

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR)
SAINTS PETER AND PAUL HOME,)
Petitioner,)
v.) No. 19-431
PENNSYLVANIA, ET AL.,)
Respondents,)

DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Petitioners,)
v.) No. 19-454
PENNSYLVANIA, ET AL.,)
Respondents.)

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

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18 Washington, D.C.
19 Wednesday, May 6, 2020
20

21 The above-entitled matter came on for
22 oral argument before the Supreme Court of the
23 United States at 10:00 a.m.
24
25

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P R O C E E D I N G S

(10:00 a.m.)

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

General Francisco.

ORAL ARGUMENT OF GEN. NOEL J. FRANCISCO

ON BEHALF OF THE PETITIONERS IN 19-454

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

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

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

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

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

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

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

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

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

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

10 GENERAL FRANCISCO: And, here, HRSA --

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you.

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas. Justice Thomas.

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

25 Justice Ginsburg?

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

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

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

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

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

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

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

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

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

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

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

7 GENERAL FRANCISCO: Yes.

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

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

23 JUSTICE GINSBURG: The church
24 itself --

25 GENERAL FRANCISCO: But even putting

1 that --

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

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

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

14 GENERAL FRANCISCO: Yes, Your Honor.

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

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas? I think you're back.

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

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

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

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

1 which would prohibit arbitrary exemptions.

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

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

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

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

1 when regulating in this area.

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

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

16 CHIEF JUSTICE ROBERTS: Thank you,
17 General.

18 Justice Breyer?

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

25 So, if you have anything to add on

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

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

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

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

24 JUSTICE BREYER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

25 JUSTICE ALITO: This broad issue has

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

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

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

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General.

3 Justice Sotomayor?

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

9 GENERAL FRANCISCO: Well, Your Honor,
10 yes, that's the number that would be affected by
11 the exemptions as compared to the original
12 church exemption and effective exemptions that
13 cover -- that affected around 30,000 women.

14 But I would note that in this
15 particular litigation, the Respondents haven't
16 yet identified anyone who would actually lose
17 access to contraception as a result of these
18 rules, I think presumably because contraception
19 -- access to contraception is widely available
20 in this country through many other means --

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

23 GENERAL FRANCISCO: -- besides forcing
24 --

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

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

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

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

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

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

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

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

13 JUSTICE SOTOMAYOR: One last --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Kagan?

17 JUSTICE KAGAN: Thank you.

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

20 GENERAL FRANCISCO: Good morning, Your
21 Honor.

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

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

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

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

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

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

4 But I would -- I guess I --

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

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

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

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

1 JUSTICE KAGAN: But why couldn't --

2 GENERAL FRANCISCO: So the only --

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Gorsuch?

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

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

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

23 And I think that's particularly clear
24 here since, one, RFRA both applies to and
25 supersedes the ACA, and, two, even if you don't

1 think that the ACA authorizes exemptions, even
2 though we think that they -- it does, there's
3 nothing in the ACA that prohibits exemptions.

4 JUSTICE GORSUCH: Thank you, General.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 Good morning, General Francisco.

10 GENERAL FRANCISCO: Good morning, Your
11 Honor.

12 JUSTICE KAVANAUGH: Your colleague on
13 the other side says the text and structure of
14 the ACA make plain that Congress delegated HRSA
15 authority to oversee guidelines defining what
16 preventive services for women must be covered,
17 not who must cover them.

18 Can you respond to that argument?

19 GENERAL FRANCISCO: Yes, Your Honor.

20 Respectfully, that is not what the ACA
21 says. Section 13(a)(4) says that employers have
22 to provide whatever coverage HRSA itself
23 provides for and supports.

24 Here, HRSA does not provide for and
25 support coverage by the small number of

1 employers with conscientious objections, but it
2 does provide for and support coverage by
3 everybody else.

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

11 JUSTICE KAVANAUGH: Thank you,
12 General.

13 CHIEF JUSTICE ROBERTS: Mr. Clement?

14 ORAL ARGUMENT OF PAUL D. CLEMENT
15 ON BEHALF OF THE PETITIONER IN 19-431

16 MR. CLEMENT: Mr. Chief Justice, and
17 may it please the Court:

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

23 And Congress recognized that the
24 mandate was not some sort of categorical
25 imperative that demanded universal compliance,

1 and so it exempted tens of millions of employees
2 under grandfathered plans. Thus, from the very
3 beginning, the government's refusal to exempt
4 the Little Sisters from the mandate and its
5 massive penalties has posed a glaring RFRA
6 problem.

7 The federal government finally got the
8 message and exempted the Little Sisters. That
9 exemption remedied the RFRA violation and
10 followed the best of our traditions.

11 Nonetheless, the Third Circuit invalidated it by
12 concluding that the regulatory accommodation
13 satisfied RFRA and the government was powerless
14 to go further.

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

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

1 that -- that underlie the basic contraceptive
2 mandate in the Hobby Lobby decision itself.

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

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

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

25 MR. CLEMENT: They -- no, the Little

1 Sisters don't have any objection if their
2 employees receive those services from some other
3 means. Their objection essentially is to having
4 their plan hijacked and being forced to provide
5 those services through their own plan and plan
6 infrastructure.

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

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

1 But the government has insisted
2 throughout this whole process that we not just
3 be able to have an opt-out form, an objection
4 form, but that that same form serve as a
5 permission slip to allow the government to track
6 down PPAs and others to provide services through
7 our plans. And that's always been the gravamen
8 of our objection. It's never been an objection
9 to objecting itself.

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

17 Is it really the case that there is no
18 way to resolve those differences?

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

1 coverage, with seamless, essentially, being a
2 synonym through -- for through the Little
3 Sisters' plans.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. CLEMENT: And as long as they
7 insisted on --

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas?

10 JUSTICE THOMAS: Thank you, Chief
11 Justice.

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

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

21 At this juncture, as long as
22 Massachusetts against EPA remains good law, we
23 don't really have an objection to the states'
24 standing. But I think their standing has to
25 depend on that precedent because, as General

1 Francisco alluded to, throughout this
2 litigation, they have not been able to identify
3 even a single person who would lose coverage in
4 such a way that it would increase the burdens
5 for the state and -- Pennsylvania and New
6 Jersey.

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Ginsburg?

20 JUSTICE GINSBURG: I would ask Mr.
21 Clement the same question I asked the
22 government. The -- at the end of the day, the
23 government is throwing to the wind the women's
24 entitlement to seamless, no cost to them. It is
25 requiring those women to pay for contraceptive

1 services if they can -- first, they would have
2 to go search for a government plan, and, if it
3 turns out, as it will for many of them, that
4 there is no government -- other plan that covers
5 them, then they're not covered.

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

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

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

1 conditions, that they were going to impose even
2 on grandfathered plans, but they didn't impose
3 the preventative mandate.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice -- Justice Breyer?

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

23 So, from that point of view, I really
24 repeat, if there's anything you want to add, the
25 Chief Justice's question. I don't understand

1 why this can't be worked out. But, if it can't,
2 from what's been said so far, it seems to me the
3 proper legal box to work it out in is whether
4 this particular rule is arbitrary, capricious,
5 or an abuse of discretion.

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

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

19 So what do I do?

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

1 who object to the accommodation, but they went
2 too far.

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

19 So I think that's the -- the path
20 forward.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Alito?

24 JUSTICE ALITO: Mr. Clement, I
25 certainly agree with my colleagues that our best

1 tradition in this area is to accommodate diverse
2 religious views. So I want to ask you about the
3 interests that are involved here.

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

16 MR. CLEMENT: So, Justice Alito, on
17 both questions, first, the Little Sisters
18 believe that complying with this mandate is
19 simply inconsistent with their faith. And so,
20 if this burden is imposed on them, they will
21 have to reconfigure their operations.

22 One of the anomalies here is that the
23 government, from the beginning, has exempted
24 religious orders, but they refuse -- if they --
25 if they stick to their knitting and do only

1 religious services, but if, on the other hand,
2 they -- they do what the Little Sisters do,
3 which is go out and provide care for the elderly
4 poor and for the sick, then they don't qualify
5 for the exemption.

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

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

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

24 One, no one will lose their coverage
25 that they have now if the Little Sisters are

1 given this exemption, and, two, throughout that
2 process, we have not heard of even a single
3 employee who views this as a problem, presumably
4 because many of these employees, even if they're
5 not Catholic, because the Little Sisters hires
6 on a non-discriminatory basis, but they've come
7 to work for the Little Sisters understanding the
8 mission of the Little Sisters, and I don't think
9 they would really want to put the Little Sisters
10 in the position that you alluded to of maybe
11 having to stop serving the elderly poor.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Sotomayor?

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

25 Can the employer object to pay through

1 that policy?

2 MR. CLEMENT: So, Justice Sotomayor, I
3 think the answer is no, and if -- I'd like to
4 explain kind of how I would work through that.

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

13 MR. CLEMENT: So, Justice Sotomayor --

14 JUSTICE SOTOMAYOR: Provided for --

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

22 Now I think an employer -- an insurer
23 that has a sincere religious objection to
24 providing the coverage, say like the Christian
25 Brothers, they might be able to object. I don't

1 think they actually have that objection, to be
2 clear, but they could in theory. If they
3 objected to providing compensation for that
4 coverage, they could object. And I think it
5 probably would be a substantial burden. In the
6 context of COVID-19, I think that you might
7 strike the -- the government might be able to
8 carry its burden under strict scrutiny, but I
9 think that would be the way to think through
10 that hypothetical.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Kagan?

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

21 But what if an employer did have an
22 objection to objecting? In other words, had an
23 even more, say, extended under -- view of
24 complicity so that he thought that -- the
25 employer thought that extending itself made him

1 complicit because it led to a sort of chain
2 reaction whereby the employees were eventually
3 going to get coverage.

4 What -- what would you say about that?

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

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

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

1 in only religious activities, they've never had
2 to even object. They're just --

3 JUSTICE KAGAN: Right, but that would
4 suggest --

5 MR. CLEMENT: -- exempt --

6 JUSTICE KAGAN: -- that even in that
7 case where objecting to objecting is the only
8 thing, that you would think that the employer
9 would prevail?

10 MR. CLEMENT: I think the employer --

11 JUSTICE KAGAN: You know, I guess that
12 --

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

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

20 MR. CLEMENT: I think that's right,
21 Justice Kagan, but just to be clear, I think
22 that has to do with the way that the government
23 has operated this whole program. Since they've
24 never required the churches or the other
25 religious orders or the grandfathered plans to

1 object, I think that puts the government in a
2 difficult position in this hypothetical
3 situation.

4 But assuming that at the outset --
5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Gorsuch?

8 MR. CLEMENT: -- my client has never
9 made that objection.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

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

17 And I -- I -- I -- I didn't want that
18 major component of the case to go unaddressed
19 today. I want to give you a chance to respond
20 to that.

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

1 Circuit erred.

2 In some ways, the most straightforward
3 way is to just find that the good cause standard
4 or exception for the original IFR here was
5 satisfied. And we think that the good cause
6 standard here was satisfied for the same reasons
7 that the government had good cause, for example,
8 to make immediately effective moderations in
9 light of this Court's order in the Wheaton
10 College case.

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

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

1 made very quickly.

2 But the third way, of course, to
3 reject the reasoning of the Third Circuit is --
4 is to say, even if there was some sort of
5 original sin in the promulgation of the IFRs, it
6 was cured by the notice and comment that
7 actually took place subsequently.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. CLEMENT: I could be --

22 CHIEF JUSTICE ROBERTS: Justice --
23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: Thank you, Mr.
25 Chief Justice.

1 Good morning, Mr. Clement. I want to
2 follow up on Justice Kagan's question about the
3 objection to objecting. I had thought that
4 would be litigated, thought out under the least
5 restrictive alternative prong of RFRA, and the
6 government might be able to argue that there's
7 no less restrictive alternative available in
8 that situation.

9 You might disagree and try to identify
10 a less restrictive alternative, but I had
11 thought that's where it would be litigated. Is
12 that correct or not?

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

24 And so it does seem to me that those
25 are essentially other ways that the government

1 has been able to comply.

2 And then I guess the other question,
3 of course, is if we're in the realm where the
4 government itself has through something like the
5 final rule alleviated the obligation even to
6 have an objection, I'm not even sure this
7 question we're talking about would arise.

8 JUSTICE KAVANAUGH: Right. No, I --
9 I -- I understand that, and that's -- that's
10 what I expected your argument to be in that
11 context.

12 Second question just to follow up on
13 Justice Breyer on the arbitrary and capricious
14 test, the exercise of discretion must be
15 reasonable, what are the limits that you would
16 identify to the government's discretion, if any?

17 MR. CLEMENT: So I would identify all
18 of the limits that General Francisco alluded to
19 and one more. One thing I think is a little bit
20 artificial here about the position of the other
21 side is they want you to look at the ACA and
22 RFRA as if they're siloed and they don't
23 interface. But, of course, they do.

24 And there's an obligation on HRSA to
25 take into account RFRA, as well as its authority

1 under the ACA. And so it seems to me that an
2 exemption for religion -- that of the kind
3 that's in the final rule here, I think, is going
4 to be insulated from an arbitrary and capricious
5 challenge in a way that's exempting, say, just
6 large employers or employers incorporated in
7 Delaware.

8 I think all of those would be
9 irrational and -- and arbitrary and capricious
10 under the -- under the APA. But, here, the --
11 the agency has complied with RFRA, consistent
12 with its authority under the ACA, which seems to
13 give it a particularly strong case for its
14 actions here to not have been arbitrary and
15 capricious.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Fischer.

19 ORAL ARGUMENT OF MICHAEL J. FISCHER
20 ON BEHALF OF THE RESPONDENTS

21 MR. FISCHER: Mr. Chief Justice, and
22 may it please the Court:

23 The moral and religious exemption
24 rules rest on three sweeping assertions of
25 agency authority. First, the agencies twist a

1 narrow delegation that allows the Health
2 Resources and Services Administration to decide
3 which preventive services insurers must cover
4 under the Women's Health Amendment into a grant
5 of authority so broad it allows them to permit
6 virtually any employer or college to opt out of
7 providing contraceptive coverage entirely,
8 including for reasons as amorphous as vaguely
9 defined moral beliefs.

10 Second, the agencies claim that RFRA,
11 a statute that limits government action,
12 affirmatively authorizes them to permit
13 employers to deny women their rights to
14 contraceptive coverage even in the absence of a
15 RFRA violation in the first place.

16 As many of the questions have
17 reflected, the prior rules struck a balance that
18 permitted objecting employers to opt out but
19 still allowed their female employees to receive
20 contraceptive coverage. These rules, however,
21 exempt such employers altogether even if they
22 had no objection to this prior accommodation.

23 And these rules also allow for the
24 first time publicly traded companies to claim
25 the same exemption, despite the agencies'

1 admission that no such company has ever
2 requested one.

3 And, third, the agencies claim they
4 were justified in issuing these sweeping new
5 rules without first putting out a proposal and
6 seeking comment, as the APA requires. They
7 advance an interpretation of the APA that is
8 inconsistent with its text and purpose and that
9 would effectively write the requirement of
10 pre-promulgation notice and comment out of the
11 statute.

12 Now, in addition, the agencies also
13 challenge to -- challenge the scope of the
14 preliminary relief entered below and, in so
15 doing, they advance the novel claim that federal
16 courts simply lack the authority to invalidate
17 unlawful agency regulations in their entirety.

18 In isolation, the agency's arguments
19 are incorrect. But taken together, stretching a
20 narrow delegation well beyond its limits,
21 finding broad affirmative rulemaking authority
22 in a statute that doesn't provide it, bypass --
23 bypassing prior notice and comment where the APA
24 requires it, and seeking to vastly curtail the
25 Court's authority to invalidate unlawful agency

1 action, taken together, these arguments make
2 apparent that what this case is about is not the
3 resolution of a long-running dispute but rather
4 the assertion of vast agency authority at the
5 expense of Congress and the courts.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. I have a question. There was a
8 hypothetical in one of the amicus briefs that I
9 thought was pretty good and I haven't heard an
10 answer to yet, and that's -- say you have a
11 couple going out to dinner, and they tell the
12 baby-sitter, well, the children have to do
13 chores, you know, you decide which ones.

14 I think everybody would agree that --
15 that that includes the authority to say not only
16 that we have to do the dishes and sweep the
17 floors, but, Tommy, you sweep -- you -- you do
18 the dishes, and, Sally, you sweep the floors,
19 and not the assumption that each child would
20 have to do each chore.

21 And, here, your argument about the ACA
22 statute is that it gives HHS the authority to
23 specify which services have to be provided but
24 does not give them the authority to make
25 determinations about who has to provide which,

1 but, instead, imply that every employer has to
2 provide everyone. So what do you --

3 MR. FISCHER: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: -- what --
5 what's your answer do that?

6 MR. FISCHER: Mr. Chief Justice, our
7 answer is that that is the only reasonable
8 reading of the text of the Women's Health
9 Amendment. The "who must provide" is answered
10 by the beginning of 13(a). It says, "A group
11 health plan and health insurance issuer offering
12 individual health insurance coverage shall at a
13 minimum provide coverage for, and shall not
14 impose any cost-sharing requirements for."

15 Now "shall" is mandatory, as this
16 Court recently acknowledged again in the -- the
17 cost-sharing case recently dealing with the ACA.
18 Below that language, there are four separate
19 categories of services to be covered. Nobody
20 disputes that the first three are mandatory,
21 that all covered insurers must cover the first
22 three.

23 The only dispute comes in the fourth
24 one, which is, with respect to women, such
25 additional preventive care as provided for in

1 comprehensive guidelines.

2 And in the hypothetical that -- that
3 Your Honor referred to, which I believe is in
4 the -- the Texas amicus brief, they modified the
5 language of this requirement by taking out the
6 "such additional" language. That language is
7 key because it answers the question of what
8 services are insurers to provide.

9 Well, with respect to women, it is
10 such additional preventive care and screenings
11 as provided for in comprehensive guidelines. So
12 "as provided for" clearly modifies "such
13 additional care and screenings." It doesn't go
14 beyond that in giving --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: General, just a brief
19 question that's a little different.

20 I'm interested in your view on
21 standing. And with your argument for standing
22 in this case, that challenge a regulation, the
23 government's regulation that might impact your
24 costs, the state's costs, seems to suggest that
25 any time there's a rule change at the federal

1 level that affects you, you would have standing.
2 And then that, again, following this case to its
3 remedy of a nationwide injunction, would suggest
4 that in these sorts of cases, a nationwide
5 injunction would be appropriate.

6 I'd like you to have -- to comment on
7 that. It seems to be somewhat problematic and
8 to suggest that there's a problem with both
9 standing and nationwide injunctions if they are
10 this easy to -- to get.

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

20 Now my friend on the other side
21 referred to Massachusetts versus EPA, which
22 certainly recognizes that states have a special
23 place in our constitutional order. However, we
24 still demonstrated that based on the
25 government's own estimates of the number of

1 women affected, these rules would impose direct
2 costs on us.

3 And with respect to the question about
4 nationwide injunctions, first of all, I want to
5 stress that we're here in a preliminary posture.
6 We were granted a preliminary injunction. We've
7 moved for summary judgment. The government
8 requested that the case be stayed. The district
9 court granted that. We could have the case
10 wrapped up now.

11 The analysis with respect to
12 nationwide injunctions is different, we submit,
13 in the context of an APA challenge, where the
14 ultimate remedy available is that the Court
15 shall set aside a rule that is invalid.

16 If courts sort of were able to slice
17 and dice rules and say, well, agency, you can
18 enforce this with this person, but it stays in
19 effect as to everybody else, the result really
20 would be regulatory chaos.

21 So where a challenge is brought under
22 the APA to a regulation, taking account of that
23 final remedy that's available, granting
24 preliminary relief on a nationwide basis is
25 appropriate.

1 It was also appropriate here because
2 the district court found in a very thorough,
3 very well-reasoned discussion that acknowledged
4 Your Honor's concerns, as expressed about
5 nationwide injunctions, discussed this idea that
6 -- that there's significant cross-border harms
7 here that simply couldn't be addressed in a more
8 narrow injunction.

9 JUSTICE THOMAS: Thank --

10 MR. FISCHER: And --

11 JUSTICE THOMAS: -- you. The -- it
12 would seem, though, that -- that, ultimately,
13 you could get, if that's the argument,
14 nationwide injunctions with virtually any
15 regulatory change.

16 MR. FISCHER: I don't believe that's
17 the case, Your Honor. I would -- I would think
18 that there are many regulations that are not
19 going to impose costs on the states directly or
20 indirectly.

21 And -- and, certainly, in a nationwide
22 injunction context, I think it would still
23 depend on the specifics of the rule being
24 challenged and the nature of the harm that the
25 challengers are alleging.

1 And -- and as I again indicated, the
2 -- the district court really took account of all
3 these concerns, talked about the need for
4 percolation among the circuit courts, and -- and
5 acknowledged, frankly, in -- in plain terms that
6 fashioning preliminary relief is an imperfect
7 science, that district courts try their best and
8 they're reviewed for the abuse of discretion
9 standard. I think that --

10 JUSTICE THOMAS: I don't mean to cut
11 you off --

12 MR. FISCHER: -- is what --

13 JUSTICE THOMAS: -- but one -- I do
14 want to get in one question about when the APA
15 was adopted, do you think there were such things
16 as nationwide injunctions, or were they handled
17 on a case-by-case basis?

18 MR. FISCHER: Your Honor, I believe
19 there is a history, certainly, of relief going
20 beyond -- beyond the parties to a case. Whether
21 they were classified as nationwide injunctions
22 is difficult to say. And I think this is dealt
23 with very well by the various amicus briefs.

24 But I also think that in passing the
25 APA, Congress provided a very specific remedy.

1 And as Your Honor stated in the -- the travel
2 ban case, you know, authority for a nationwide
3 injunction has to come from either the
4 Constitution or a statute.

5 Well, the APA here is the authority
6 that we would allege -- we argue that the -- the
7 basis for this injunction comes from. It says,
8 as a final remedy, courts shall set aside
9 improper agency action, and that it permits
10 agencies or permits courts to stay agency
11 action, as this Court did a few years ago in the
12 Clean Power Plan case. It permits better
13 injunctions. It permits them to postpone the
14 effective date.

15 And many of those remedies suggest
16 going -- relief going to the rule in its
17 entirety.

18 CHIEF JUSTICE ROBERTS: Thank you --

19 MR. FISCHER: So I think, here, the
20 text --

21 CHIEF JUSTICE ROBERTS: -- counsel.
22 Justice Ginsburg?

23 JUSTICE GINSBURG: Let's see. So I --
24 I just remain troubled by the complete
25 abandonment of the Congress's interest in saving

1 women costs. This is going to force costs on
2 the women that Congress wanted to provide free
3 coverage for. I've never seen any of our prior
4 decisions suggest that those interests could be
5 thrown to the wind and the women could be left
6 to their own resources to cover themselves, to
7 get policies that would cover them for these
8 contraceptive services at -- at a premium to
9 them.

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

13 First of all, there are two rules that
14 we're dealing with. One that we haven't talked
15 about as much is the moral rule that simply says
16 an employer with a moral objection to providing
17 contraception can be completely exempted.

18 The district court noted this could,
19 in theory, allow an employer that objects to
20 women in the workforce, for instance, to remove
21 itself from providing contraception.

22 And with respect to the religious
23 exemption, you know, there are certain key
24 features that really show how broad this is.
25 First of all, it eliminates the accommodation as

1 a mandatory requirement. So even for, for
2 instance, all the various plaintiffs in the
3 Hobby Lobby cases that this Court recognized
4 were perfectly fine with the accommodation, they
5 are now exempt.

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

14 In addition, as I mentioned, this
15 applies --

16 JUSTICE GINSBURG: Where is the --

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

18 JUSTICE GINSBURG: -- where is the
19 moral -- where would the moral exemption come
20 from? That doesn't seem to come from --

21 MR. FISCHER: So it -- it does not --
22 they do not rely on RFRA for the moral
23 exemption. They claim authority under 300gg-13,
24 under the ACA's women's health amendment, for
25 the moral exemption. And as we have argued and

1 as -- as the courts below found, that statute
2 simply doesn't support the conclusion that they
3 can create whatever exceptions they want.

4 If their reading were correct, there
5 would be no limits to what HRSA could do, other
6 than arbitrary and capricious review. HRSA
7 could decide to eliminate the no cost sharing
8 requirement, it could decide that, you know,
9 certain services really don't need to be covered
10 at all, even if they're in -- you know, even if
11 they're widely recognized as preventive
12 services. It could exempt whole classes of
13 employers for reasons having nothing to do with
14 the reasons here.

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 JUSTICE BREYER: Two related

1 questions. Thank you.

2 One is, as you know, the statute says
3 that they have to provide additional preventive
4 care as provided for in comprehensive guidelines
5 supported by the Health Resources and Services
6 Administration.

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

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

1 pirate the health plan of Little Sisters.

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

6 All right. Now those are advantages I
7 see of going back and making a different kind of
8 argument, put all your arguments in a different
9 legal box. So why not?

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

14 We also argued, I think correctly,
15 that they exceeded -- the statutory authority
16 cited by the agencies did not support the rules.
17 And since we won on that basis, there was no
18 need to go any further and say, well, if they
19 had the authority, did they exercise it
20 correctly?

21 I disagree also with Your Honor's
22 suggestion that the language is ambiguous. I
23 think, as we explained, the use of the word
24 "supported" in context reflects similar language
25 in paragraph 3 immediately preceding. And all

1 that refers to is the fact that the guidelines
2 in paragraph 3, which are the -- the bright
3 horizons guidelines, were funded by HRSA but
4 actually conducted or produced by the American
5 Academy of Pediatrics. So HRSA supports those
6 guidelines by contracting, by funding. And I
7 think Congress borrowed that language.

8 And the as provided for, as I -- as I
9 indicated, refers back to such additional
10 preventive care and screenings. So we don't
11 think there's an argument as to ambiguity.

12 Now, as to whether there could be a
13 resolution, I certainly would hope that there
14 is. As the Borzi and Maguire brief explains,
15 the government, the prior administration, we do
16 not believe that these plans are being hijacked.

17 And to be clear, we brought this suit
18 against the federal government. We have not
19 challenged the Little Sisters. We have not
20 challenged their Colorado injunction. They and
21 all the other parties to Zubik are protected by
22 injunctions and do not have to comply with the
23 contraceptive mandate no matter what happens in
24 this case.

25 But could there be a resolution to the

1 narrow set of cases out there? I would hope so.
2 But the fact that there was this ongoing dispute
3 doesn't justify jettisoning the accommodation
4 for everyone else, bringing in publicly traded
5 companies certainly doesn't justify the moral
6 rule. And those, I think, are the -- the most
7 egregious examples of simply how overbroad this
8 -- these two regulations are.

9 JUSTICE BREYER: Thank you. Thank you
10 very much.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: Mr. Fischer, you say
13 that the Affordable Care Act does not allow the
14 government to make any exceptions to the
15 contraceptive mandate to accommodate religious
16 objections.

17 Now, if that's true, the original
18 exemption for churches, their auxiliaries, and
19 conventions of churches, which was established
20 by the prior administration, violated the
21 Affordable Care Act. But you come back and say
22 that was required to comply with a First
23 Amendment church autonomy doctrine.

24 And what I'd like you to explain is
25 your understanding of the scope of that

1 doctrine. And let's take as an example a woman
2 who works for a church in an entirely secular
3 capacity. Let's say a woman who cleans church
4 property.

5 Under your understanding of this
6 religious autonomy doctrine, does that mean that
7 that employment relationship is entirely off
8 limits for any federal regulation, for example,
9 or any state regulation?

10 For example, from Title VII's
11 prohibition of discrimination on the basis of
12 race, Age Discrimination in Employment Act, the
13 Americans with Disabilities Act, Equal Pay Act,
14 the Fair Labor Standards Act?

15 MR. FISCHER: Your Honor, we would not
16 agree with that conclusion that individuals in
17 entirely secular positions are exempt from all
18 those requirements under the church autonomy
19 doctrine.

20 What we have argued is that --

21 JUSTICE ALITO: I don't mean to
22 interrupt you, but you do say that it would
23 violate the First Amendment to require the
24 church to provide contraceptive coverage for
25 that woman?

1 MR. FISCHER: Your Honor, what we are
2 arguing is that there is a basis in the First
3 Amendment for exempting churches in some way,
4 that, certainly, there is a core of church
5 autonomy that -- that agencies in implementing
6 federal law must protect.

7 JUSTICE ALITO: Well, in some way as
8 to the provision of insurance coverage for
9 contraceptives. I took your argument to mean
10 the First Amendment would prohibit the
11 government from requiring a church to provide
12 that.

13 And what I wanted to --

14 MR. FISCHER: Certainly, as to -- as
15 to ministers, certainly.

16 JUSTICE ALITO: Pardon me? Do I -- I
17 hadn't finished what I wanted --

18 MR. FISCHER: As to ministers,
19 certainly. That -- that is correct, but -- but
20 I would add we are not arguing necessarily that
21 the prior administration got everything right in
22 the details. There have been arguments on both
23 sides that perhaps the churches have to --

24 JUSTICE ALITO: Mr. Fischer, I'm not
25 talking about the details. I'm talking about

1 exempting a secular employee of a church from
2 receiving the contraceptive coverage. Your
3 argument has to be that's required by the First
4 Amendment, or you have to say -- maybe this is
5 your position -- that the original church
6 exemption is contrary to the Affordable Care
7 Act.

8 MR. FISCHER: That is not our
9 position. We think that the original church
10 exemption was supported by the afford --
11 supported by the First Amendment. We don't
12 agree it was supported by the Affordable Care
13 Act. We -- we think the prior administration
14 was wrong in --

15 JUSTICE ALITO: All right. So I
16 really would appreciate your answering my
17 question. If the First Amendment requires an
18 exemption for the provision of contraceptive
19 coverage, why would it not also require an
20 exemption for all of the other regulations that
21 I mentioned?

22 MR. FISCHER: Certainly, in a core --
23 in the core ministerial functions, it does. We
24 don't dispute that.

25 I think the question is whether --

1 JUSTICE ALITO: I'm not talking about
2 a minister. I'm talking about a woman who
3 cleans the church.

4 MR. FISCHER: Exactly. And our
5 position there is I don't think it's necessarily
6 the case that the first -- that the First
7 Amendment required that the church exemption be
8 as broad as it was. However, given the
9 realities of insurance and the need for ERISA
10 plans to be consistent, the prior administration
11 made a decision that they were going to apply to
12 all employees of churches.

13 We don't take issue with that, even if
14 that went a little bit broader than what the
15 First Amendment requires, which is protecting
16 individuals in ministerial functions and the
17 church's autonomy with respect to those
18 individuals.

19 That's a far cry from what they did in
20 these rules, which goes well beyond the core of
21 the protection that the First Amendment requires
22 or that RFRA requires.

23 JUSTICE ALITO: If I could ask one
24 other question. Explain to me why the Third
25 Circuit's analysis of the question of

1 substantial burden is not squarely inconsistent
2 with our reasoning in Hobby Lobby.

3 MR. FISCHER: So the --

4 JUSTICE ALITO: Hobby Lobby held that
5 if a person sincerely believes that it is
6 immoral to perform an act that has the effect of
7 enabling another person to commit an immoral
8 act, a federal court does not have the right to
9 say that this person is wrong on the question of
10 moral complicity. That's precisely the
11 situation here.

12 Reading the Third Circuit's discussion
13 of the substantial burden question, I wondered
14 whether they had read that part of the Hobby
15 Lobby decision.

16 MR. FISCHER: So, in Hobby Lobby, the
17 question was essentially the degree of
18 attenuation between providing coverage and
19 utilizing the contraceptive care. And the --
20 the Court rightly concluded that the fact that
21 others were involved didn't really matter.

22 Here, the Court said essentially that
23 where an objection -- it depends on the
24 operation of the law. And, here, it is -- it is
25 the legal requirements that are shifting the

1 burden to the insurer or the third-party
2 administrator.

3 Courts still have a duty to inquire as
4 to what the law actually requires of the
5 objector, and the -- the nature of the objection
6 was that filling out this form made them
7 complicit in providing contraception. They did
8 not object to the idea of filling out a form
9 stating their objection by itself. They
10 objected to what flowed from the form.

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

23 JUSTICE ALITO: But you're -- you're
24 arguing that --

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

1 JUSTICE ALITO: -- the Little Sisters
2 didn't understand what the law required them to
3 do or didn't understand the significance of what
4 the law required them to do?

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

7 JUSTICE ALITO: Which of those --
8 which of those things is it? They didn't
9 understand what the law required them to do?

10 MR. FISCHER: No, we're not saying
11 that at all. We're saying that the harm they've
12 alleged is not a legally cognizable substantial
13 burden. The courts do not --

14 JUSTICE ALITO: You're saying they're
15 wrong in their -- their understanding of moral
16 complicity is wrong?

17 MR. FISCHER: No, we're not saying
18 that at all. We do not challenge their view of
19 moral complicity. What we do challenge is
20 whether that -- what they are saying rises to
21 the level of a substantial burden, which is
22 ultimately a legal test. And Congress included
23 the word "substantial" for a reason, because it
24 recognized that not every law that had an effect
25 on religion necessarily should be subject to

1 strict scrutiny.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Counsel, going
6 back to the Chief Justice's example a second,
7 clearly, we understand that there's inherent
8 power to share the chores between the two
9 children, correct? However --

10 MR. FISCHER: Yes, I think --

11 JUSTICE SOTOMAYOR: -- if the
12 baby-sitter decides, ahh, I just disagree with
13 the mom, I'm not going to have either of them do
14 anything, would that be contrary to the
15 instructions that the law gave?

16 MR. FISCHER: That -- that certainly
17 would be, Your Honor.

18 JUSTICE SOTOMAYOR: All right.

19 MR. FISCHER: I would agree with that.

20 JUSTICE SOTOMAYOR: So let's talk
21 about this situation. Here, the government's
22 exemption is not merely saying to the Little
23 Sisters you don't have to provide coverage,
24 whether it's you or a church or anyone else, but
25 we're not going to permit -- we're also saying

1 that your insurance policies, independent
2 actors, who have a legal obligation to pay for
3 the contraceptives that employees use, that they
4 don't have to do it either.

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

7 MR. FISCHER: So that is correct as a
8 general matter. I just want to make one
9 specific point, which is that -- Your Honor
10 mentioned the Little Sisters. Their -- their
11 insurance carrier stated that it will not
12 provide contraception no matter what. Or their
13 -- their health plan. And because it's a church
14 plan exempt from ERISA, the government cannot
15 enforce it. So, even if they didn't have their
16 separate injunction, their employees would not
17 receive contraception. We're not trying to
18 challenge that at all. We're not trying to
19 require --

20 JUSTICE SOTOMAYOR: Oh, oh --

21 MR. FISCHER: -- them to provide
22 coverage --

23 JUSTICE SOTOMAYOR: -- that -- that --
24 that's an interesting point. I didn't know
25 that. So the Little Sisters' claim is actually

1 moot here? So --

2 MR. FISCHER: Well, that is why we
3 argued -- that's why we argued that they lacked
4 appellate standing, and the Third Circuit
5 agreed.

6 JUSTICE SOTOMAYOR: They -- they lack
7 appellate standing because they don't have to
8 provide it; neither does their insurance
9 carrier, correct?

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

11 And as --

12 JUSTICE SOTOMAYOR: And that --

13 MR. FISCHER: -- a result of the
14 injunction.

15 JUSTICE SOTOMAYOR: -- has nothing --
16 that has nothing to do with this case, as I
17 understood it -- well, no, that has to do with
18 the church exemption. Church plans do not have
19 to provide -- under the law, they're not ERISA
20 plans, so they don't have to provide coverage in
21 this situation, correct?

22 MR. FISCHER: So where -- where the
23 employer utilizes the accommodation, the
24 government lacks a means of enforcing the
25 requirements against church plans because they

1 are exempt from ERISA. So, if an employer
2 utilizes the accommodation, the church plan can
3 decide whether or not it wants to comply, and
4 there's no penalty if the government -- if -- if
5 it chooses not to comply.

6 JUSTICE SOTOMAYOR: All right. So
7 tell me which part of the government's exemption
8 you are actually challenging.

9 MR. FISCHER: So we -- we think the
10 government's claims of authority for the
11 exemptions were incorrect, but we -- we think
12 that the most egregious parts of the rules are,
13 first of all, the moral rule, which I -- I think
14 is important to stress, that that's half of
15 what's at issue in this case; the elimination of
16 the accommodation as a mandatory requirement,
17 including for companies that have no problem
18 with it; the inclusion of publicly traded
19 companies and large universities.

20 And then two other points. One, to
21 claim this exemption, companies do not have to
22 provide any specific notice to their employer --
23 employees. They can simply, you know, include
24 the fact that contraception isn't covered in all
25 of the other ERISA notices that they mail out.

1 They don't have to say specifically we have this
2 objection. We are not providing coverage.

3 And, in addition, they don't have to
4 show any sort of substantial burden. They don't
5 have to send anything to the government saying,
6 we believe we're burdened for these reasons, we
7 have these objections. So there's really no way
8 to evaluate, for instance, whether a company is
9 sincere in the nature of its objections.

10 That is part of the RFRA analysis.

11 And, you know, as this Court acknowledged
12 recently in -- in *O Centro*, RFRA creates a
13 mechanism for courts to enforce this. We don't
14 dispute that agencies should take RFRA into
15 account, but, ultimately, RFRA creates a
16 judicial remedy, and courts -- and agencies
17 should be looking to guidance from the courts
18 and ensuring that when they do exempt people,
19 there's at least a meaningful opportunity for
20 judicial review of their decisions.

21 JUSTICE SOTOMAYOR: So if --

22 CHIEF JUSTICE ROBERTS: Thank you --

23 JUSTICE SOTOMAYOR: Sorry.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor, proceed.

1 JUSTICE SOTOMAYOR: I guess the
2 question I have is, the exemption as structured
3 permits the insurance carriers not to provide
4 coverage?

5 MR. FISCHER: Yes. There -- there's
6 no requirement that objecting entities utilize
7 the accommodation. It's completely optional.
8 So they can simply claim the exemption and tell
9 their insurer don't provide contraception. And
10 no entity has an obligation to -- to provide it
11 at that point.

12 JUSTICE SOTOMAYOR: And that is --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel -- thank you, counsel.

15 Justice Kagan?

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

18 MR. FISCHER: Good morning, Your
19 Honor.

20 JUSTICE KAGAN: -- a few questions
21 about what many people will think of as the most
22 boring part of your argument, which is APA
23 notice and comment, because I'm not quite sure I
24 understand the argument, so let me just start by
25 saying what you're doing is you're hypothesizing

1 that there should be some significant difference
2 between what happens and how a court reviews
3 what happens when an agency works off of an
4 interim final rule as opposed to when an agency
5 works off a notice of proposed rulemaking.

6 And I -- I guess the question is, why
7 should there be any real difference between
8 those two?

9 MR. FISCHER: So, Your Honor, I want
10 to stress one aspect of our argument, which is
11 that our argument hinges on whether the first
12 rules, the 2017 rules, were themselves
13 procedurally valid. If they were valid, then
14 the 2018 rules are procedurally valid as well.

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

16 MR. FISCHER: So --

17 JUSTICE KAGAN: -- but let me just
18 make sure I understand it.

19 Suppose that there were good cause for
20 issuing an interim final rule. At that point,
21 if the agency then says, well, that's nice, we
22 had good cause for doing this because we had an
23 emergency, but now we're going to notice and
24 comment, at that point, should the notice and
25 comment be treated the exact same way as it

1 would be if there were no good cause rule at
2 all?

3 MR. FISCHER: Your Honor, if the
4 agency has good cause to issue the rule with
5 immediate effect, then the provisions of
6 Section 553 simply don't apply.

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

8 MR. FISCHER: And they're actually not
9 --

10 JUSTICE KAGAN: I don't think that's
11 right because the good cause can give you cause
12 to act right now, but it -- it doesn't give you
13 cause to act for 20 years without notice and
14 comment. So an agency could say we have good
15 cause to act right now, but now we understand
16 that we have to do a notice and comment
17 proceeding because now, you know, there's
18 something in place and we can take our time and
19 do it.

20 MR. FISCHER: That's certainly true,
21 Your Honor. I apologize. If the agency wishes
22 to -- to modify the rule or take further
23 comment, then, yes, it can go through the 553
24 process if -- if the good cause that -- that
25 prompted the immediately effective rule no

1 longer applies. So that -- that's correct.

2 JUSTICE KAGAN: Okay. So, I mean, it
3 not only can, but, in many cases, it has to.
4 The --

5 MR. FISCHER: That's right.

6 JUSTICE KAGAN: -- good cause doesn't
7 last forever. So, in that kind of case, do you
8 think that the standard is heightened when a
9 court looks at -- at -- at -- at -- at this and
10 says did they do notice and comment correctly?

11 MR. FISCHER: No, Your Honor. In that
12 -- in that case, the standard would be the same
13 as it would be in any other APA case.

14 JUSTICE KAGAN: Okay. Because --
15 because I thought that your reasons for why the
16 standard should be heightened would apply even
17 when there was -- when the -- when the interim
18 rule was valid, because, as I understand your
19 reasons for thinking that the standard should be
20 heightened, it's that the agency has kind of
21 gotten psychologically used to the rule and --
22 and may be less willing to make departures from
23 it.

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

1 MR. FISCHER: It -- it does. And I
2 think that reflects a balance that Congress
3 struck, recognizing that, in most cases, prior
4 notice and comment is the most effective means
5 of getting to a more informed decision.

6 In some cases, that interest is
7 trumped by the need for an immediately effective
8 rule, so the benefits of notice and comment have
9 to sort of give way a little bit so that the
10 agency could act quickly.

11 And -- but, here, where we believe
12 the -- the good cause standard wasn't satisfied,
13 the APA plainly requires the agency seek comment
14 on a proposal --

15 JUSTICE KAGAN: And so --

16 MR. FISCHER: -- and comment.

17 JUSTICE KAGAN: Okay. So I'm right in
18 saying that this really does depend on whether
19 the good cause requirement was satisfied in the
20 first place?

21 MR. FISCHER: Yes, absolutely.

22 JUSTICE KAGAN: Okay. And then, as a
23 remedy, you say we should just go back to the
24 original rule, but the original rule was done in
25 the exact same procedural manner.

1 So how would that make anybody any
2 happier?

3 MR. FISCHER: So there are a number of
4 rules that have been implemented dealing with
5 this. A number of them went through full notice
6 and comment. In one case, there was an advance
7 notice of prior rulemaking, of proposed
8 rulemaking, an NPRM.

9 In two cases since the women's health
10 guidelines were issued and one time before, the
11 prior administration did immediately go to an
12 immediately effective rule. They argued good
13 cause. In one instance, the D.C. Circuit upheld
14 that finding. In another instance, it was
15 never, as far as we know, ruled on by any court.

16 We think the arguments made were much
17 stronger in those cases, and, regardless, to be
18 litigating this question nine years after the
19 fact simply doesn't make a lot of sense. What
20 we're saying is that the good cause claims made
21 here by these agencies in these rules have to be
22 evaluated on their own.

23 And if -- if what the agency said here
24 satisfies good cause, then agencies could always
25 find good cause. And the result would be -- and

1 I think this is the most important part of our
2 argument -- if what the agency did here is okay,
3 every agency could say we're just going to issue
4 a rule, make it effective immediately, claim
5 good cause, and then take comment.

6 And even if they lose on the good
7 cause finding, they don't have to worry for long
8 because, as soon as they've taken comment, they
9 issued a new rule, then the rule will be
10 immediately effective, and it will be as if
11 there was no violation in the first place.

12 And it's reasonable to think that
13 agencies will -- will take their cues and will
14 say, okay, well, we're going to take the risk
15 and we're going to do that because, frankly,
16 there really isn't much of a risk in the end if
17 everything will be fine once they've taken
18 comment and issued a new final rule.

19 JUSTICE KAGAN: Thank you, counsel.

20 MR. FISCHER: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice --
22 Justice Gorsuch?

23 JUSTICE GORSUCH: Good morning,
24 counsel. I'd like to turn back to where Justice
25 Breyer left off on the substantive challenge,

1 and I suppose the argument on the other side
2 goes something like one could understand an
3 arbitrary and capricious argument about the
4 overbreadth, arguable overbreadth of these
5 exemptions, but the challenge before us is
6 whether the -- the agencies exceeded its
7 statutory authority.

8 And looking at the statute here, it's
9 about as excessive a delegation of -- of
10 statutory authority -- or not excessive --
11 expansive a delegation of statutory authority as
12 one might -- might imagine. It talks about
13 comprehensive regulations.

14 And when -- when an agency's given
15 that kind of leeway, we normally think of
16 comprehensive to include limitations,
17 conditions, exceptions, as well as a general
18 rule because there's no rule that doesn't have
19 an exception.

20 And then we look at the original
21 accommodation, and at least some suggest that --
22 that that original accommodation to churches was
23 consistent with that statutory delegation.

24 And then you throw RFRA in the mix,
25 and that's normally thought to trump any and

1 inform any other existing statutory obligation.
2 So what -- what do we do about that? I -- I
3 think that's what Justice Breyer was trying to
4 get at, and I guess I'm curious for a little
5 further thought on it.

6 MR. FISCHER: So, yes, Your Honor, I
7 think, if -- if the delegation is read the way
8 the agencies would like to read it, then it is
9 remarkably broad and I think would, frankly,
10 raise non-delegation problems.

11 I think the delegation is cabined by
12 the fact that -- two things. First of all, I
13 think the structure of the section makes clear
14 that Items 1, 2, 3, 4 are all simply categories
15 of services.

16 Even though, in identifying those
17 services, it refers to comprehensive guidelines,
18 what begins that paragraph 4 is, with respect to
19 women, "such additional preventive care and
20 screenings." And then the second point is that
21 to the extent there might be --

22 JUSTICE GORSUCH: Counsel, I -- I'm
23 sorry to interrupt there, but -- and I -- I just
24 want to understand how you read that because it
25 does -- I -- I -- I heard that a few times, such

1 additional preventive care and screenings, but
2 then ... as provided for in these comprehensive
3 guidelines.

4 Can you explain how those two
5 interact, I guess?

6 MR. FISCHER: Yes. So -- so "such,"
7 which -- which typically means, you know, in the
8 manner to be indicated --

9 JUSTICE GORSUCH: Yes.

10 MR. FISCHER: -- refers or sort of
11 sets the stage for "as provided for." So, if
12 you're asking the question, well, what
13 additional preventive care and screenings must
14 be provided, the answer is such -- so in the
15 manner to be provided as provided for in the
16 comprehensive guidelines.

17 So all of that is answering the
18 question of what additional preventive care and
19 screenings are to be provided. If you read "as
20 provided for" as sort of applying to the entire
21 section, sort of going back into subsection (a)
22 and modifying those requirements, then you're
23 sort of unmooring it from the way it's used in
24 paragraph 4 and leaving "such additional
25 preventive care and screenings" without any

1 further explanation.

2 And -- and, in addition, I think the
3 other three categories provide some guidance and
4 I think reasonably cabin the agency's authority.
5 The other three paragraphs all refer to
6 guidelines that already existed.

7 So HRSA had the ability to look to
8 those. And those are all -- you know, there are
9 no religious exemptions in those guidelines,
10 there are no broad exemptions. They're simply
11 lists of services, lists of vaccinations that
12 are required, other things.

13 So where Congress lists several items,
14 I think it's reasonable to conclude that
15 Congress envisions that the agencies will
16 operate or will exercise their discretion sort
17 of in a similar manner in each instance. And I
18 think that's what was assumed here.

19 JUSTICE GORSUCH: But is -- is -- is
20 -- is not part of that a function -- I think the
21 argument is, A, we can't specify which
22 preventative care and screenings will be
23 provided or under what conditions and that any
24 -- any provision of care is necessarily going to
25 be conditioned and subject to all sorts of

1 exceptions. That's just the way the world
2 works. There's no rule without an exception.

3 And -- and -- and toward that end,
4 again, just drawing your attention back to
5 the -- the accommodation for churches, many
6 people have argued, and -- and, certainly, the
7 prior administration did, that that was
8 consistent with the statute, not -- not
9 something imposed upon it from outside by the
10 First Amendment.

11 What do you say about that?

12 MR. FISCHER: Your Honor, so we
13 disagree with the prior administration's
14 conclusion that this section authorized the
15 prior church exemption --

16 JUSTICE GORSUCH: I understand that.

17 MR. FISCHER: -- and challenged and --

18 JUSTICE GORSUCH: Let -- let -- let's
19 suppose, though -- let's suppose, though, that
20 that was correct. And -- and -- and -- and I
21 understand that's not your position.

22 What would follow from that for this
23 case?

24 MR. FISCHER: So, if -- if that were
25 correct, then the agencies would have some

1 discretion to create exemptions. And then I
2 think we would be in a position where we would
3 evaluate these rules under arbitrary and
4 capricious review. And I think there are
5 several problems with them, but we would not be
6 in a world where the question of the agency's
7 authority in the abstract was at issue.

8 JUSTICE GORSUCH: Okay. And if I
9 could turn quickly to one other point entirely,
10 the substantial burden argument that Justice
11 Alito raised. And I -- I -- I understand your
12 position. I -- I -- I thought that there would
13 be no substantial burden imposed by a
14 requirement that they pay for contraceptive
15 care. Is -- is that correct?

16 MR. FISCHER: No, Your Honor, not at
17 all. I mean, that -- you know, if an employer
18 objected to that requirement, there -- there
19 would certainly be a -- a substantial burden.

20 JUSTICE GORSUCH: Okay. All right, I
21 misunderstood that colloquy then. Thank you
22 very much.

23 MR. FISCHER: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice.

3 And good morning, Mr. Fischer.

4 MR. FISCHER: Good morning, Your
5 Honor.

6 JUSTICE KAVANAUGH: I want to see your
7 reaction to this way to think about the case,
8 maybe picking up on Justice Breyer's question
9 and -- and Justice Gorsuch's first question.

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

23 And -- and RFRA provides a backstop on
24 that, but even beyond RFRA, in the ACA, Congress
25 has delegated to the agency. Okay, so we have a

1 delegation from Congress to the agency, and --
2 which is common, and sometimes Congress
3 delegates narrowly with narrow language, and
4 sometimes it delegates broadly.

5 And the rule of thumb I've always
6 thought is courts should construe narrow
7 language narrowly and broad language broadly.
8 And this seems to be broad language, as Justice
9 Thomas noted. And when you have that kind of
10 broad language, you're going to get different
11 executive branches who are going to exercise
12 their discretion within that broad language and
13 balance the interests differently.

14 And then the question is, what's the
15 judicial role? And it seems to me the judicial
16 role is not to put limits on the agency
17 discretion that Congress has not put there.

18 And then we're left, I think, as
19 Justice Breyer said, with -- and -- and I want
20 to get your reaction to this -- with the
21 arbitrary and capricious test at the end of the
22 day and just making sure that in exercising its
23 discretion and balancing those interests, the
24 agency didn't go outside the limits of
25 reasonableness, which is a very deferential

1 test. It's not abdication, but it's
2 deferential.

3 Why isn't that the way to look at the
4 case, and if we get down to the bottom line of
5 is this reasonable, not maybe everyone's
6 preferred choice but at least within the bounds
7 of reasonable, why isn't this a reasonable way
8 to balance it? So just get your reaction to all
9 that.

10 MR. FISCHER: Thank you, Your Honor.

11 So, on -- on that last point, the
12 reason this is not a reasonable way of balancing
13 is that the rules go well beyond when RFRA even
14 arguably would require. As we mentioned, for
15 instance, companies that have no objection to
16 accommodation are now wholly exempt.

17 And however you interpret the Women's
18 Health Amendment -- and -- and we -- we
19 strenuously believe that it imposed a -- a
20 mandatory duty on insurers to provide this
21 coverage -- but, certainly, it would defeat the
22 purpose of that amendment to say that women
23 should not receive coverage if they work for an
24 employer that objects to contraception generally
25 but was willing to participate in the

1 accommodation process or to note its objections
2 so that they could still receive coverage.

3 We also think there's -- that the
4 exemption for publicly traded companies, in the
5 absence of any evidence that any publicly traded
6 companies requested one, goes well beyond. We
7 think the moral rule is so untethered from any
8 reasonable standard that -- that it's certainly
9 arbitrary and capricious.

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

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

1 the agencies.

2 And we submit the Women's Health
3 Amendment impose a mandatory obligation. It
4 says, "shall at a minimum provide coverage for
5 and shall not impose any cost-sharing
6 requirements for." And, nevertheless, what is
7 clear from the -- the floor debate on that is
8 that Congress envisioned that it would require
9 coverage for preventive services, that family
10 planning would be included.

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

21 JUSTICE KAVANAUGH: Thank you very
22 much, Mr. Fischer.

23 MR. FISCHER: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 General Francisco, you have a minute
2 for rebuttal.

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

5 GENERAL FRANCISCO: Thank you,
6 Mr. Chief Justice.

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

19 Under my friend's position, they seem
20 to concede that all of these other provisions
21 violate Section 13(a)(4). After all, the church
22 exemption is not limited to ministers, and the
23 church exemption applies to churches that don't
24 even object to contraception.

25 But regardless of how you resolve the

1 issue, the rules here bring a decade-long
2 dispute to a durable end, and they should be
3 upheld.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General.

6 The case is submitted.

7 (Whereupon, at 11:40 a.m., the case
8 was submitted.

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