor in the United States have provided an incomparable loving environment for elderly poor people, many of whom have nowhere else to go.” Brief of Residents and Families, *supra* note 163, at 7.

263. Brief of Concerned Women, *supra* note 138, at 2.

264. *Id.* at 11, 13–15.

265. Brief of Residents and Families, *supra* note 163, at 7.

266. *Id.* at 11.

267. *Id.* at 20.

268. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1167 (10th Cir. 2015); see also Brief of Residents and Families, *supra* note 163, at 22.

the necessity of religion to the Sisters' work, explaining that "[n]ot all the residents are believers, though there is a great religious devotion among the Sisters, and it is difficult to imagine such a level of care without such a deep dedication."²⁶⁹ The briefs illustrate how secular society and religious institutions are inextricably intertwined.

Despite differences, both groups employ a holistic approach towards helping marginalized and oppressed people live with dignity and respect. Each is concerned with eradicating sex discrimination, ensuring economic freedom, and protecting women's health.²⁷⁰ Beginning the conversation with commonalities will afford the groups a mutual ground to begin holding the national government accountable for ensuring the welfare of its people.

C. Opportunity for Conversation and Compromise

Though the Mandate appears to be an overall net positive for women, the RJ movement should not ignore the negative consequences that the Mandate in its current form could have on the nuns or others like them. This is especially important, because religious backlash generated by the Mandate could create additional problems in the future, especially if the religious groups feels they are being treated unfairly. Legal scholar Martha Minow explains that religious groups can be effective in organizing against civil rights reforms, creating a "[b]acklash to progressive social change[, which] can produce newly restrictive treatment, undermine initial reforms, erode public support for the government that was pursuing the reform, and further mobilize reactionary forces with even broader agendas for retrenchment."²⁷¹ The rippling consequences of ignoring the concerns of the Sisters could do more damage to RJ's cause than any exemption would. To avoid religious backlash, Minow suggests that secular governments create "a framework within which individuals and groups negotiate across the multiple sources of norms and meaning affecting them and their communities."²⁷² The Trump administration does not appear to be interested in fostering dialogue. Perhaps, in the absence of government action, civil society could create such a framework, creating space to foster understanding and dialogue.

How productive the discussion will be depends on a number of important considerations. Some important factors include: who gets

269. Brief of Residents and Families, *supra* note 163, at 11 (quoting OLIVER SACKS, ON THE MOVE: A LIFE 224, 225 (2015)).

270. *See supra* Section III.A.

271. Minow, *supra* note 11, at 823–24.

272. *Id.* at 826.

a voice at the table—the nuns, the Latino Pope, the predominantly White, male leadership of the U.S. Catholic Church, members of Catholics for Choice, lay persons, RJ advocates, etc.? How are negotiations handled? What is non-negotiable? Do the concerns of marginalized people get priority? Minow cautions that “[n]egotiation, especially with the strategy of identifying solutions that satisfy the religious groups and the civil rights advocates, can be a meaningful option—but not in a climate of pitched conflict over values.”²⁷³ Ensuring that everyone feels heard and making sure that minorities and people from marginalized communities are represented may help neutralize potential conflict and facilitate negotiation.

Legal scholar Ruth Colker stresses the importance of “compassion and constructive dialogue” for overcoming conflict, especially conflict between secular and religious groups.²⁷⁴ She explains, “[d]ialogue refers to conversations in which we may offer an opinion, but are genuinely interested in learning the perspective of the other person. We enter the conversation not to persuade, but to learn.”²⁷⁵ As Minow and Colker both suggest, bringing people to the table and giving voice to the oppressed has a far greater chance of creating long-term sustainable change, such as that called for by RJ advocates.²⁷⁶

Some contend that accommodating the Sisters in this instance will provide impetus for more accommodations.²⁷⁷ Because of the adverse effects these accommodations could have, especially on marginalized groups and women of color, this could further encumber RJ. Even Justice Ginsburg in her *Hobby Lobby* dissent cautioned that offering accommodations to religious groups could create a space for other challenges by religious organizations wanting exemptions based on their respective religious beliefs.²⁷⁸ While the Court and legal advocates should be concerned with potential future legal challenges based on the precedent it sets, a compromise—such as the one that was ordered in this case—does not favor one party over the other and should not be viewed as a negative outcome for either side. As was elucidated in Justice Sotomayor’s concurrence in *Zubik v. Burwell*, the decision was not based on the merits of the case, but rather it was a decision that provided an opportunity for cooperation

273. *Id.* at 829.

274. Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN’S L. J. 137, 140 (1990).

275. *Id.* at 142.

276. *See id.* at 140; Minow, *supra* note 11, at 829. *See also* SISTERSONG, *supra* note 34.

277. *See* Brief of Catholics for Choice et al., *supra* note 248, at 12; Minow, *supra* note 11, at 786–88, 823.

278. *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2805 (2014).

and dialogue.²⁷⁹ Engaging the nuns and even providing accommodation does not necessitate that all other requests be granted, especially at the expense of marginalized people—it merely requires people to come to the table and examine the complex realities of people’s lives and work to ensure that even the most vulnerable and marginalized people are able to achieve self-determined lives.

In light of the recent political changes in the United States, the future of the Mandate has never been so uncertain. Constructive dialogue must propel the conversation forward in meaningful ways, which will, ideally, produce an outcome that empowers all people to live fulfilling, self-determined lives. Although it may take longer and be more challenging to listen to the nuns and take their concerns seriously, while also ensuring that everyone has access to contraceptives, this type of approach is the best opportunity for achieving sustainable progress. Conversation, compromise, and alliance building are the best ways to proceed.

279. *Zubik v. Burwell*, 136 S. Ct. 1557, 1562 (2016).