PRELIMINARY REMARKS ON *LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME V. PENNSYLVANIA* AND ON ITS IMPACT ON THE RIGHT TO CONSCIENTIOUS OBJECTION

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Abstract: «Culture wars» is a term that is increasingly used in the US political and legal framework to refer to the growing polarization of competing narratives on a highly controversial issue: new conscience claims for religious exemptions to generally applicable laws. The recent US Supreme Court judgment, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (the third Supreme Court decision about the Contraceptive Mandate) represents a crucial triumph for conservative forces, as it held that all employers can enjoy an exemption, for religious or moral reasons, from insurance coverage for contraceptive services. The present paper aims to analyze the growing tension, in the complex US legal framework, between the Patient Protection and Affordable Care Act and the Religious Freedom Restoration Act and to investigate possible future legal trajectories.

Keywords: Contraceptive Mandate, Coverage for Contraceptive Services, Conscientious Claims, Third-Party Burdens, Pluralism.

Resumen: «Guerras culturales» es un término que se usa cada vez más en el marco político y legal de Estados Unidos para referirse a la creciente polarización de narrativas en competencia sobre un tema muy controvertido: la nueva conciencia reclama exenciones religiosas a las leyes de aplicación general. La reciente sentencia de la Corte Suprema de los EE. UU., Hermanitas de los Santos Pobres Peter y Paul Home v. Pennsylvania (la tercera decisión de la Corte Suprema sobre el mandato de anticonceptivos) representa un triunfo crucial para las fuerzas conservadoras, ya que sostuvo que todos los empleadores pueden disfrutar de una exención, por razones religiosas o morales, de la cobertura del seguro de servicios anticonceptivos. El presente artículo tiene como objetivo analizar la creciente tensión, en el complejo marco legal de los Estados

Unidos, entre la Ley de Protección al Paciente y Cuidado de Salud Asequible y la Ley de Restauración de la Libertad Religiosa e investigar posibles trayectorias legales futuras.

Palabras clave: Mandato anticonceptivo, cobertura de servicios anticonceptivos, afirmaciones de conciencia, cargas de terceros, pluralismo.

1. THE INCREASE OF «CULTURE WARS» IN THE US PLURALISTIC ENVIRONMENT

«Culture wars»[1] is a term that is increasingly used in the US political and legal framework to refer to the growing polarization of competing narratives on a highly controversial issue: the «new generation» claims for religious exemptions to generally applicable laws[2]. The growing number of conscientious objections, «covering a broader range of acts and actors» and «many forms of conduct, interactions and association with the objector», gives rise to growing public concerns, and to the pressing need to identify standards to assess whether

[1] See DAVIDSON HUNTER, J., *Culture Wars: The Struggle to Define America*, Basic Books, New York, 1991.

[2] See MANCINI, S., ROSENFELD, M., «Introduction: The New Generation of Conscience. Objections in Legal, Political and Cultural Context», in MANCINI, S., ROSENFELD, M. (Eds.), *The Conscience Wars. Rethinking the Balance between Religion, Identity and Equality*, Cambridge University Press, Cambridge, 2018, pp. 1-19.

and to what extent a religious claim deserves constitutional protection and which conflicting interests can justify restrictions on the exercise of religious freedom[3].

In a complex legal context where the distinction between religious and secular, for-profit and non-profit, public and private actors' legal regimes, roles and responsibilities becomes steadily more blurred[4], one of the battlegrounds of the tensions between conservative and progressive forces concerns the obligation for religious employers, like other employers, to include contraceptive coverage among the services included in insurance plans they provide for women employees.

This crucial issue is part of the broader complex relationship between religion and health care that is specifically challenging in such a pluralistic landscape as the United States, where many different religious and cultural perspectives interact, which emphasize the unresolved question about how much religious accommodation is workable in the health-care market. In the US context, indeed, health-care delivery involves a «web of relationships» that includes not only the individuals affected (whose individual choices are recognized and given increasing weight in medical decision-making) and the health-care staff, but also different institutions: insurance companies, health-care providers, employers[5]. Currently, an increasing government involvement in the fields of health care and payer contracting is causing new challenges, as it leads to growing public regulation and pervasive supervision on the health market and new concerns for religious organizations.

In 2020, the COVID-19 pandemic emphasized clashes between the protection of public health and the exercise of religious freedom. However, during this time religious freedom has prevailed in litigation before the Supreme Court. The recent US Supreme Court judgment, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*[6] (the third Supreme Court decision about the contraceptive mandate), decided by a vote of 7 to 2, represents a crucial

[3] See Mancini, S., Rosenfeld, M., «Introduction…», pp. 1-19.

[4] See Madera, A., «Enti religiosi e nuove modalità organizzative fra esercizio di attività diverse e tutela dell'identità religiosa in Italia e negli Stati Uniti», in Dammacco, G., Ventrella C., (Eds.), *Religioni, diritto e regole dell'economia*, Cacucci Editore, Bari, 2018, p. 139; Greendorfer, A., «Blurring Lines Between Churches and Secular Corporations. The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion (with a Post-Hobby Lobby Epilogue)», in *Delaware Journal of Corporate Law*, 29 (2015), p. 819 ff.

[5] See Sepper, E., Fernandez Lynch, H., Glenn Cohen, I., «Introduction: Law, Religion and Health in the United States», in Sepper, E., Fernandez Lynch, H., Glenn Cohen, I. (Eds.), in *Law, Religion and Health in the United States*, Cambridge University Press, New York, 2017, p. 1.

[6] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U. S. _;140 S. Ct. 2367 (2020).

triumph for conservative forces, as it held that all employers can enjoy an exemption, for religious or moral reasons, from insurance coverage for contraceptive services. On the same day, the US Supreme Court also ruled on *Our Lady of Guadalupe v. Morrisey-Borru* (where the Court held that religious schools are covered by the ministerial exception in their employment relationships), a coincidence that shows the extent of the «institutional»[7] turn in the protection of religious freedom that was a main feature under the Trump Administration[8]. In ruling the *Guadalupe* case, actually, the Supreme Court moved toward an absolutization of religious freedom, removing it from any balance between competing values, as internal church matters were at stake. Also, *Espinoza v. Montana* follows the same judicial line, as the Supreme Court held that a state scholarship program providing public funding to enable students to attend private schools, but excluding religious institutions because of their religious identity, amounts to a religious discrimination under the Free Exercise Clause[9].

However, the Supreme Court gave another recent controversial judgment, *June Medical Services v. Russo*[10] where it held that the Louisiana's Unsafe Abortion Protection Act was unconstitutional, a holding that could have seriously undermined women's reproductive rights.

For decades, the Supreme Court has been split between the judges who wanted to embrace a more conservative direction and the others who wanted to follow a progressive approach.

Nowadays, the increasingly sharp contrast between these two judicial approaches witnesses a growing tension between the two wings of a highly «ideologically polarized» court[11], the progressive wing and the conservative one, and the difficulty of reconciling their opposite views, resulting in, more frequently, frail compromise solutions that put the rights of vulnerable classes at risk[12].

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[7] See SCHRAGGER, R., SCHWARTZMAN, M., «Against Religious Institutionalism», in *Virginia Law Review*, 99 (2013), p. 917 ff.

[8] See *Our Lady of Guadalupe v. Morrisey-Borru*, 591 U. S. _ (2020).

[9] See *Espinoza v. Montana Department of Revenue*, 591 U. S._ (2020).

[10] See *June Medical Services v. Russo*, 591 U. S. _ (2020).

[11] See DE GIROLAMI, M., «Constitutional Contraction: Religion and the Roberts Court», in ANNICCHINO, P., *La Corte Roberts e la tutela della libertà religiosa*, European University Press, Fiesole, 2017, p. 23.

[12] See CHIERAGATO, E., «La Corte Suprema e gli ultimi episodi della *culture war* su aborto e contraccezione: un commento a Little Sisters of the Poor v. Pennsylvania», in *Diritti Comparati* (September 10, 2020), https://www.dirittocomparati.it/la-corte-suprema-e-gli-ultimi-episodi-della-culture-war-su-aborto-e-contraccezione-un-commento-a-little-sisters-of-the-poor-v-pennsylvania-2020/.

2. THE TENSION BETWEEN THE ACA AND THE RFRA

At first glance, *Little Sisters of the Poor v. Pennsylvania* underlines the tension within the complex US legal framework between two federal statutes: the Affordable Care Act (ACA)[13], aimed at safeguarding public health, and the Religious Freedom Restoration Act (RFRA)[14], aimed at satisfying demands for religious accommodation.

The ACA was signed into law in 2010 with the aim of expanding health-care protection, to guarantee affordable health insurance to more people and to improve significantly women's free access to preventive health care, and to eliminate cost sharing, as previously contraceptive coverage was dealt with in a fragmented legal framework at federal and state level and access to contraception was connected with cost-sharing requirements[15]. In 2010, a model of government-funded health care was not considered workable[16], so Congress designed a sophisticated model based on the US insurance health system[17].

However, from the time it became law, the ACA has provoked tensions between the rights of women to enjoy some health services, including contraceptive services, for free, and conscientious objections of employers who have to comply with the so-called Contraception Mandate and to guarantee insurance coverage for contraceptive services.

By virtue of the Women's Health Amendment, Congress modified the ACA, with the aim of eliminating any gender disparity in access to health care. However, the new version of the ACA gave a high degree of discretion to the Health Resources and Services Administration (HRSA), a federal agency charged with determining what preventative health services employers must provide through group health insurance plans, but also with establishing the extent of the government's authority to carve out exceptions to accommodate religious

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[13] See 124 Stat. 119, amended by the *Health Care and Education Reconciliation Act*, 124 Stat. 1029.

[14] See 42 U. S. C. § 2000bb.

[15] See KILLION, V. L., «The Federal Contraceptive Coverage Requirement: Past and Present Legal Challenges», in *Congressional Research Service* (April 28, 2020), https://fas.org/sgp/crs/misc/R45928.pdf.

[16] See *Griswold v. Connecticut,* 381 U. S. 479 (1965); *Eisenstaedt v. Baird*, 405 U. S. 438 (1972); *Harris v. MacRae*, 448 U. S. 297, 316 (1980), where the Court held that «although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation». The Court also found that «[w]hether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement». See *Harris v. MacRae*, at 312-318.

[17] See FENTIMAN, L. C., «Of Mosquitoes and "Moral Convictions" in the Age of Zika: How the Trump Administration's Gutting of the Affordable Care Act's Contraceptive Mandate Jeopardizes Women's and Children's Health», in *Health Matrix*, 30 (2020), p. 111.

objections[18]. In 2011, complying with this duty, the HRSA, which is a division of the Department of Health and Human Services, issued guidelines requiring health plans to provide women with coverage that granted access to all «FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity» at zero cost. These guidelines are commonly called the contraceptive mandate, and they immediately raised concerns for faith-based organizations.

At first, under the Obama Administration, a total exemption from the Contraception Mandate was provided for strictly religious providers[19]. However, this complete exemption covered only a restricted number of institutions, leaving other social actors claiming an unsatisfied religious conscience[20]. Later, the Obama Administration provided a sophisticated accommodation scheme for non-profit religiously affiliated organizations, aimed at releasing objecting institutions from directly providing coverage. This expanded the range of beneficiaries of exemptions, shifted the financial burden onto third parties (insurers or third-party administrators), and provided an opting-out mechanism for non-profit corporations, which had been charged with the duty to self-certify their religious objection, provided that they met the required standards[21].

After its enactment, the ACA was challenged several times on the basis of the RFRA. As is well known, the RFRA was enacted in 1993 as a federal response to the *Smith* case[22] that severely restrained religious freedom. The *Smith* ruling shifted the protection of religious freedom from the judicial arena to the legislative sphere, and since then, lawmakers have been increasingly charged

[18] See *Women's Preventive Services Guidelines*, U. S. Health Res. & Serv. Admin., *https://www.hrsa.gov/womensguidelines/index.html*: «A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum, provide coverage for and shall not impose any cost sharing requirements for... with respect to women, such additional preventative care and screenings... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration». See BROWN, L., «Supreme Court Discusses Religious Freedom, Protection for the Little Sisters of the Poor», in *Catholic National Catholic Register* (May 8, 2020), https://www.ncregister.com/news/supreme-court-discusses-religious-freedom-protection-for-the-little-sisters-of-the-poor

[19] See 45 C. F. R. § 147.131(a) 2013.

[20] See 76 Fed. Reg. 46621 (Aug. 3, 2011), that refers only to «churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order».

[21] See 45 C. F. R. § 147.131(b) 2013. Organizations can enjoy this form of accommodation if they manifest a religiously motivated conscientious objection to the supply of all or some contraceptive instruments, are organized and operate as non-profit organizations, qualify as religious non-profits and self-certify that they meet the prescribed requirements.

[22] See *Employment Division, Department of Human Resources v. Smith*, 494 U. S. 872 (1990).

with the duty to provide forms of «generic» and «specific» exemptions[23]. The RFRA restored the strict scrutiny standard of judicial review, according to which a religiously neutral law of general applicability cannot impose a substantial burden on religious freedom unless it is in furtherance of a compelling state interest and the law is the least-restrictive alternative to pursue that interest. In the light of the complex interaction between constitutional and statutory sources of protection of religious freedom, the RFRA is central in recent controversies about the ACA. As is well known, the tensions between the two above-mentioned statutes culminated in fierce judicial battles that involved the Supreme Court.

A first judicial track was about «whose» conscience deserves protection against the Contraception Mandate. In *Burwell v. Hobby Lobby*, the Supreme Court had to decide whether certain for-profit corporations (closely held corporations) can be considered as «persons» under the RFRA and exercise conscientious objection and to refuse to provide insurance coverage for contraceptive services[24]. In this controversial decision, the Court held that a least-restrictive alternative was available to pursue the public interest, namely the extension to closely held corporations of the same kind of religious accommodation provided for non-profit corporations. In this way, a highly controversial accommodation was provided for «corporate religious conscience»[25]. After this decision, the government provided new updated directives, according to which closely held for-profit corporations could enjoy the same accommodation granted to non-profit institutions[26].

However, religious objections did not stop. A second judicial trend involved the very scope of the accommodation scheme. Religious non-profit employers claimed that they felt part of the «chain of complicity» in the objectionable

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[23] Although the enactment of the RFRA restored the strict scrutiny standard, the *Boerne* decision precluded the application of the RFRA at a state level. See *City of Boerne v. Flores*, 521 U. S. 507 (1997). However, 21 states expanded the protection of religious freedom, enforcing their own version of the RFRA. See Fretwell Wilson, R. «Bargaining for Religious Accommodations. Same-Sex Marriage and LGBT Rights After Hobby Lobby», in Schwartzman, M., Flanders, C., Robinson, Z. (Eds.), *The Rise of Corporate Religious Liberty*, Oxford University Press, New York, 2016, p. 257 ff.

[24] See *Burwell, Secretary of Health and Human Service, et al. v. Hobby Lobby Stores, Inc., et al.*, 573 U. S. 682 (2014).

[25] See Gedicks, F. M., Van Tassell, R. G., «RFRA Exemptions from the Contraception Mandate: an Unconstitutional Accommodation of Religion», in *Harvard Civil Rights-Civil Liberties Law Review*, 49 (2014), pp. 350-351, who doubted that the beneficiaries of health plans would not suffer any burdens because of the religious objections of their employers.

[26] See Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015).

practice because of their duty of notice to the other entities involved[27]. They claimed that their religious convictions were not coherent with any form of contracting with companies providing coverage and they required a full exemption, the same as provided for religious organizations.

In *Zubik v. Burwell* a religious organization of nuns, devoted to assisting the elderly, claimed that the accommodation scheme provided by the government to non-profit organizations (the «new accommodation», namely, that an eligible organization has to give notice to the Secretary of Health and Human Service that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services) imposed a substantial burden on their religious freedom, infringing their rights under the Free Exercise Clause and the RFRA, as it resulted in a complicity in health services contradictory to their religious tenets[28]. The religious organization claimed that

[27] See *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), where the Supreme Court granted an interlocutory injunction in favor of the college, a religious non-profit institution. The Supreme Court enjoined federal agencies from requiring the college to file the self-certification form with its third-party administrator. The college was required only to «inform the Secretary of Health and Human Services [HHS] in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services».

Therefore, in August 2014 interim final regulations were issued, and the HHS provided an alternative option in the accommodation scheme (the «new accommodation»), namely the duty of giving notice directly to HHS rather than to the insurer or third-party administrator «*[A]n eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services. The notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services […]; the plan name and type [...]; and the name and contact information of any of the plan's third party administrators and health insurance issuers*». After receipt of the notice the *HHS* has to notify the insurer of the non-profit entity's religious objection. For its part, the insurer must «*[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan[] and [...] [p]rovide separate payments for any contraceptive services required to be covered*». See 79 Fed. Reg. 51092 (Aug. 27, 2014). After these changes the Seventh Circuit responded to the college's claim of complicity that «it is the law not any action on the part of the college that requires the third-party administrator to provide insurance coverage for contraception».

[28] See *Zubik v. Burwell*, 578 U. S. _, 136 S. Ct. 1557 (2016). This decision consolidated *Little Sisters of the Poor Home for the Aged, Denver v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted sub nom. S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015) *and cert. granted in part* 136 S. Ct. 446 (2015), *and vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) with other six lower courts cases: *Geneva Coll. v. Sec'y U. S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Priests For Life v. U. S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D. C. Cir. 2014); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W. D. Okla. Dec. 23, 2013); *Zubik v. Sebelius*, 983 F. Supp. 2d 576 (W. D. Pa. 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, 19 F. Supp. 3d 48 (D. D. C. 2013).

the connection between contraceptive coverage and employer-sponsored health plans made it accomplice of morally wrong procedures[29].

The Supreme Court issued a *per curiam ruling* that vacated the decisions of the Circuit Courts of Appeals and remanded the cases to those courts for reconsideration in order to offer both parties involved «an opportunity to arrive to an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage»[30]. The Court circumvented the main issue, that being whether the accommodation scheme substantially burdened religious exercise and whether it complied with the RFRA's standards. However, a compromise solution that satisfies the religious demands of the faith-based organization involved was not reached[31] and the question whether the self-certification procedure implied complicity remained unresolved.

3. THE NEW RULES UNDER THE TRUMP ADMINISTRATION

Under the Trump presidency, the whole system of health-care delivery experienced a sharp transition from an «inclusive strategy», aiming to avoid placing burdens upon women in order to maximize the protection of religious freedom, to an increasingly «conservative commitment»[32]. As a first step of a deep commitment to promote religious freedom, in May 2017, the new presidency issued an executive order «Promoting Free Speech and Religious Liber-

[29] See 78 Fed. Reg. at 39876 (July 13, 2013): «[P]lan participants and beneficiaries (and their health care providers) do not have to have two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)». Also, other courts held it was the ACA, not the procedure of self-certification, that provided that health plans had to provide coverage; for this reason the exercise of religious freedom was not burdened.

[30] See *Zubik v. Burwell*, at 1559-1560. According to the Court, the parties should find a solution that means religious organizations have to «do nothing more than contract for a plan that does not include coverage for some or all forms of contraception».

[31] According to the attorney representing Little Sisters (oral argument): «If the government has some way to provide the contraception services independently of us and our plans, we've never had an objection to that… But the government has insisted throughout this whole process that we not just be able to have an opt-out form, an objection form, but that that same form serve as a permission slip to allow the government to track down PPAs [Preferred Provider Arrangements] and others to provide services through our plans. And that's always been the gravamen of our objection». See https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-431_6537.pdf

[32] See Casey, S., «How the State Department Has Sidelined Religion's Role in Diplomacy», in *Religion & Politics* (September 5, 2017), https://religionandpolitics.org/2017/09/05/how-the-state-department-hassidelined-religions-role-in-diplomacy/.

ty» where federal agencies were solicited to «consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under the Women's Health Amendment»[33]. Following these new guidelines, the Department of Health and Human Services issued two new interim final rules (IRFs), offering opting-out options to employers who objected to compliance with the contraceptive mandate, not only on religious grounds, but also «on sincerely held moral convictions but not religious beliefs»[34]. The range of those benefiting from the exemptions was extended to include not only religious organizations and closely held corporations but also all non-governmental (closely held or publicly traded) organizations and «non-federal governmental plan sponsors» who claim sincere religious beliefs that conflict with contraception. Finally, the rules made optional the obligation for employers and health-plan sponsors to self-certify their objection to the government or health-plan administrator. The 2019 Final Rules provided some amendments «to clarify the intended scope of the language» but did not substantially alter the IFRs[35]. The new rules are coherent with the former Trump's Administration directives, which aimed to avoid the federal government being able impose substantial burdens on the exercise of religious freedom unless the parameters of the strict scrutiny were satisfied. The rationale that led the departments' choices is that that faith-based entities would suffer a substantial burden on the exercise of their religious freedom if they had to choose between complying with the contraception mandate or incurring a financial penalty.

However, the broad extension of the range of those benefiting (employers or insurance plan providers) from the exemptions from compliance with the contraceptive mandate, risks substantially dismantling the intent of the ACA, as the new rules provide no alternative opportunity for women to access objected-to preventive services. Progressive forces immediately complained that the true effectiveness of the contraception mandate risked being seriously undermined, and that many women lost the advantages of the mandate[36].

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[33] See Executive Order 13798 (June 16, 2020).

[34] See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) («[E]xemptions for objecting entities will apply to the extent that an entity described in § 147.132(a)(1) objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs»).

[35] See 83 Fed. Reg. 57,536 (Nov. 15, 2018) (codified at 45 C. F. R. § 147.132) and 83 Fed. Reg. 57,592 (Nov. 15, 2018) (codified at 45 C. F. R. § 147.133).

[36] A non-profit organization, Planned Parenthood, filed a lawsuit, claiming that the new rules are in contradiction with Title X (a program that funds family planning services). However, the

Also, some states were concerned they would have to bear the cost of the coverage[37], so they sued the federal government in federal courts over the question of the legality of agency rules[38]. The crucial questions are whether federal agencies had «statutory authority» under the ACA and the RFRA to provide such a broad exemption from the contraceptive mandate and whether federal agencies infringed federal laws regulating administrative agencies, namely the Administrative Procedure Act (APA)[39].

Specifically, the Commonwealth of Pennsylvania and the state of New Jersey claimed that the rules violated the APA, both for procedural and substantive reasons. On the procedural side, Pennsylvania claimed that the agencies «failed to comply» with the APA's «notice-and-comment procedures»[40]. On the substantive side, the Commonwealth argued that the rules were «arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the [APA's] substantive provisions»[41]. The *Little Sisters* decision

district court granted summary judgment to the government, holding that the rules did not result in «final agency action». See *Planned Parenthood of Wisconsin, Inc. v. Azar*, 316 F. Supp. 3d 291, 298 (D. D. C. 2018).

[37] See *Pennsylvania v. President of the U. S.*, 930 F.3d 543, 560–61; *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d 791, 827-28 (E. D. Pa. 2019) *aff'd sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *cert. granted sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 918 (2020*)*. See also *California v. Health & Hum. Servs.(HHS)*, 351 F. Supp. 3d 1267, 1282 (N. D. Cal. 2019) *affirmed*, 941 F.3d 410 (9th Cir. 2019), *cert. filed*, Nos. 19-1038, 19-1040, 19-1053 (Feb. 2020) where 14 states asked to enjoin the enforcement of the 2019 final rules, before they became effective. The Ninth Circuit confirmed the district court's injunction, but only for the states that were plaintiffs in the action. The states asked again to enjoin the enforcement of the 2019 final rules when they became effective, claiming that they violated the APA, the Establishment Clause, and the Equal Protection Clause. The district court granted a preliminary injunction for the plaintiff states, holding that the final rules infringed the APA, the ACA and were not mandated by the RFRA. The Ninth Circuit confirmed the district court ruling, even though it underlined its preliminary character.

See also *Massachusetts v. Azar*, 923 F.3d 209, 228 (1st Cir. 2019), where the First Circuit held that Massachusetts had demonstrated an «imminent» fiscal harm due the expansion of the exemptions and remanded the matter to the district court to verify whether the 2019 final rules infringed the APA, the Establishment Clause, and the Equal Protection Clause.

[38] See *Pennsylvania v. Trump*, 351 F. Supp. 3d, at 803, *California v. HHS*, 351 F. Supp. 3d, at 1279; *Massachusetts v. HHS*, 301 F. Supp. 3d 248, 250 (D. Mass. 2018), *vacated and remanded*, 923 F.3d 209 (1st Cir. 2019).

[39] See Turret, E. S., Kraschel, K. L., Curfman, G., «Supreme Court to Decide Fate of Affordable Care Act Contraceptive Coverage Mandate», in *Jama Health Forum* (15 May 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2766247.

[40] See *Pennsylvania v. Trump*, 351 F. Supp. 3d, at 802.

[41] See *Pennsylvania v. Trump*, 351 F. Supp. 3d, at 802; *California v. HHS*, 351 F. Supp. 3d, at 1279.

consolidated two appeals from the injunction imposed by the United States Court of Appeals for the Third Circuit[42].

The *Little Sisters* case concerns the crucial question of whether and to what extent the government should provide accommodation for employers who object to the contraceptive mandate for religious and moral reasons when this kind of accommodation negatively affects employees. So the Court had the opportunity to explain whether and to what degree the RFRA mandates the government to exempt entities with religious and conscientious objections from generally applicable laws that impose a substantial burden on the exercise of their religious belief, and whether the government had to consider the negative implications of the accommodation on affected third parties[43]. This determination could have had significant impact on further litigation involving another legal issue: i.e., the problematic impact of the recognition of exemptions from the contraceptive mandate for objecting religious universities on students and employees[44]. However, the Supreme Court was not directly required to assess whether the rules are coherent with the Religion Clauses or the RFRA. The Court was not asked to decide whether the rules are religiously neutral or whether they give preferential treatment to certain religious groups, accommodating the beliefs of certain employers. Nor was the Court asked to determine the proper standard of judicial review for religious accommodation. In the *Little Sisters* decision, the main question is the coherence of the Final Rules with the ACA and the APA; that is the matter at the centre of the litigation, and brings about new alarming implications. The ruling confirms that «courts prefer

[42] In 2018, Pennsylvania and New Jersey asked a district court to enjoin Final Rules before they came into effect. The US District Court for the Eastern District of courts granted a national preliminary injunction, ruling that it was the only viable solution «to provide the States complete relief» as «there is no more geographically limited injunction that prevents the States from potential harm». See *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d, at 827-28. Both the federal government and a religious organization, Little Sisters of the Poor (that was allowed to intervene in the judicial proceeding in defense of the interim final rules, but was denied standing to contest the final rules in the appeal phase) appealed the Third Circuit's decision to the Supreme Court. The Supreme Court granted certiorari. The court consolidated the two cases: Little Sisters of the Poor v. Pennsylvania and Trump v. Pennsylvania. The states asked the Supreme Court to confirm the Third Circuit's ruling.

[43] See LIPPER, G. M. «Not Your Father's Religious Exemptions, The Contraceptive-Coverage Litigation and The Rights of Others», in SEPPER, E., FERNANDEZ LYNCH, H., GLENN COHEN, I. (Eds.), *Law, Religion and Health in the United States*, pp. 60-74.

[44] See *Irish 4 Reprod. Health v. HHS*, No. 3:18-CV-491-PPS-JEM, 2020 U. S. Dist. LEXIS 7537 (N. D. Ind. Jan. 16, 2020).

not to decide constitutional questions when they can be avoided by deciding on statutory grounds»[45].

4. THE OPINION OF THE MAJORITY

First of all, the majority attempted to respond to the states' claims that the exemptions were invalid because the government did not comply with the proper procedures when it enacted the Rules and that the departments did not take into serious account the criticism of the IRF, as the Final Rules closely resembled the earlier ones. On the basis of three crucial words in the ACA, «*as provided for* in comprehensive guidelines of HRSA»[46], Justice Thomas, who wrote a «narrow» majority opinion[47], found that the final rules met both procedural and substantive requirements under the ACA. Regarding the APA, he also underlined that the agencies provide notice to the public, and a broad opportunity for the public to make remarks, as the agencies included a «concise general statement of [a final rule's] basis and purpose»[48], and that the publication of the final rules occurring in advance (30 days) before the rules came into effect, so they would had been available to the public for scrutiny[49].

Justice Thomas sidestepped the lawmaker's responsibility for the exemptions, shifting it from the lawmakers to the administrative agencies, arguing that the exemptions do not infringe the ACA. As said above, the ACA did not directly provide exemptions, but charged an administrative board, the HRSA, with the task of «identify[ing] what preventative care and screenings must be

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[45] See Fentiman, L., «Of Mosquitoes and "Moral Convictions"…», p. 101; Nelson, C., «Avoiding Constitutional Questions Versus Avoiding Unconstitutionality», in *Harvard L. Rev.* (June 9, 2015), https://harvardlawreview.org/2015/06/avoiding-constitutional-questions-versus-avoiding-unconstitutionality/.

[46] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2371. See § 2713(a)(4) of the Public Health Service Act, which stated that «as provided for in comprehensive guidelines supported by» the HRSA. This section grants «sweeping authority to HRSA to craft a set of standards defining the preventive care that applicable health plans must cover.»

[47] See Hoffman, A. K., «Allison Hoffman offers her perspective on Little Sisters of the Poor v. Pennsylvania», in *Penn. Law* (July 9, 2020), https://www.law.upenn.edu/live/news/10253-allison-hoffman-offers-her-perspective-on-little

[48] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2385.

[49] Thomas remanded the case back to the lower courts, as «the only question we face today is what the plain language of the statute authorizes… And the plain language of the statute clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions». See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2382. See Howe, A., «Opinion Analysis: Court Rejects Challenge to Exemptions From Birth Control Mandate», in *Scotusblog*, 8 July 2020, https://www.scotusblog.com/2020 de julio de opinion-analysis-court-rejects-challenge-to-exemptions-from-birth-control-mandate/.

covered [under the ACA] and to exempt or accommodate certain employers' religious objections»[50]. The majority found that the HRSA enjoys «virtually unbridled discretion to decide what counts as preventive care and screenings», which is «equally unchecked in other areas, including the ability to identify and create exemptions from its own Guidelines»[51]. This implies that an administrative agency has an alarmingly broad discretion about «the context of (the what) and the reach (the who) of the ACA's Women's Health Amendment»[52]. However, as far as the Court is concerned, the only relevant matter is that the government «had the statutory authority to craft that exemption, as well as the contemporaneously issued moral exemption», and that the «rules promulgating these exemptions are free from procedural defects».

In addition, Justice Thomas avoided the argument, raised by Justice Ruth Bader Ginsburg in her dissenting opinion that the majority's opinion would actually undermine women's right to free access to birth control, thus frustrating the efforts of Congress. Instead, in his rationale, Justice Thomas seems to minimize the need to reach a reasonable balance between the two competing interests at stake (religious freedom and women's access to contraceptive services). According to Thomas, in the ACA there is a lack of a specific provision requiring health plans to include birth control, so the HRSA is given broad authority «without any qualifications»[53].

Adopting a «textualist»[54] approach (which the Supreme Court is increasingly making use of in its recent rationales[55], where the Court assumed a «mini-

[50] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2379.

[51] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2380. See HOWE, A., «Opinion Analysis….»

[52] See HOFFMAN, A. K., «Allison Hoffman offers her perspective…».

[53] According to the Court, «Congress could have limited HRSA's discretion in any number of ways». However, it «enacted expansive language offer[ing] no indication whatever that the statute limits what HRSA can designate as preventive care and screenings or who must provide that coverage». See *Little Sisters of the Poor Saints Peter and Paul v. Pennsylvania*, at 2380.

[54] SEE J. BEAN, J. T., FREWELL WILSON, R., «The Administrative State as a New Front in the Culture War: *Little Sisters of the Poor v. Pennsylvania*», in *Cato Supreme Court Review*, 2020, p. 247.

[55] See MADERA, A., «L'interazione fra esenzioni religiose e diritti *LGBT* sul luogo di lavoro: nuove traiettorie giudiziarie al crocevia fra narrative plurali», in *Stato, Chiese e Pluralismo Confessionale*, 20 (2020), p. 31; BENNETT, D., «LGBT Rights Ruling Isn't the Beginning of the End for Religious Liberty», in *Christianity Today*, June 17, 2020, https://www.christianitytoday.com/ct/2020/june-web-only/bostock-gorsuch-supreme-court-ruling-religious-liberty.html.

malist role»)[56], Thomas defined the issue as a «policy concern», which «cannot justify supplanting the text's plain meaning»[57].

According to Justice Thomas, it was «Congress, not the Departments» that made a «deliberate choice to issue an extraordinarily 'broad general directiv[e]' to HRSA to craft the Guidelines, without any qualifications as to the substance of the Guidelines or whether exemptions were permissible»[58]. So it was Congress that «declined to expressly require contraceptive coverage in the ACA itself», and finally failed to grant coverage to a vulnerable class of individuals[59].

Secondly, provided that the rules creating the exemptions were coherent with the ACA, the majority asserted that the Court was not required to verify whether the exemptions found their rationale in the RFRA. Although the Trump Administration and the petitioners solicited the Court to recognize that the RFRA implies religious and moral exemptions to the contraceptive mandate[60], the Court however left the RFRA issue unresolved.

Ultimately, the majority rejected the states' claim that the agencies «could not even consider RFRA as they formulated the religious exemption»[61].

Justice Thomas underlined that the right of religious organizations to conscientious objection to the Contraception Mandate is grounded on the RFRA and did not miss the opportunity to assert that the «superstatute» status of the RFRA cannot be underestimated[62]. Quoting previous case law[63], Justice Thomas asserted that the RFRA deserved appropriate consideration by the departments as «the potential for conflict between the contraceptive mandate and RFRA is well settled»[64]. Also, the Supreme Court's earlier decisions in *Hobby Lobby* and *Zubik* concerning the mandate demonstrated the RFRA's weight in the issue, as «all but instructed the Departments to consider RFRA going forward»[65]. For all these reasons, «it is hard to see… how the Departments could promulgate rules

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[56] See Annicchino, P., «The Geopolitics of Transnational Law and Religion. Wars of Conscience and the Framing Effects of Law as a Social Institution», in Mancini, S., Rosenfeld, M. (Eds.), *The Conscience Wars*, pp. 258-274.

[57] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2380.

[58] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2381.

[59] See Howe, A., «Opinion Analysis…»; *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,, at 2380.

[60] See Keith, K., «Supreme Court Upholds Broad Exemptions to Contraceptive Mandate-For Now», in *Health Affairs*, July 9, 2020, https://www.healthaffairs.org/do/10.1377/hblog20200708.110645/full.

[61] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2382.

[62] See *Bostock v. Clayton County, Georgia*, 590 U. S. _ (2020).

[63] See *Burwell, Secretary of Health and Human Service, et al. v. Hobby Lobby Stores, Inc.*, et al., 573 U. S. 682 (2014); *Zubik v. Burwell*, 578 U. S._, 136 S. Ct. 1557 (2016).

[64] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2383.

[65] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2383.

consistent with these decisions if they did not overtly consider these entities' rights under RFRA»[66]. Finally, «it is unsurprising that RFRA would feature prominently in the Departments' discussion» as «the Departments had authority under RFRA to 'cure' any RFRA violations caused by its regulations»[67].

Thomas's opinion culminated in recognizing the importance of the charitable work and the commitment of the Little Sisters, who «–like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision– have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts the Little Sisters from the source of their complicity-based-concerns the administratively imposed contraceptive mandate»[68].

5. CONCURRING AND DISSENTING OPINIONS

The difficulty of the Supreme Court in unanimously ruling on religious freedom matters is palpable, as different personal inclinations underlie the concurring opinions and the completely different narrative leading the dissenting opinion.

Justice Samuel Alito filed a concurring opinion, which was joined by Justice Neil Gorsuch, where he went further toward a more radical protection of religious freedom. Asserting that the *Little Sisters* ruling finally establishes «the end» of «the Little Sisters' legal odyssey»[69], he expressly stated that the contraception mandate, if applied to religious organizations, would violate the RFRA, as they would be compelled to infringe their sincere religious belief or suffer a substantial burden (namely, financial fines for not complying with the mandate). Comparing the present situation to that of conscientious objection to military service[70], Alito asserted the lack of a compelling government interest

[66] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2383. See HOWE, A., «Opinion Analysis…».

[67] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2382.

[68] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2385. See HOWE, A., «Opinion Analysis…».

[69] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Alito, concurring), 2396. See HOWE, A., «Opinion Analysis…».

[70] See VILE, J. R., «Little Sisters of the Poor Saints Peter and Paul, Home v. Pennsylvania», in *The First Amendment Encyclopedia* (July 13, 2020), https://www.mtsu.edu/first-amendment/article/1865/little-sisters-of-the-poor-saints-peter-and-paul-home-v-pennsylvania.

in the Contraceptive Mandate, as Congress failed to define it in the ACA. Also, the many exceptions the lawmaker crafted for the mandate weaken the «compelling» nature of the public interest[71]. Finally, providing free contraception cannot be qualified as a «compelling» state interest, nor can the mandate be considered as «the least restrictive means» to achieve that goal, as the government could burden the cost of providing contraception on its own[72]. Alito argued «not only that it was appropriate for the Departments to consider RFRA, but also that the Departments were required by RFRA to create the religious exemption (or something very close to it)»[73]. For this reason, «it is not clear that the [wholesale exemptions] provisions concerning entities that object to the mandate on religious grounds go any further than necessary to bring the mandate into compliance with RFRA»[74].

Justice Elena Kagan filed another concurring opinion, joined by Justice Stephen Breyer. Although she agreed with the result that the majority reached, she did not share its rationale. She underlined a kind of «mismatch between the scope of the [wholesale exemption] and the problem the agencies set out to address»[75]. Section 2713(a)(4) of the ACA requires to «defer to the agency's longstanding and reasonable interpretation» the issue[76]. However, relying on *Chevron, U. S. A., Inc. v. Natural Resources Defense Council*[77], Kagan suggests that the broad exemptions provided in the rules seem unreasonable and are not the result of «reasoned decision-making»[78]. In fact, an agency fails to adopt reasoned decision-making when: «it has not given "a satisfactory explanation for its action" –when it has failed to draw a "rational connection" between the

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[71] According to Bean, T. J., Fretwell Wilson, R., «The Administrative State as a New Front in the Culture War…», p. 251: «1) The ACA does not provide coverage for women who do not work outside the home, (2) the ACA's exemption of employers with fewer than 50 employees, and (3) the ACA's expansive grandfathering of pre-existing plans».

[72] «The Government... [could] assume the cost of providing the... contraceptives... to any women who are unable to obtain them under their health-insurance policies». See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Alito, concurring), at 2394.

[73] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Alito, concurring), at 2396.

[74] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Alito, concurring), at 2396.

[75] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2397.

[76] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2398.

[77] See *Chevron, U. S. A., Inc. v. Natural Resources Defense Council*, 467 U. S. 837 (1984).

[78] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2398.

problem it has identified and the solution it has chosen, or when its thought process reveals 'a clear error of judgment"»[79].

According to Justice Kagan, the result of the present ruling is that lower courts will be charged with the burdensome task of assessing whether the exemptions are «arbitrary and capricious»-that is, whether they are the effective result of a reasoned agency's decision-making[80].

Finally, Justice Kagan complained that the agencies acted unreasonably, as the recognition of too broad exemptions negatively affected women's health and well-being, without any agency's attempt to «minimize the impact» of religious accommodation on them[81]. According to Justice Kagan, the exemptions are too broad as they also include «even publicly traded corporations» as well as employers «with only moral scruples»[82].

As a defender of the rights of the most vulnerable classes, Justice Ruth Bader Ginsburg filed a dissenting opinion, joined by Justice Sonia Sotomayor, where she complained that the conclusion of the majority seriously prejudiced women's rights by over-expanding the exercise of religious freedom. According to Ginsburg, «today for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree»[83]. She argued that «this decision leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and absent another available source of funding, to pay for contraceptive services out of their own pockets»[84]. The result of the decision is that «between 70,500 and 126,400 women [will] immediately lose access to no-cost contraceptive services»[85]. The negative impact on women will surely be emphasized

[79] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2397.

[80] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2397.

[81] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», 250.

[82] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Kagan, concurring), at 2399. See HOWE, A., «Opinion Analysis…».

[83] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2400.

[84] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2400-2403: «Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage».

[85] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2401.

by the current unprecedented health crisis, which is likely to exacerbate the financial hardship that burdens vulnerable classes of women[86].

Justice Ginsburg underlined that the federal agencies exceeded their powers, as although the ACA authorized the HRSA to identify which services are covered by the guidelines, it did not authorize substantial restriction on the actors charged with the duty to provide the service. Ginsburg asserted that the administrative agencies failed to adopt a «balanced approach… that does not allow the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs»[87]. According to Ginsburg, this result was not the genuine intent of the RFRA and of the constitutional framework[88]. A total exemption is «neither required nor permitted under the RFRA»[89]; instead, the accommodation scheme initially provided did not imply a substantial burden on religious freedom[90].

The contrasting opinions of the judges show that the judges give different meanings to the right to religious freedom and its limits, perpetuating its fragmented interpretation, which results in charging the lower courts, where the dispute will revert, with strong responsibilities[91].

6. UNRESOLVED QUESTIONS ABOUT THE SCOPE OF THE RFRA AF*TER LITTLE SIS*TERS

In 1990, the *Smith* decision severely restricted the possibility for religious exemptions from neutral and generally applicable law, to prevent «every citizen» from becoming «a law unto himself»[92]. One of the collateral and unex-

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[86] See Lithwick, D., «The Supreme Court Sidelines Women in Favor of Religious Bosses», in *Slate* (July 8, 2020), https://slate.com/news-and-politics/2020 de julio de supreme-court-sidelines-women-little-sisters-of-the-poor-v-pennsylvania.html

[87] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2399.

[88] See Howe, A., «Opinion Analysis…».

[89] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2409.

[90] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (Ginsburg, dissenting), at 2409-2410: An «employer is absolved of any obligation to provide the contraceptive coverage to which it objects; that obligation is transferred to the insurer».

[91] See *DeOtte v. Azar,* 393 F. Supp. 3d 490 (N. D. Tex. 2019), where two class actions were brought against the contraceptive mandate. The district court enjoined the federal agencies from enforcing the contraceptive mandate against employers objecting to it, holding that «i]f the Government has a compelling interest in ensuring access to free contraception, it has ample options at its disposal that do not involve conscripting religious employers».

[92] See *Smith*, at 879.

pected effects of the *Smith* case was «the idea that *Smith* left open the possibility of recognizing institutional or corporate liberties»[93]. However, this judicial track not only resulted in a «hands off»[94] approach toward strictly religious organizations and internal church matters, but also generated a lively debate on whether corporations can claim religious rights.

The *Little Sisters* decision is the outcome of a judicial track which aims to expand the standards defining what a religious organization is and what «falls within» religious exercise[95]. This ruling seems to solicit a revisitation of the limits of the collective dimension of religious freedom, namely «what will be the interests that courts find sufficiently powerful to limit the freedom of religious organizations» and «what factors will courts take into consideration in determining whether its policies are least restrictive»[96]. However, cases about new conscientious objections, such as the *Little Sisters* case, do not involve claims that only affect a sphere of religious interest or religious communities, where all members and employees are expected to manifest an «implied consent» to the directives of religious employers[97] and to be committed to shared religious goals[98].

Little Sisters, therefore, raises the main concern that an over-expansion of the exemptions could encourage multiple claims of many individual and collective actors for exemptions from the contraceptive mandate, thereby a) allowing any for-profit or non-profit entity to bypass the obligations stemming from the contraception mandate on the basis of any presumptive attenuated burden; b) undermining compelling state interests in the field of health care; c) disproportionately affecting third-parties. The result could be an increasing skepticism about accommodationism, leading to it being seen as a threat not only for civil rights and anti-discrimination law, as a crucial factor of an erosion of the Esta-

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[93] See FLANDERS, C., SCHWARTZMAN, M., ROBINSON, Z. «Introduction», in SCHWARTZMAN, M., FLANDERS, C., ROBINSON, Z. (Eds.), «*The Rise of Corporate Religious Liberty*, pp. xvii-xx.

[94] See GREENAWALT, K., «Hands Off: When and about What*, »* in *Notre Dame L. Rev*., 84 (2009), p. 913.

[95] See FLANDERS, C., SCHWARTZMAN, M., ROBINSON, Z. «Introduction», in SCHWARTZMAN, M., FLANDERS, C., ROBINSON, Z. (Eds.), *The Rise of Corporate Religious Liberty*, p. xvii.

[96] See FLANDERS, C., SCHWARTZMAN, M., ROBINSON, Z. «Introduction», in SCHWARTZMAN, M., FLANDERS, C., ROBINSON, Z. (Eds.), *The Rise of Corporate Religious Liberty*, p. xx.

[97] See HELFAND, M. A., «What is a "Church"?: Implied Consent and the Contraception Mandate», in *J. Contemp. Legal Issues*, 21 (2013), p. 409.

[98] See MANCINI, S., ROSENFELD, M., «Introduction…», pp. 1-19.

blishment Clause[99], but also for the rationale that religious organizations deserve special solicitude compared to their secular counterparts[100].

However, in *Little Sisters* the Supreme Court did not face these crucial issues. The majority did not clearly decide whether the accommodation scheme violated the RFRA (as Alito expressly stated)[101], namely whether the petitioners' religious exercise was substantially burdened, whether the government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest. So, the RFRA, its parameters and its scope remain at the centre of an unresolved dispute.

7. CRUCIAL QUESTION OF «WHOSE» PROTECTION THE RFRA HAS TO PROTECT

As is well known, the scope of the RFRA was a key element of the *Hobby Lobby* decision, which significantly altered the legal scenario concerning the right to religious freedom[102]. Enacted as a «massive bipartisan effort»[103], the RFRA seeks to «leav[e] accommodation to the political process»[104]. Under the RFRA, religious accommodation depends on the above-mentioned three-pronged strict scrutiny test, the parameters of which raise many questions when conscience claims are involved[105]. The RFRA undoubtedly acted as a catalyst on the issue of religious freedom, giving rise to an increase of conscientious objections and a proliferation of new «religious» actors and new «religious» claims when contraceptive rights and other ethical issues are at stake[106].

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[99] See Madera, A., Nuove forme di obiezione di coscienza fra oneri a carico della libertà religiosa e *third-party burdens*. Un'analisi comparativa della giurisprudenza della Corte Suprema U. S. A. e della Corte di Strasburgo», in *Stato, Chiese e Pluralismo Confessionale*, 16 (2017), p. 17; Magarian, G. P., «The New Religious Institutionalism Meets the Old Establishment Clause», in Schwartzman, M., Flanders, C., Robinson, Z. (Eds.), *The Rise of Corporate Religious Liberty*, p. 441 ff.

[100] See *Our Lady of Guadalupe v. Morrisey-Borru*, 591 U. S. _ (2020).

[101] See Bean, T. J., Fretwell Wilson, R., «The Administrative State…», p. 251.

[102] See Fentiman, L., «Of Mosquitoes and "Moral Convictions"…», p. 98.

[103] See Carmella, A., «Progressive Religion and Free Exercise Exemptions», in *U. Kan. L. Rev.*, 68 (2020), p. 548.

[104] See *Employment Division, Department of Human Resources v. Smith*, at 890.

[105] See Carmella, A., «Progressive Religion…», pp. 535-615.

[106] Cfr. Madera, A., «Nuove forme di obiezione di coscienza…», p. 1; Conkle, D. O., *Religion, Law and the Constitution*, LEG, St. Paul (MN), 2016; Nichols,; J. A., Witte Jr., J., «National Report Unites States of America: Religious Law and Religious Courts as a Challenge to the State», in Kischel, U. (Ed.), *Religious Law and Religious Courts as a Challenge to the State. Legal Pluralism in Comparative Perspective*, Mohr, Tübingen, 2016, p. 83 ff.

A crucial concern is «whose» conscience has to be protected under the RFRA. In the US landscape, religious corporations have traditionally been engaged in charitable activities. Their charitable apostolates were the battleground of the difficult definition of a boundary between legal areas subject to state supervision and areas where state control was prevented because of constitutional protection of religious freedom[107]. The boundary line between religious and charitable organizations has been traditionally blurred, and case law often resorted to legal documents (charter, bylaw, mission statement) to determine proper distinctions that had an impact on the applicable legal regime and how much constitutional protection corporations deserved[108]. However, there has been a traditional judicial skepticism toward any link between business activities and the religious status of an entity[109]. For this reason, academics sharply contested the rationale of *Hobby Lobby*, which included closely held corporations as «persons» under the RFRA, and which can exercise a sort of «corporate religious conscience»[110]. Now the Final Rules over-expand the range of those who can benefit from the option to opt out based on conscientious objections. The inclusion of a broad range of non-governmental, for-profit or non-profit corporations among those who can object to providing contraceptive coverage, even on moral grounds, brings up concerns that it could encourage big corporations to «manufacture» these beliefs as a «way to save money»[111].

The crucial question underlying the *Little Sisters* case is whether the RFRA mandated, or at least authorized, the possibility of a wider range of employers to be exempted or to opt out of the contraceptive mandate[112]. Both the Third Circuit Court of Appeal and the Ninth Circuit Court of Appeal held that although the RFRA empowered federal agencies to offer protection to employers' religious freedom, the rules were not justified under the RFRA standards. In the *Little Sisters* case, the government argued that the expansion of the exemption regime is authorized if not required by the RFRA, as the RFRA applies to «the implementation» of «all federal law»[113]. Federal agencies strongly asserted that the government enjoys broad discretion to expand the exemp-

[107] See MADERA, A., «Spunti di riflessione sulla decisione *Hobby Lobby* e sul suo impatto sulla tutela della libertà religiosa negli U. S. A.», in *Dir. Eccl*., 124 (2014), p. 696.

[108] See MADERA, A., «Spunti di riflessione…», p. 696, and its references.

[109] See MADERA, A., «Spunti di riflessione…», pp. 696-697.

[110] See NELSON, J. D., «The Trouble with Corporate Conscience», in *Vanderbilt Law Review*, 71 (2018), p. 1655.

[111] See FENTIMAN, L., «Of Mosquitoes and "Moral Convictions"…», p. 146.

[112] As said above, under the Obama Administration only a restricted number of institutions could enjoy a complete exemption.

[113] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2371.

tion to a wider range of employers, to prevent further litigation and give certainty to employers about their duties[114]. However, the Court that ruled on the *Little Sisters* case did not face the issue of a possible new expansive reading of the RFRA, the original intent of which was to protect religious beliefs with a view to restoring the compelling interest test[115].

In an age where there is an increasing pressure to make religious and secular interests equal, the issue where moral objections deserve equal constitutional consideration is extremely relevant[116].

In the US constitutional framework, there is no constitutional clause providing a right of freedom of conscience and in case law there is no uniform reading of the meaning of «religion». However, in the framework of a separationist approach, the US Supreme Court has traditionally emphasized a constitutional prohibition on government providing a preferential treatment for religion compared to non-religion under the Establishment Clause[117].

Also, the Supreme Court faced the crucial question of whether and to what extent ethical-moral sets of values deserved constitutional protection. Since the 1960s the Supreme Court has abandoned a theistic approach, and recognized that «a given belief», that is «sincere and meaningful», and «occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God» deserves the same consideration and respect as a system of religious beliefs[118]. This functional address allowed the Court to interpret specific statutes concerning military objection as including deeply non-religious beliefs. However, the judiciary sidestepped the question of the genuine meaning of the Religion Clau-

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[114] On the contrary, the lower courts stated that the government agencies infringed the separation of powers and exceeded their statutory authority under the ACA, violating section 706 of the APA, as they argued that the RFRA mandated a wider range of exemptions than the ones provided in the ACA mandate. See *California v. HHS*, 351 F. Supp., at 1282; *Pennsylvania & New Jersey v. Trump*, 351 F. Supp. 3d, at 827-28.

[115] See Fentiman, L., «Of Mosquitoes and "Moral Convictions"…», p. 148.

[116] In *California v. HHS*, 351 F. Supp. 3d, at 1297, the court found that the «Moral Exemption implicates neither RFRA nor the Religious Clauses of the Constitution» and that the exemption for moral convictions was «inconsistent with the language and purpose of the statute [the agencies]... purport to interpret.»

[117] Justice Stevens in his concurring opinion in *Boerne v. City of Flores*, at 537 (1997), wrote that «governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment». In *Larson v. Valente*, 456 U. S. 228, 244 (1982), the Court held that «[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another». See also *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 605 (1989), where the Court held that «[w]hatever else the Establishment Clause may mean... [it] means at the very least that government may not demonstrate a preference for one particular sect or creed».

[118] *United States v. Seeger*, 380 U. S. 163, 166 (1965); *Welsh v. United States*, 398 U. S. 333 (1970); *Torcaso v. Watkins*, 367 U. S. 488 (1961).

ses, and did not give a clear answer as to whether religious and ethical-moral convictions had to be treated on equal terms in the light of constitutional protection[119].

After the *Hobby Lobby* decision, some courts, on the basis of the «similarly situated standard», held that recognizing an entity's right to objection for religious reasons and denying another entity the right to object to the same obligation on moral grounds would represent an arbitrary distinction. Under the Equal Protection Clause, a court held that «*religiosity 'cannot be a complete answer' where... two groups with a shared attribute are similarly situated* "*in everything except a belief in [a] deity"*»[120]. This recent judicial trend resumed a rationale close to that used in the *Welsh* and the *Torcaso* cases but it extends it from individual conscientious objection founded on moral grounds to ethically based organizations, allowing them to claim a corporate conscience. In this way, the courts get round the question of whether these claims can be included under the umbrella of protection of the Religion Clauses and focus on equality and anti-discrimination standards, without camouflaging ethical-moral claims as religious ones[121]. Under this standard, making «distinctions between religious and secular beliefs that hold the same place in adherents' lives» would be irrational and discriminatory, as religious and secular beliefs share a *precise attribute selected for accommodation* (anti-abortifacient tenets)[122]. So the court

[119] See MADERA, A., «La definizione della nozione di religione ed il ruolo della giurisprudenza: una comparazione fra l'ordinamento statunitense e quello italiano», in *Anuario de Derecho Eclesiástico del Estado*, 34 (2018), p. 541; LUND, C. C., «Religion is Special Enough», in *Virginia Law Review*, 103 (2017), p. 508.

[120] See *March for Life v. Burwell*, 128 F. Supp. 3d 116, 124-127 (D. D. C. 2015), where a district court recognized a secular anti-abortion organization as having a total exemption to the Equal Protection and Patient Care Act, equalizing its juridical regime to that of religious organizations instead of that provided *to non-profits (*that can enjoy only an opting out mechanism). The court recognized a total exemption under the Equal Protection Clause, as it held that «sin quo non [sic] of equal protection is that the government must 'not treat similarly situated individuals differently without a rational basis' for doing so». For this reason, «March for Life is similarly situated with regard to the precise attribute selected for accommodation». See MADERA, A., «La definizione...», p. 552.

[121] See MADERA, A.*,* «*Dealing with Atheism*: Una lettura alternativa dei rapporti fra Stato e Confessioni nell'ordinamento statunitense», in *Quad. Dir. Pol. Eccl.*, 22 (2019), p. 867; See KUHN, J. P., «The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion», in *Washington University Law Review* 94 (2016), p. 9.

[122] See*. March for Life v. Burwell*, at 128: «By singling out a specific trait for accommodation, and then excising from its protection an organization with that precise trait, it sweeps in arbitrary and irrational strokes that simply cannot be countenanced, even under the most deferential of lenses. As such, the Mandate violates the equal protection clause of the Fifth Amendment and must be struck down as unconstitutional».

focused on the «stated purpose in creating a religious exemption» which «justifies the extension of such an exemption to nonreligious organizations»[123]. Although religion deserves judicial special solicitude, this deferential attitude toward religion «does not imply an ability to favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones with regard to the regulated attribute»[124]. Nevertheless, lower courts were divided on whether they had to recognize an exemption to the Contraceptive Mandate to non-religious organizations depending on whether these entities could be regarded as «comprehensive belief systems»[125].

However, standard individual objection cases, for example the *Welsh* and *Torcaso* cases, concerned a refusal to participate directly in activities the objector perceives as wrong on moral grounds[126], and the «cost» of the objection did not negatively affect third parties or prejudice the pursuit of public interests.

Also, an open question concerns the standard of review the judiciary will resort to when it deals with moral objections. The result of the judicial balance between public and private interests could vary depending on the adoption of a strict scrutiny standard (which the courts makes use of, under the RFRA when religious claims are at stake) or less pervasive standards of judicial review, as a rational basis review, which allows restrictions on private autonomy for the sake of mere legitimate government interests[127], and grants the government a higher level of «deference» in explaining the aim of a statute[128].

8. UNDERMINING STATE INTERESTS IN HEALTH CARE

In *Hobby Lobby*, Justice Alito asserted that the intent of Congress was to guarantee a level of religious freedom higher than that provided in the pre-

[123] See Kim, S., «To Exempt or Not Exempt: Religion, Nonreligion and the Contraceptive Mandate», in *San Diego L. Rev.*, 56 (2019), p. 800.

[124] See. *March for Life v. Burwell*, 128 F. Supp. at 127.

[125] See *Real Alts., Inc. v. Sec'y HHS*, 867 F.3d 338 (3d Cir. 2017). According to this ruling, the traditional judicial recognition of church autonomy justifies distinctive treatment of religious organizations.

[126] See Sepinwall, A., «The Challenges of Conscience in a World of Compromise», in Knight, J. (Ed)., *Nomos LIX: Compromise*, NYU Press, New York, 2018, 222-223.

[127] See *March of Life*, at 126: «Thus, to preserve the regulatory balance, equal protection prevents only classifications motivated by discriminatory animus… In the ordinary course, laws that neither burden a fundamental right, nor target a suspect class, must satisfy so-called rational basis review-meaning that to survive an equal protection challenge, they must rationally relate to a legitimate governmental purpose». See Madera, A., «*Dealing with Atheism*…», p. 869; Kim, S., 2019. «To Exempt or Not Exempt…», pp. 819-820.

[128] See Kim, S., «To Exempt or Not Exempt…», p. 819.

Smith case law, going beyond its stated purpose to restore the strict scrutiny analysis[129]. Specifically, Alito urged for a «highly fact-specific» analysis[130] of the compelling interest prong, as it implied restrictions on the exercise of religious freedom. In the *Hobby Lobby* ruling, Alito also argued that the compelling interest underlying the ACA was weakened by so many provisions exempting certain classes of employers from compliance to the extent that it was losing its compelling character. However, in *Hobby Lobby*, the Supreme Court, to reach a majority, eventually circumvented an in-depth investigation of the compelling interest prong and focused on the idea that Congress did not make use of the least restrictive alternative to pursue the public interest[131].

In *Little Sisters*, the Court assumed an attitude of judicial deference to the exercise of religious freedom, which implies that the burden is upon public actors to show the compelling character of the government interest and the impossibility of pursuing that interest in a least restrictive way that will not impose burdens on religious freedom. In this way, «it is harder to perform a proportionality *stricto sensu* test given that it would be impossible to compare the burden on the claimant against the degree to which the statute advances government objective or policy»[132]. According to the government, Congress did not mandate women's access to contraception, but only preventative services, and there is no compelling government interest in providing women's access to contraceptive coverage[133].

However, it cannot be denied that with the enactment of the ACA, Congress affirmed that the promotion of the health of women is a basic concrete government interest. Instead, the final rules result in a weakening of the government commitment to pursue that interest, as they bypass the statutory obligations deriving from the ACA[134] and deprive a large number of women of access to preventative services. The solutions proposed by the Trump Administration did not even provide for women to have access to contraception on a regular

[129] See FENTIMAN, L., «Of Mosquitoes and "Moral Convictions"…», p. 129.

[130] See *Gonzales v. O Centro Espirito Beneficiente Uniao*, 546 U. S. 418 (2006).

[131] See MADERA, A., «Spunti di riflessione…», p. 691.

[132] See SU, A., «Judging Religious Sincerity», in *Oxford Journal of Law and Religion*, 5 (2016), p. 45.

[133] The government asserted that some women receive coverage in any event (grandfathered plans); that they can have access to contraception without taking advantage of their health plans; that contraception cannot provide any guarantee to be effective in every case and can cause collateral pathologies; that regulations should remove every difference in treatment among religious not-for profit corporations depending on the nature of entity and the structure of their health plans in view of providing an uniform treatment to al faith-based entities. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2392-2393.

[134] See FENTIMAN, L., «Of Mosquitoes and "Moral Convictions"…», p. 155.

basis, because of financial obstacles, transportation problems, time constraints[135]. As Congress expressly granted to women access to all preventative services, as well as to FDA-approved methods of contraception, the final rules seem like indirect attempt by the Trump Administration to erode the aims of the ACA, a goal he failed to achieve directly.

Also, only women as a vulnerable class are negatively affected, which provokes concerns about further fundamental interests that the state should be committed to pursue– gender-based discrimination and equality –as well as a minimization of other constitutionally and statutorily protected interests (equal protection grounded in the Fifth Amendment, the right to procreative liberty, the right to privacy in family matters, the elimination of every form of discrimination in the workplace under Title VII of the Civil Rights Act)[136].

9. UNDUE SUBSTANTIAL BURDEN

Another crucial factor of the strict scrutiny analysis framework is the evidence of an undue substantial burden on the exercise of religious freedom because of legislation. The crucial issue is: «what constitutes a substantial burden on the exercise of religion, and who gets to decide (the religious adherents or the courts)?»[137]. In the United States, there is a long judicial tradition that aims to exclude any judicial interference in the substance of the beliefs or convictions that are the basis of a religious act or omission, with the intent being the protection of idiosyncratic religious beliefs and practices and individual interpretations of religious tenets, and preventing the judicial analysis from shifting from legal to strictly religious matters[138]. For this reason, a court cannot examine if a prac-

[135] The Admistration provided new family-planning regulations where low-income women could receive coverage at Title X family clinics. See Fentiman, L., «Of Mosquitoes and "Moral Convictions"…», p. 159.

[136] See Melling, L., «Religious Refusals and Reproductive Rights: Claims of Conscience as Discrimination and Shaming», in Mancini, S., Rosenfeld, M. (Eds.), *The Conscience Wars*, pp. 375-391.

[137] See Gaylord, S. C., «RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases», in *Missouri Law Review*, 81 (2016), p. 655.

[138] See *Thomas v. Review Board* of *Indiana Employment Security Division*, 450 U. S. 707, 715-716 (1981). «[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation»; *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc., et al.*, at 724: «Arrogating the authority to provide a binding national answer to this religious and philosophical question... in effect tells the plaintiffs that their beliefs are flawed».

tice is central to one's belief system, and judicial analysis is limited to the sincerity of religious beliefs and convictions. Since the 1960s, the substantial burden standard of strict scrutiny has been considered «a powerful gatekeeper», that has prevented many claims being analyzed for the presence of a compelling state interest[139]. Provided that there is not an unanimous judicial view regarding what represents a substantial burden[140], courts have traditionally refused to accommodate religious claims when the implied burden on religious exercise was simply «subsidizing» activities or service an individual objected to[141].

However, the most recent case law gives rise to the crucial question as to whether a complicity claim can meet the «substantial burden»[142] standard, as the judiciary gives significant weight to indirect or attenuated burdens on religious freedom[143].

In *Hobby Lobby,* a deferential attitude toward the claimant's own perception of a substantial burden on his religious exercise is adopted, as the Court has an attitude of self-restraint toward any inquiry into the sincerity of the religious beliefs of the petitioner.

In the *Little Sisters* case (as well in the *Zubik* decision[144]) the accommodation scheme is at the centre of the judicial debate, as the petitioners claimed that the self-certification procedure is a substantial burden on their exercise of religious freedom and that the government was «duty-bound to change its rules and stop forcing religious objectors to comply via the accommodation» if the accommodation scheme imposed a substantial burden on their religious exercise[145]. The self-certification process was claimed by the petitioner to be «the

[139] See CARMELLA, A., «Progressive Religion…», p. 581.

[140] See MADERA, A. «La decisione *Holt v. Hobbs*: una svolta nelle politiche di *religious accommodation* con riguardo agli istituti di detenzione nell'ordinamento statunitense», in *Stato, Chiese e Pluralismo Confessionale* (November 2016), p. 12; OLREE, A. G., «The Continuing Threshold Test for Free Exercise Claims», in *William & Mary Bill Rights J.*, 17 (2008), p. 103 ff.

[141] See SEPINWALL, A., «The Challenges of Conscience…», p. 222.

[142] See LUPU, I. C., TUTTLE, R. W., «Little Sisters of the Poor v. Pennsylvania: the Misuse of Complicity», in *Take Care*, July 20, 2020, https://takecareblog.com/blog/little-sisters-of-the-poor-v-pennsylvania-the-misuse-of-complicity.

[143] See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc., et al.*, 573 U. S. 682 (2014).

[144] In *Zubik*, the Court avoided facing the specific issue about whether self-certification was a substantial burden for the exercise of religious freedom. However, the Court stated that «[n]othing in this opinion is to affect the ability of the Government to ensure that women covered by petitioners' health plans obtain, without cost, the full range of FDA-approved contraceptives». See *Zubik v. Burwell*, at 1560.

[145] See Brief for Petitioner at 30-31, *Little Sisters of the Poor v. Pennsylvania*, No. 19-431 (Mar. 2, 2020).

stingiest of accommodations» that resulted in «merely another means of complying with the contraceptive mandate»[146].

However, the religious organization had simply to notify the government and its health insurers of its objection. Both the Third Circuit Court of Appeal and the Ninth Circuit Court of Appeal rejected the argument that employers suffered a substantial burden on the exercise of their religious freedom because of their mere obligation to certify their objection to the government and to third parties[147].

The Supreme Court declined to decide on the claimant's assertion that compliance with the rules would imply complicity in sinful conduct[148]. However, it argued that employers with religious and moral objections suffered a substantial burden on their exercise of religion/conscience because of their duty of notification, which made them complicit in a chain aimed at providing contraceptives, and the prior accommodation process did not «alleviate» the «substantial burden» for certain employers[149]. In so doing, the Court embraces a dangerous «subjective view», which results in the blurring of the boundaries between the sincerity of a religious belief and the evidence of a substantial burden on the exercise of religious freedom: thus, this burden is unduly identified with financial penalties for disregarding a statutory provision[150].

Instead, the dissenting judge asserted the court's jurisdiction in assessing whether the compliance with a law results in a substantial burden upon the exercise of religious freedom for the claimant.

The judicial approach of the majority in *Little Sisters* causes concerns about the possibility of abuse of complicity claims. Some academics complain of a «low bar» in recent case law when it comes to establishing a substantial

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[146] See Brief for Petitioner at 33–36, *Little Sisters of the Poor v. Pennsylvania*, No. 19-431 (Mar. 2, 2020).

[147] See *Pennsylvania v. Trump*, 930 F.3d, at 573-74; *California v. Dep't of Health and Hum. Servs*., 941 F.3d, at 428-29.

[148] «That is, they could not 'tell the plaintiffs that their beliefs are flawed' because, in the [government's] view, 'the connection between what the objecting parties must do... and the end that they find to be morally wrong... is simply too attenuated.'» See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2367.

[149] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2409.

[150] See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc., et al.*, at 725: «… the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial». See Madera, A., «Nuove forme di obiezione di coscienza…», p. 41; Su, A., «Judging Religious Sincerity», pp. 28-48.

burden on religious exercise[151]. They fear the beginning of «an era of… unprecedented reverence for religious freedom»[152], criticize the actual «impoverished understanding of *complicity*»[153] and argue that is necessary «to treat complicity as a secular matter», and to resort to the «ordinary doctrines of tort and criminal law» to limit its scope, even when faith matters are involved[154].

10. THIRD-PARTY CONCERNS

In cases before *Hobby Lobby*, the majority of conscientious objectors claimed the right «to be left alone», but did not expect to impose their beliefs on others or to prevent the implementation of public policies[155].

However, concerns on third-party burdens is grounded on both the Establishment Clause and the Free Exercise Clause[156] and the analysis of the issue has traditionally been an unavoidable part of the strict scrutiny test[157]. In the employment field, the Court carefully balanced demands for religious accommodation with the risk of «hardship» for employers[158]. However, the baseline for determining harm» is controversial[159]. Academics are divided about the degree of solicitude the US Supreme Court demonstrated toward the risk that the exercise of religious freedom had a negative impact on third-party non-beneficiaries. Some commentators focused on the crucial difference between «the imposition of a burden» and «the absence of a benefit»[160]. Others conce-

[151] See CORBIN, C. M., «A Religious Right to Disregard Mandatory Ultrasounds», in *Canopy Forum*, April 1, 2020, https://canopyforum.org/2020/04/01/a-religious-right-to-disregard-mandatory-ultrasounds/

[152] See SEPINWALL, A., «Conscience and Complicity: Assessing Pleas for Religious Exemptions in "Hobby Lobby's" Wake», in *University of Chicago Law Review*, 82 (2015), pp. 1901-1903.

[153] See SEPINWALL, A., «Conscience and Complicity…», p. 1906.

[154] See LUPU, I. C., TUTTLE, R. W., «Little Sisters of the Poor v. Pennsylvania…».

[155] See SEPINWALL, A., «Conscience and Complicity…», p. 1925.

[156] See TEBBE, N., SCHWARTZMAN, M., SCHRAGGER, R., «When do Religious Accommodations Harm Others», in ROSENBER, M., MANCINI, S. (Eds.), *Conscience Wars*, p. 329 ff.

[157] See BARCLAY, S. H., «First Amendment "Harms"», in *Indiana Law Journal*, 95 (2020), p. 331; MADERA, A., «Some Preliminary Remarks on the Impact of COVID-19 on the Exercise of Religious Freedom in the United States and Italy», *in Stato, Chiese e Pluralismo Confessionale*, 16 (2020), p. 99.

[158] See *United States v. Lee*, 106 U. S. 196 (1882); *Estate of Thornton v. Caldor*, 472 U. S. 703 (1985).

[159] See MANCINI, S., ROSENFELD, M., «Introduction…», pp. 1-19.

[160] See TEBBE, N., SCHWARTZMAN, M., SCHRAGGER, R., «When do Religious Accommodations…», p. 329 ff.

ded that religious accommodation can burden third parties[161]. If so, the crucial question concerns the threshold of tolerability of third-party burdens in a pluralist democratic legal order[162]. On one hand, since the enactment of the RFRA, the Court concerns about third-party harms played a significant role in the Court's reasoning[163] to «prevent harm to other citizens who do not share the objector's beliefs»[164]. However, third-party concerns remained just «tangential» in a judicial analysis focused on the government's interest[165]. Also, commentators wonder about whether the RFRA «runs through» other federal statutes[166].

Nowadays, the judicial trend to expanding religious accommodation generated increasing concerns about the risk of negative «externalities» on third parties[167]. There are cases where the accommodation of religious freedom is decidedly «harmless».

However, the crucial concern is whether and to what extent reasonable accommodation may be granted where it risks negatively affecting third-party non-beneficiaries[168], and whether third-party burdens have «to rise to the level of compelling interests… to defeat an exemption under the RFRA»[169].

In the *Hobby Lobby* case, religious accommodation was granted as the complex mechanism of accommodation or religious claims and shifting costs guaranteed the zeroing of negative externalities on women[170], even

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[161] See Volokh, E., «Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause», in *The Volokh Conspiracy*, December 4, 2013, http://volokh.com/2013 de diciembre de 04/3b-granting-exemption-employer-mandate-violate-establishment-clause/.

[162] See Laycock, D., «Religious Liberty, Health Care and the Culture Wars», in Sepper, E., Fernandez Lynch, H., Glenn Cohen, I. (Eds.), in *Law, Religion and Health in the United States*, p. 19 ff.

[163] See *Cutter v. Wilkinson*, 544 U. S. 709 (2005).

[164] See *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, at 1723; Nejaime, D., Siegel., R., «Religious Exemptions and Antidiscrimination Law in *Masterpiece Cakeshop*», in *Yale L. J. F.*, 128 (2018), p. 202.

[165] See Sepinwall, A., «Conscience and Complicity…», p. 1907.

[166] See Stokes, M., «A RFRA Runs Through It: Religious Freedom and the US Code», in *Montana Law Review*, 56 (1996), pp. 249-294.

[167] See Harvard Law Review, «Affordable Care Act — Contraceptive Mandate — Religious Exemptions — Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania», *in Harvard Law Review*, 134 (2017), p. 565.

[168] See Barclay, S. H. «First Amendment "Harms"», pp. 343-345.

[169] See Tebbe, N., Schwartzman, M., Schragger, R., «When do Religious Accommodations…», p. 329 ff.

[170] See *Burwell, Secretary of Health and Human Services, et al., v. Hobby Lobby Stores, Inc., et al.*, at 693: «[t]he effect of the... accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero». See also *Wheaton College v. Burwell*, 34 S. Ct. 2806 (2014); *Zubik v. Burwell*, 578 U. S. _ (2016).

though some academics emphasize the high risk of the «cost shifting» of this mechanism[171]. The Court «reiterated the third-parties burdens as a limiting principle on religious accommodation»[172] in *Zubik*. According to early commentators, the *Little Sisters* ruling clashes with *Hobby Lobby*, where the Supreme Court accommodated the exercise of religious freedom only because a least restrictive alternative was found that safeguarded contraceptive coverage. Although both the Third Circuit Court of Appeal and the Ninth Circuit Court of Appeal held that prioritizing religious freedom of employers had a negative impact on third parties involved, namely women who would be denied access to contraception[173], in the *Little Sisters* case the Court did not resort to any balancing between competing interests; instead, it removed an important restraint that prevented uncontrolled religious accommodation, depriving vulnerable classes of non-discrimination protection[174]. Weakening the Jeffersonian idea that religious freedom should not harm others, the Supreme Court that decided the *Little Sisters* case failed to find compromise solutions that balance «genuine religious objections» with appropriate forms of alleviating the burdens on women's rights to have free access to preventative services. Actually, the exemption provided in the new rules will bring about loss of insurance coverage for a large number of women, and the abandonment of the self-certification obligation on objecting entities implies that women will probably be unaware of the lack of coverage[175]. Furthermore, undermining the standard of the third-party burdens undoubtedly could result in exacerbating tensions between women's rights for access to preventative services and faith-based employers in different legal environments[176]. A proper evaluation of damage to third parties could have altered the results of the judicial analysis.

Embracing an approach that some academics define as «pretty dystopian»[177], the Court declined to adopt an interventionist approach, that would provide a reading of the ACA consistent with the real intent of Congress,

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[171] See GEDICKS, F. M., VAN TASSELL, R. G., «RFRA Exemptions from the Contraception Mandate…», pp. 350-351.

[172] See NEJAIME, D., SIEGEL, R., «Trump and Pence Invoke Conscience to Block Contraception, Contrary to Our Religious Liberty Tradition», in *Take Care*, June 4, 2017, https://takecareblog.com/blog/trump-and-pence-invoke-conscience-to-block-contraception-contrary-to-our-religious-liberty-tradition.

[173] See *Pennsylvania v. Trump*, 930 F.3d, at 573-74; *California v. Dep't of Health and Hum. Servs*., 941 F.3d, at 428-29.

[174] See HARVARD LAW REVIEW, «Affordable Care Act…», pp. 567-569.

[175] See FENTIMAN, L. C., «Of Mosquitoes and "Moral Convictions...", p. 166.

[176] See HARVARD LAW REVIEW, «Affordable Care Act…», pp. 567-569.

[177] See CORBIN, C. M., «A Religious Right to…».

and instead limited itself to providing a literal interpretation of the statute. However, the «Court's refusal to acknowledge these consequences [i.e. third-party burdens] came in the context of a challenge to the agencies' statutory authority to issue the rules, rather than a free exercise challenge to the mandate itself», so the Supreme Court did not address a general response that could rule future cases[178].

The critical concern the *Little Sisters* case raises is whether the Court is going to completely abandon its traditional commitment to balancing religious accommodation with third-party burdens in the future, whether this development will become the rule in the near future and whether and to what extent this decision will influence future decisions and weaken the protection of other vulnerable classes (i.e. LGBT community)[179].

11. A COMPARISON WITH THE EUROPEAN CONTEXT

On both the sides of the Atlantic, conscientious objection has increasingly been considered a powerful tool for the management of diversity in pluralist democratic societies[180]. However, western systems have to cope with the rise of the phenomenon of conscientious objection, which ranges from traditional to new objections. New kinds of objection imply new actors and new claims and are more difficult to accommodate as they collide with the mainstream set of values and put social cohesion at risk. Judicial boards are showing a «subjective turn», which implies a judicial reluctance to intrude into the province of religion, in order to assess whether religious convictions or practices are central and compulsory within a belief system[181]. The US Supreme Court has traditionally recognized that «Courts are not arbiters of scriptural interpretation»[182]. However, the European Court of Human Rights (ECtHR) also embraced this approach, asserting that the principle of secularism is not consistent with any

[178] See Harvard Law Review, «Affordable Care Act…», p. 567.

[179] See Harvard Law Review, «Affordable Care Act…», pp. 567-569; Schwartzman, M., Shragger, R., Tebbe, N., «Religion Privilege in Fulton and Beyond», in *Scotusblog*, November 2, 2020, https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/

[180] See Lo Giacco, M. L., «Il rifiuto delle vaccinazioni obbligatorie per motivi di coscienza. Spunti di comparazione», in *Stato, Chiese e Pluralismo Confessionale*, 7 (2020), p. 42.

[181] See Su, A., «Judging Religious Sincerity», pp. 28-48; Madera, A., «Il porto di simboli religiosi nel contesto giudiziario», in *Stato, Chiese e Pluralismo Confessionale*, 4 (2020), p. 51; Alidadi, K., *Religion, Equality and Employment in Europe. The Case for Reasonable Accommodation*, Bloomsbury, Oxford and Portland, Oregon, 2017, pp. 1-24.

[182] See *Thomas v. Review Board of the Indiana Employment Security Division*, at 714.

assessment about the legitimacy of religious beliefs[183]. However, there is a substantial difference between the inclination of US Supreme Court judges, who give significant consideration to complicity claims, and the trends of certain European courts, who seek to reduce conscientious objection to cases of active participation in morally illicit procedures and to prevent conscientious objection being established as a substantial obstacle to individual choices and undermining public policies. On its part, the ECtHR adopted a cautious approach toward those kinds of conscientious objection where a European consent is lacking[184]. Moving within «a multilevel constitutional architecture in which national, supranational (EU) and international (ECHR) laws intertwine»[185], the ECtHR asserted that national authorities are charged with the task of providing models of organization and management of health-care delivery that can reconcile an effective conscientious freedom with women's access to the health services they have a right to. In this way, religious choices cannot be given priority if they are imposed on people who do not share the same convictions[186]. The ECtHR specifically emphasized a «third-party centric factor» which results in a more careful recalibration of demands of religious accommodation with the impact on vulnerable classes of individuals[187]. In the European landscape, such a recalibration of the competing interests is possible as judges take more seriously the lack of public mechanisms that mitigate the impact of conscientious objections on vulnerable classes, which results in an increasing risk of undermining governments' abilities to pursue public goals.

Instead, academics have underlined that the fundamental problem of the US system is that the mechanism of conscientious objections «forces the so-

[183] See ECtHR, Fourth Section, *Eweida and Others v. United Kingdom* (applications 48420/10, 59842/10, 51671/10 and 36516/10), 27 May 2013.

[184] See MADERA, A., Nuove forme di obiezione di coscienza…», p. 30; TURCHI, V., *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, ESI, Napoli, 2009.

[185] See FABBRINI, F., «The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic», in *Columbia Journal of European Law*, 18 (2001), p. 5.

[186] See. MADERA, A., «Nuove forme di obiezione di coscienza…», p. 32; TURCHI, V., *«Nuove forme di obiezione di coscienza»,* in *Stato, Chiese e pluralismo confessionale* (October 2010), pp. 1-51.

[187] See ECtHR, *Pichon and Sajous* v. *France,* Third Section, 2 Oct 2001, App. No. 49853/99, para. 4, where the ECtHR held that religious objectors are not allowed to «give precedence to their religious beliefs and impose them on others». See MCGOLDRICK, D., «Religion and Legal Spaces, in Gods We Trust; in the Church We Trust, but Need to Verify», *Human Rights Law Review*, 12 (2012), pp. 759-786; MADERA, A., «Eccezione ministeriale e normativa antidiscriminatoria in materia giuslavoristica: prime riflessioni sulla pronunzia *Our Lady of Guadalupe v. Morrissey-Berru»,* in *Quad Dir Pol. Ecd.,* 23/3 (2020), p. 817.

ciety to favor one constitutional right over another», allowing «health care professionals and entities to sidestep one right by claiming the usage of another»[188].

However, in the US legal context, the actual constitutional and legal conundrum depends on crucial political choices concerning health care, which make the US legal context different from other democratic and pluralistic countries[189].

Those choices generated an uncontrolled statutory expansion of religious exemptions, that are independent of personal involvement in health services that are considered morally wrong by the claimant, and also cover attenuated forms of connection with the objected-to practice; the overexpansion of the number of actors that can raise conscientious objections, including not only individuals with sincere religious (or moral beliefs), but also corporate for-profit entities; the absence of any form of measure aimed at mitigating the impact of conscientious objections on third parties (informed consent, duty to refer patients to non-objecting providers)[190]. Complicity claims over-expanded «the universe of objections», resulting in «barriers to access to goods and services»[191].

12. THE CHALLENGES RAISED BY THE NEW CONSCIENCE OBJECTIONS IN THE US LEGAL CONTEXT

In the US legal context, reproductive rights have given rise to sharp political divisions since the 1960s, and democratic processes have navigated between polarized narratives. In an age where abortion was still illegal[192],

[188] See Rojas, O., «Conscience Clauses and the Right to Refusal: The War between Legal and Ethical Responsibility», in *Wake Forest L. Rev.*, 55 (2020), p. 717.

[189] For a comparison with the legal regime concerning conscientious objections of other countries, see Schvey, A. A., Kim, C., «Unconscionable: How the U. S. Supreme Court's Jurisprudence Lags Behind The World When It Comes to Contraception and Conscience», in Contraception and Reproductive Medicine, 3:2 (2018), pp. 1-10.

[190] See Schvey, A. A., Kim, C., «Unconscionable: How the U. S. Supreme Court's Jurisprudence…», pp. 1-10.

[191] See Siegel R., Dejaime, N., «Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm and Pluralism», in Mancini, S., Rosenfeld, M. (Eds.), *Conscience Wars*, p. 203.

[192] Before *Roe v. Wade*, 410 U. S. 113 (1973), abortion was illegal in many states for safety reasons. Prohibitions had no religious or moral goals: they were aimed at preventing the risk of unlicensed persons performing these services.

Roe v. Wade[193] was the first case where women's reproductive rights found recognition under the Fourteenth Amendment[194], within a broader judicial trend aiming to recognize the right to privacy in family matters, which emphasized individual choice in important personal life choices, such as the right to decide to have a child[195]. This decision provoked an alarming scenario for health professionals, who were concerned about being forced to perform abortions, contrary to their religious convictions; also, religious institutions were frightened of being compelled to deliver health services contradictory to their religious tenets[196]. In the wake of the judicial recognition of women's right to abortion, an emerging need arose: to balance this right with other conflicting interests (health, protection of potential life, maintaining medical standards).

However, the relationship between the right to abortion and the enactment of conscience clauses became highly controversial at a judicial level[197]. As attempts to overturn *Roe* failed, at a federal level regulations were enacted, aimed at counterbalancing the recognition of the right to abortion with the tailoring of opting-out mechanisms for the sake of religious actors (individuals and health providers)[198]. Conscience claims were granted recognition through «discretionary» accomodations, which were «conceived… as providing the bases for the exercises of discretion by those in authority»[199]. Furthermore, the political divisions over reproductive rights resulted in the enactment of laws establishing

[193] See *Roe v. Wade*, 410 U. S. 113 (1973). Case law that followed aimed to make clear the boundaries of the right to abortion. In *Planned Parenthood v. Casey*, 505 U. S. 833 (1992), the Supreme Court recognized a woman's right to abortion before the fetus was viable without undue government interference, and identified four standards that could restrict access to abortion.

[194] See MINOW, M., «Foreword», in SEPPER, E., FERNANDEZ LYNCH, H., GLENN COHEN, I. (Eds.), *Law, Religion and Health in the United States*, p. xvii.

[195] See *Griswold v. Connecticut*, 381 U. S. 479 (1965), where the Court held that the right to privacy is protected under the *Bill of Rights*, which implied the recognition of the right to contraception for married couples. Also, in *Eisenstadt v. Baird*, 405 U. S. 438 (1972), the Court held that everyone enjoys freedom from «unwarranted governmental intrusion» in their right to have a child, independently from their married/unmarried status.

[196] See MLNSA L., «Stem Cell Based Treatments and Novel Considerations for Conscience Clause Legislation», in *Indiana Health Law Review*, 8:2 (2011), p. 472.

[197] See *Doe v. Bolton*, 410 U. S. 179 (1973), where the Court held that Georgia law that restricted women's right to abortion was unconstitutional.

[198] For an overview of state legislatures providing information and «conditional exemptions» to mitigate the impact on third parties, see FRETWELL WILSON, R., «Unpacking the Relationship between Conscience and Access», in SEPPER, E., FERNANDEZ LYNCH, H., GLENN COHEN, I. (Eds.), in *Law, Religion and Health in the United States*, p. 246.

[199] See GREENAWALT, K., «Religious Toleration and Claims of Conscience», in SCHWARTZMAN, M., FLANDERS, C., ROBINSON, Z. (Eds.), *The Rise of Corporate Religious Liberty*, p. 5.

restraints on the government's involvement in abortion procedures, demonstrating a frail balance between competing interests[200].

Although the so-called Church Amendment[201] established a narrow range of religious protections[202], since then, in the United States a legislative trend has developed, at a federal and at a state level[203], that aimed to expand conscientious objections.

Although presidential administrations ranged between conservative and progressive, since 1973 there has been a constant legislative trend to expand conscientious objections to include further procedures (i.e., sterilization, termination of life) and a broader range of beneficiaries, creating broad rights to decline to undertake many health services and procedures on religious and moral grounds

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[200] See ROJAS, O., «Conscience Clauses and the Right to Refusal…», p. 729. In 1976, Congress enacted the Hyde Amendment, S. 142 (113th), that prohibited the government's use of public funds for abortions, other than for the exceptions of rape, incest, or if the pregnancy is determined to endanger the woman's life. This legislative choice implied that women could not have access to abortion through Medicare and other publicly funded programs. The Hyde Amendment was an attachment to the United States Department of Health and Human Services Congressional Appropriations Bill, and Congress uses it to reiterate public funding restraints every year. See HHS Appropriations 1977, Pub. L. No. 94-439 § 209, 90 Stat. 1434 (1976).

[201] This statute, (42 U. S. C. §§ 300a-7(b), (c)(1), and (d) (2018)), known as the Church Amendment, was enacted as part of the Health Programs Extension Act of 1973 (Pub. L. No. 93-45, 87 Stat. 91 §§ 401 (A)-(B)) (1973).

[202] See 42 U. S. C. § 300a-7(c)(1). The Church Act made clear that faith-based hospitals could have access to public funding even though they did not provide for abortion or sterilization, when such procedure or abortion would be contrary to the religious beliefs or moral convictions that the institution is committed to respect. Congress also granted protection to physicians against the loss of staff privileges or other kinds of «discrimination» in employment, promotion and termination and access to staff privileges because of their choice to participate in abortion and sterilization procedures, or their refusal to be involved in them (participation or assistance). Finally, Congress granted that an institution was not required to provide any personnel «for the performance or assistance in the performance» of an abortion or sterilization if these procedures conflicted with staff religious beliefs or «moral convictions». In 1978, the Danforth Amendment to the Civil Rights Restoration Act, 20 U. S. C. § 1688 (2010) provided that nothing in Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 (2010), «shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service... related to an abortion» nor «to permit a penalty to be imposed on any person or individual because such a person or individual is seeking or has received any benefit or service related to a legal abortion».

[203] *Roe v. Wade* empowered states to legislate on abortion, giving them a certain margin of discretion. However, state policies gave a reading of this decision aimed at restricting the possibilities of women to have effective access to abortion services (e.g. introductions of direct or indirect limitations on the number of facilities providing abortion). States took advantage of this to implement more restrictive provisions, and they also enacted a broad number of conscience clauses.

at a federal[204] and also at a state level[205]. However, protection was limited to the performance of or assistance with the procedures of abortion and sterilization.

It cannot be underestimated that public policies concerning health care have been traditionally deeply influenced by mainstream religious views, even in a country devoted to secularism and to separation between church and state[206] and where the legal framework mirrored the predominance of a political perspective imbued with mainstream religious values.

However, new technologies, the advancement in field of healthcare and a growing number of changes in mechanisms to provide health-care services generated new challenges and exacerbated clashes between multiple competing interests. Social and cultural changes began increasingly to influence legislation that could hardly be aligned with mainstream religions' views, as legislation had to take into account the needs of a society where multiple and apparently irreconcilable sets of values coexist. Since the 1990s, contraception has been another battleground, as states enact statutes forcing employers to provide insurance coverage and yet grant exemptions for religious organizations. The political debate culminated in the enactment of the ACA, which aimed to extend health coverage (including preventative services) and make it more affordable. However, this Act was supported by pro-life parties because of the preservation of previous guarantees (religious exemptions, restrictions on the use of public funding for abortion)[207].

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[204] The Public Health Service Act 1996 provided that federal and state governments were prohibited from using any form of discrimination against institutions that refused to perform abortion and sterilization services. The Coats Snowe Amendment also granted protection to health care professionals against any form of discrimination for refusing to participate in abortion training, to provide referrals for abortions or abortion training, or to make arrangements for such training. See also the 1996 Omnibus Consolidated Rescissions and Appropriations Act, 42 U. S. C. § 238n(a) (2010), and the1997 Balanced Budget Act, Pub. L. No. 105-33, 111 Stat 251 (2010). The Weldon Amendment stated that no federal agency or program, nor any state or local government, may receive health and human services funding if it discriminates against a health-care entity because it «does not provide, pay for, provide coverage of, or refer for abortion». See Consolidated Appropriations Act, Pub. L. No. 114-113, § 507(d) of Title V of Division H. More recently, the last day of his administration, Bush adopted a new rule to expand the beneficiaries of religious objection, to also allow the employees who were not directly involved in performing abortion to refuse to provide information about abortion to patients. Under the Obama Administration, public measures were adopted to protect the LGBT community against any form of discrimination in their access to health care. However, these rules did not affect the Amendments. Under the Trump Administration, a higher level of protection against the risk of discrimination in access to public funding was granted to entities that refused to provide abortion services.

[205] See MLNSA L., «Stem Cell Based Treatments…», pp. 717-741, for a study of the differences between federal state conscience protections, showing more reluctance at a federal level to expand moral objections and to limit objections to abortion and services connected to it.

[206] See MINOW, M., «Foreword», p. xviii.

[207] See ACA § 1303(b)(2).

The key question is why newly arising objections are significantly different from the traditional ones. Although the Trump Administration tried to connect the final rules with the legislative tradition of conscience clauses, new conscientious objections have been deemed «interventionist» and «intrusive» in comparison to traditional «claims aimed at withdrawal and absence from discrete areas of mainstream collective undertakings»[208].

With specific regard to the final rules, academics underlined the main difference between the final rules and other conscience objections (Church Amendment), as traditional conscience clauses were enforced through specific statutes, enacted with a large majority of both houses of the Congress and aimed at pursuing particular issues. The final rules are broad exemptions, coming from executive agencies and probably with the purpose of frustrating the aims of an Act of Congress[209].

Unlike the conscience clauses provided by the Church Amendment, whose beneficiaries were limited, as well as the services they could object to, the Trump Administration's exemption for «moral convictions» is broader, as employers are allowed to «opt out of a statutory obligation», by virtue of an «attenuated connection» between a statutory provision about insurance coverage and employees' individual choices regarding health care[210].

This state of affairs, where «the conditions of conflict changed»[211], brought about a «redefinition of civilization boundaries»[212] and to concerns about a «repoliticization of religion», resulting in a strong opposition to the «expansion of liberal rights» and in an «erosion of the boundary between the public and the private spheres»[213]. Namely, recent claims of complicity seem to come from mainstream groups, as they can no longer directly influence political democratic processes, so they attempt to «speak as minorities»[214], making a strategic use of the judicial arena to undermine legislative choices «that break with traditional sexual morality»[215] and that are not coherent with their religious tenets,

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[208] See Mancini, S., Rosenfeld, M., «Introduction…», pp. 1-19.

[209] See Mancini, S., Rosenfeld, M., «Introduction…», pp. 1-19.

[210] See Fentiman, L. C., «Of Mosquitoes and "Moral Convictions"…», p. 153.

[211] See Siegel R., Dejaime, N., «Conscience Wars: Complicity-based Conscience in Religion and Politics», in *The Yale Law Journal*, 124 (2015), p. 2516; Siegel R., Dejaime, N., «Conscience Wars in Transnational Perspective…», pp. 187-219.

[212] See Annicchino, P., «The Geopolitics of Transnational Law and Religion…», pp. 258-274.

[213] See Mancini, S., Rosenfeld, M., «Introduction…», pp. 1-19.

[214] See Siegel R., Dejaime, N., «Religious Exemptions and Antidiscrimination Law…», p. 202; Siegel R., Dejaime, N., «Conscience Wars in Transnational Perspective…», p. 189.

[215] Siegel R., Dejaime, N., «Conscience Wars in Transnational Perspective…», p. 189.

asking for broad exemptions from general laws[216]. According to some commentators, in this way conservative forces attempt to transform religious objections into «collective» weapons to «subvert existent laws»[217], causing «free-exercise litigation seemingly motivated by political ideology rather than sincere religious belief»[218].

In a highly polarized political clime, where conservative forces try to reach «preservation through transformation»[219], this judicial trend implies that today freedom of religion is skeptically identified with conservative claims that encourage the refusal to comply with liberal statutes[220]. The overexpansion of religious freedom gives rise to the scenario Justice Scalia warned about in *Smith*: allowing exceptions to every regulation affecting religion «would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind»[221].

Actually, the current tension between the RFRA and the ACA is the tip of the iceberg of a deeper crisis between certain mainstream religions that perceive «constitutional secularism» not as religiously neutral, but as «strongly biased» against religion[222], and women claiming reproductive rights and who feel frustrated in their expectations of equal and effective access to health-care services and procedures that should be granted in a liberal and pluralist democracy.

However, the ambiguous recognition of the reproductive rights cannot be underestimated. They are deemed individual rights protected against any form of government interference. However, institutions providing them have to cope with federal and state funding restraints that can undermine women's effective access to the health services they have a right to. Although in *Hobby Lobby* and in *Little Sisters* Justice Alito strongly suggested the government could be char-

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[216] See MADERA, A., «Nuove forme di obiezione…», p. 16. In 2012, the Respect for Rights of Conscience Act, (the so-called Blunt Amendment) was proposed to amend the ACA and provide an exemption for employers from «providing coverage of any «items or services... contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan». The Amendment was defeated in the Senate.

[217] See MANCINI, S., STOECKL, K.,«Transnational Conversations: The Emergence of Society-Protective Antiabortion Arguments in the United States, Europe and Russia», in MANCINI, S., ROSENFELD, M. (Eds.), *The Conscience Wars,* pp. 220-257

[218] See LIPPER, G. M., «The Contraceptive-Coverage Cases and Politicized Free-Exercise Lawsuits», in *University of Illinois Law Review*, 4 (2016), p. 1331.

[219] SIEGEL R., DEJAIME, N., «Conscience Wars in Transnational Perspective…», p. 193.

[220] See CARMELLA, A., «Progressive Religion…», p. 536.

[221] See TOTENBERG, N., «Religions, Abortion, Guns and Race. Just the Start of a New Supreme Court Menu», in *NPR*, December 29, 2020, https://www.npr.org/2020 de diciembre de 29/950654338/religion-abortion-guns-and-race-just-the-start-of-a-new-supreme-court-menu.

[222] See MANCINI, S., ROSENFELD, M., «Introduction…», pp. 1-19.

ged with the cost of conscientious objections (or at least of some of them)[223], the majority, in both the *Little Sisters* and the *Hobby Lobby* cases, declined to embrace this rationale, that conflicts with the logic that underlies the Amendments. However, the present legal framework risks creating a serious barrier to effective access to some health services for vulnerable classes because of the absence of a sufficient public role in the funding of health care, which implies that only one of the competing interests is given high-priority consideration[224].

The *Little Sisters* case emphasizes the difficulty for the judiciary to manage a system of general exemptions and the strong need for a definition of statutory limits for the impact of religious accommodation on third parties[225]. The self-restraint approach of the Court strongly emphasizes the need for Congress to claim the role as the most appropriate place for the negotiation of differences: the implications of the controversial relationship between the Congress choices about health care and increasing demands for accommodation on religious and moral grounds requires new balances.

Indeed, as *Little Sisters* concerns a statutory claim, «Congress is persuaded that the policy concerns identified by the dissent require a recalibration of the liability scheme, it is, of course, free to amend»[226] the contraceptive mandate, the provision of exemptions or to modify the RFRA[227].

13. THE EMPOWERMENT OF ADMINISTRATIVE AGENCIES IN THE «LEGAL VACUUM»

For now, in the current «legal vacuum», increasing importance has been given to the role of administrative agencies, which are the arbiter to decide which health services are included in the ACA, and also which entities are exempted from the contraception mandate[228].

In fact, during the Obama Administration and the Trump Administration, administrative agencies «impressed a political vision» on ethically controver-

[223] In *Burwell v. Hobby Lobby*, Alito referred to a «business objection» that the government should be charged with.

[224] See Rojas, O., «Conscience Clauses and the Right to Refusal…», p. 717.

[225] See Lupu, I. C., «Moving Targets: Obergefell, Hobby Lobby and the Future of LGBT Rights», in *Alabama Civil Rights & Civil Liberties Law Review*, 7 (2015), p. 32.

[226] See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L. p. A*, 559 U. S. 573, 604 (2010).

[227] See Killion, V. L., «The Federal Contraceptive Coverage Requirement…».

[228] See Bean, T. J., Fretwell Wilson, R., «The Administrative State…», p. 230.

sial issues and public policies that have often been pursued through executive orders (LGBT rights, anti-discrimination policies, etc.)[229].

Under Trump's Administration there was a further overexpansion of the powers of administrative agencies, apparently because of their technical competences and ability to face peculiar aspects of policy implementation, but really as a muscular display of Trump's presidential administration[230].

However, this trend is dangerous when it involves ethically and morally controversial issues, as there is a high risk that federal agencies' nominations become «a matter of political loyalty» and are strictly connected with sharing the views of the current presidential administration, resulting in «impressing a political agenda on an agency's technical work»[231]. In this way the reasons for «deference» to their technical and scientific competence can be seriously «undermined»[232]. The final rules and the procedures to adopt them are undoubtedly an expression of this overexpansion of the powers of the executive branch. According to the lower courts, federal agencies exceeded their powers. The lower courts found that no evidence was provided by federal agencies that the expansion of the exemptions did not exceed the statutory authority under the ACA, as the ACA did not provide such a wide exemption from compliance with the contraceptive mandate[233].

When the agencies asserted that the new rules are mandated by the RFRA, they took on the role of interpreters of the meaning of the ACA[234]. In the *California* case, the Ninth Circuit confirmed the district court decision that neither the RFRA nor case law required an expansion of religious and moral exemptions, and that the executive agencies could not resort to the RFRA to justify their administrative actions[235]. The court emphasized that the RFRA was intended to provide a «private cause of action» for plaintiffs claiming a substantial

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[229] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», pp. 257-260.

[230] See KEITH, K., «Supreme Court upholds broad exemptions…», who notes that in some previous cases the Court was skeptical about attempts of the Trump Administration to change the rules (i.e. new census question, deferred action for childhood arrivals).

[231] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», pp. 257-259.

[232] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», p. 260.

[233] See FENTIMAN, L. C., «Of Mosquitoes and "Moral Convictions"…», p. 99.

[234] See FENTIMAN, L. C., «Of Mosquitoes and "Moral Convictions"…», p. 83. See Fed. Reg. 57,536, 57,539, 57,544-45 (Nov. 15, 2018).

[235] According to *California v. U. S. HHS,*941 F. 3d, at 427, the RFRA did not «delegate to any government agency the authority to determine violations and to issue rules addressing alleged violations», and the exemption for self-certifying religious objectors was «at odds with the careful, individualized, and searching review mandate[d] by RFRA (410).

According to *California v. HHS,* 351 F. Supp. 3d, at 1293: «the courts, not the agencies, are the arbiters of what the law and the Constitution require».

burden on their free exercise of religion, but it did not authorize the federal agencies to create blanket exemptions from general statutes[236].

In the *Pennsylvania* case, the Third Circuit rejected the Trump Administration's argument that the rules are required by the RFRA, and emphasized the risk of undermining the separation of powers. The RFRA did not require a broader exemption, as the prior accommodation scheme, provided under the Obama Administration, satisfied the RFRA parameters[237]. Also, the court argued that interpreting the RFRA and applying it to specific circumstances was a competence of the judiciary, not of the executive power and it held that the ACA did not authorize the executive branch to carve out exceptions in addition to those authorized by Congress[238]. Finally, the court raised concerns that the IFRs expanded the existing exemption and accommodation framework, made the accommodation process voluntary, and offered similar protection to organizations with moral objections to contraceptives[239].

Additionally, the lower courts[240] held that the administrative agencies failed to comply with the APA's requirements for public notice-and-comment rulemaking[241]. This Act provides a specific procedure that the government has to

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[236] See *California v. U. S. HHS,*941 F. 3d, at 410: «even assuming that agencies were authorized to provide a mechanism for resolving perceived Religious Freedom Restoration Act violations, the Act likely did not authorize the religious exemption at issue in this case». Also, the court rejected the government's argument that the rules were intended at avoiding further litigation, as such a broad exemption «contradicts congressional intent that all women have access to appropriate preventative care».

[237] According to *Pennsylvania v. President United States*, 930 F.3d, at 574, making self-certification optional implies «an undue burden on non-beneficiaries-the female employees who will lose coverage for contraceptive care».

[238] See *Pennsylvania v. President United States*, 930 F.3d, at 570: an «authority to issue 'comprehensive guidelines' concerns the type of services that are to be provided and does not provide authority to undermine Congress's directive… concerning *who* must provide coverage for these services, so health plans and insurers shall» cover «such additional preventive care... as provided for in comprehensive guidelines supported by [the HRSA]».

[239] See *Pennsylvania v. President United States*, 930 F.3d, at 558. See Bean, T. J., Fretwell Wilson, R., «The Administrative State…», pp. 249-250.

[240] See *Pennsylvania v. Trump*, 351 F. Supp. 3d, at 803; *California v. HHS*, 351 F. Supp. 3d, at 1279.

[241] APA § 553(b) and (c) provide that the government has to issue a notice of the proposed rulemaking, including basic information, and the legal authority for and general content of the proposed rule; in this way it offers the interested public «an opportunity to participate in the rule making through submission of written data, views, or arguments», and «*[a]fter* consideration of the relevant matter presented» the final rules have to include a «concise general statement of their basis and purpose». Also, APA § 553(b) provides the possibility for exemptions from these requirements only for a «good cause». The aim of this procedure is «to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies and to assure that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions». See *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (1987). See Bean, T. J. Fretwell Wilson, R., «The Administrative State…», p. 249.

follow to enact regulations, in order to guarantee to the public an opportunity to participate in the decision-making[242]. Although the departments apparently solicited comments before issuing the final rules, neither did they offer an effective «opportunity» to the public to participate in the decision-making process nor did they demonstrate «any real open-minded» intent to amend the rules[243].

Furthermore, the Congress enforced the good cause exemption «to accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense, while assuring that agency decisions are based on facts»[244]. The APA implements the notice-and-comment requirements unless «the agency *for good cause* finds... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest»[245]. In the *Little Sisters* case there was no emergency or risk of harm that could justify the disregard of the procedure, and the lower courts held that the intent to provide immediate guidance does not meet the requirement of «good cause»[246]. So it seems that the presence of a good cause is far from de-

[242] In the *Pennsylvania* case, the court found a violation of the APA's procedural requirements. The agencies' actions infringed section 706 of the APA, because they were «in excess of statutory jurisdiction, authority, or limitations, or short of statutory right» and they issued the IFRs by «dispensing with» the statute's notice-and-comment requirement, without a «good cause» justifying administrative agencies' choice to bypass the notice and comment procedure. See *Pennsylvania v. President United States*, 930 F.3d, at 567-569.

[243] See *Pennsylvania v. President United States*, 930 F.3d, at 568. Instead, the government claimed that federal agencies had «ample authority to develop guidelines» for women's preventive services because ACA's «plain text» implies coverage «'*as provided for* in comprehensive guidelines supported by [HRSA].'» See Brief for the Petitioners at 11, 19, *Trump v. Pennsylvania*, No. 19-454. In fact, the government asserted that the ACA authorized the use of IFRs. Before the Supreme Court, the states claimed that the dispute was not only about «the appropriate balance between the health and autonomy of women and the religious and moral views of their employers», because it implied «the power of federal agencies to resolve such questions by relying on power never explicitly granted by Congress nor recognized by the courts» (Id, at 2). The states reiterated that Congress «delegated HRSA authority to oversee guidelines defining *what* preventive services for women must be covered, not *who* must cover them», (Id. At 29) because the «RFRA does not grant federal agencies broad rulemaking authority to create exemptions from mandatory laws absent a violation». (Id. at 36, 40). Also, «[n]o party claims that RFRA authorizes the *moral* rule». *(Id*., at 36). See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», p. 245.

[244] See LA VILLA, J. J., «The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act», in *Admin. L. J*., 3 (1989), pp. 320-321.

[245] 5 U. S. C. § 553(b)(3)(B) (2018). See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», p. 249.

[246] The government claimed the presence of a «good cause» that justified the omission of the notice prior to promulgation. However, good cause exemption requires «situations of emergency or necessity», and cannot be used as an «escape clause», as judicial scrutiny will verify whether the «cause found» is «real and demonstrable». See *N. J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038,

monstrated in the present case; instead, it was used as a «safety valve» to bypass «public discourse» for undue «political reasons»[247].

In *Little Sisters* the Supreme Court «embraced a canon of constitutional avoidance», leaving to Congress the task to determine on the interplay among the ACA, the RFRA and the APA[248]. However, according to some commentators, in the *Little Sisters* decision the Supreme Court substantially legitimized the administrative agencies to define the boundaries of religious freedom[249].

The majority also embraced a textual interpretation of the APA, according to which the order in which the different stages provided in this statute occur is not influential, as long as at some point during the rulemaking the information required is provided to the public and the «maximum procedural requirements» under the APA are met[250]. The judicial response undoubtedly took into account the administrative agencies dissatisfaction about formal rulemaking, which was perceived as «burdensome», «cumbersome», «time-consuming», as well as an «obstacle» to the achievement of «worthy goals» in an efficient way[251].

However, in a democratic system «the interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people»[252]. Administrative agencies that are charged with the task of interpreting statutes can take advantage of the comments from those who are subject to their action.

The IFRs represented a big change in public policies, in a field as crucial as women's access such as health-care preventative services. These rules will affect a significant part of civil society, as they widely expanded the range of

1046 (D. C. Cir. 1980). Although it is a «flexible standard» courts held that it «is to be narrowly construed and only reluctantly countenanced». See *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749 (D. C. Cir. 2001).

[247] See Stiefel, M. R., «Invalid Harms: Improper Use of the Administrative Procedure Act's Good Cause Exemption», in *Wash L. Rev*., 94 (2019), pp. 960-964.

[248] See Stiefel, M. R., «Invalid Harms…», p. 957.

[249] See Bean, T. J., Fretwell Wilson, R., «The Administrative State…», p. 261: «The Court said the Obama administration was authorized by Congress to create the contraceptive mandate and the Trump administration was authorized by Congress to gut it». According to these commentators, the Court also endorsed the specific procedures federal agencies adopted for rulemaking and declared their consistency with the APA. Actually, in the *Little Sisters* case, notice and binding regulation occurred almost simultaneously, so the government substantially disregarded the real intent of the APA, which was to give the interested public the opportunity to make suggestions and to offer the federal agencies the option to adopt changes in the rules in response to the comments received. See APA § 553(b) and (c).

[250] See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, at 2384-2385.

[251] See Hickman, K. E., «Did Little Sisters of the Poor Just Gut APA Rulemaking Procedures?», in *Yale Journal of Regulation*, July 9, 2020. https://www.yalejreg.com/nc/did-little-sisters-of-the-poor-just-gut-apa-rulemaking-procedures/.

[252] See *Buschmann v. Schweiker*, 676 F.2d 353, 357 (9th Cir. 1982).

objectors, including health plan sponsors who have moral objections. So it was a case where the public could have made significant contribution to the decision-making[253]. Moreover, rejecting the standard of «open-mindedness» about the comments of the public[254], the Court seems to misunderstand the language of the APA, emphasizing «one-way communication» (public agencies to the public) and underestimating the importance of «collaboration and engagement between public agencies and the public»[255] and «endangering the participatory government principles»[256]. Also it «delegitimized the rulemaking processes»[257] and emphasized the central role of administrative agencies in resolving controversial issues, giving them a significant degree of discretion, which can lead to arbitrariness[258]. According to some commentators, this solution contradicts previous attempts of conservative judges to limit the powers of the executive through the ancient doctrine of no delegation that traditionally prevented Congress from delegating its legislative powers to the executive[259].

However, the crucial question is whether in the near future the Supreme Court, where the conservative wing has predominated following the appointment of Amy Coney Barrett in October 2020, will maintain the same deferential attitude toward the Biden Administration. According to some commentators, it will be interesting to see if a Court that empowered administrative agencies will maintain this trend under a presidency whose policies it does not share and some commentators think there is a distinct possibility that that the conservative majority will restrict the regulatory power of administrative agencies to carry out goals indicated by the law maker[260].

14. POSSIBLE LEGAL TRAJECTORIES IN THE NEAR FUTURE

An in-depth analysis of the *Little Sisters* case underlines the current inadequacy on the part of the US Congress to face expanding culture wars; thus, the judicial boards are empowered to negotiate differences and to reach legal com-

[253] See FENTIMAN, L. C., «Of Mosquitoes and "Moral Convictions"…», pp. 165-166.
[254] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», pp. 249.
[255] See HICKMAN, K. E., «Did Little Sisters of the Poor…».
[256] See STIEFEL, M. R., «Invalid Harms…», p. 964.
[257] See STIEFEL, M. R., «Invalid Harms… », p. 927.
[258] See BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», pp. 229 ff.
[259] See KEITH, K., «Supreme Court upholds broad exemptions….»
[260] See TOTENBERG, N., «Religions, Abortion…».

promises in a pluralistic framework[261]. Where controversial issues are at stake (LGBT rights, reproductive rights) Congress «removed the debate» from governmental bodies, undermining democratic processes and legitimizing a sort of «juristocracy»[262]. However, the crucial questions are, where «tragic choices»[263] are at stake, who is charged with the role of «hav[ing] the final word», and whether the increasing decision-making weight given to the «judicialization of politics» [264] is an effective way to solve conflicts, or instead whether it exacerbates conflicts and erodes trust in the law[265]. The US legal context demonstrates that when the duty to balance the values in conflict is removed from the legislative mediation, and when the judiciary has «taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed»[266], there is a high risk of negatively affecting vulnerable classes of individuals.

Public actors have to be the main players not only in promoting «channels for debate», but also in «preserving» legal space for all the competing narratives, as neutral rulers of an ongoing constructive dialogue between plural sets of values[267]. The implementation of a genuine pluralism requires the support of laws aimed at «mediating the impact of accommodation on third parties»[268].

Regarding the tension between the ACA and the RFRA, progressive members of Congress suggested various possible future scenarios, ranging between opposite views. If the main intent of the lawmakers was the enhancement of access to contraception, Congress could statutorily underline the importance of contraception among preventative health services and emphasize the compelling nature of a governmental interest. In this way Congress would enable contraceptive services to pass the strict scrutiny test grounded on the RFRA. Also, Congress could amend the RFRA. In this way «any provision of law or its implementation that provides for or requires... access to,... referrals for, pro-

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[261] See French, D., «The Supreme Court Tries to Settle the Religious Liberty Culture War», in *Time*, July 14, 2020, https://time.com/5866374/supreme-court-settle-religious-liberty/».

[262] See French, D., «The Supreme Court Tries…»; Hirshl, R., *Toward Juristocracy: The Origins and Consequences of New Constitutionalism*, Harvard University Press, Cambridge, MA, 2007.

[263] See Calabresi, G., Bobbit, P., *Tragic Choices*, W. W. Norton & Co., New York, 1978.

[264] See Hirshl, R., «Judicialization of Mega-Politics and the Rise of Political Courts», in *Annual Review of Political Sciences*, 11 (2008), pp. 93-118.

[265] See Minow, M., «Foreword», p. xvii.

[266] See *Lawrence v. Texas*, 539 U. S. 558, 602-603 (2003) (Scalia, dissenting).

[267] See Minow, M., «Should Religious Groups be Exempt from Civil Rights Law?,», in *Boston College Law Review*, 48 (2007), p. 847.

[268] See Siegel R., Dejaime, N., «Conscience Wars in Transnational Perspective…», p. 218.

vision of, or coverage for, any health care item or service» would be removed from the RFRA application[269].

However, if Congress wanted to maximize the exercise of religious freedom, it could expressly provide categorical exemptions to the contraceptive coverage for all entities objecting on religious or moral grounds[270].

Both approaches underestimate the complex nature of the competing interests, as they emphasize the risk of substantially emptying one of the rights at stake of its basic content[271]. They emphasize the traditional tension between religious accommodation and non-establishment.

The first approach would bring about claims grounded on the RFRA, as a substantial burden would be imposed on the exercise of religious freedom and any federal law cannot be immunized against conflicting with the RFRA «unless such law explicitly excludes such application by reference to this Act»[272].

Some commentators argue that the overexpansion of religious claims is due to the distortive implications the RFRA had on religious freedom, and raise the question of whether the RFRA contradicts with the Establishment Clause[273]. They blame the RFRA as the cause of an expansion of the protection of certain sets of beliefs, which contradict the traditional reading of the separation clause prohibiting forms of preferentialism toward religion or toward specific religious groups, and they solicit its amendment[274].

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[269] See Do Not Harm Act, H. R. 1450; S. 593 (116th).

[270] See the Religious Liberty Protection Act of 2014, H. R. 4396 (113th), prohibiting federal agencies from «implement[ing] or enforc[ing]» rules that «relate to requiring any individual or entity to provide coverage of sterilization or contraceptive services to which the individual or entity is opposed on the basis of religious belief». That bill also stated that a «health plan shall not be considered to have failed to provide» preventative health services «on the basis that the plan does not provide (or pay for) coverage for sterilization or contraceptive services because-(A) providing (or paying for) such coverage is contrary to the religious or moral beliefs of the sponsor, issuer, or other entity offering the plan; or (B) such coverage, in the case of individual coverage, is contrary to the religious or moral beliefs of the purchaser or beneficiary of the coverage».

[271] EVANS, C., HOOD, A., «Religious Autonomy and Labour Law: A Comparison of Jurisprudence of the United States and the European Court of Human Rights», in *Oxford Journal of Law and Religion*, 1 (2012), p. 107.

[272] See Access to Birth Control Act, H. R. 2182, 116th Cong. § 3; KILLION, V. L., «The Federal Contraceptive Coverage Requirement…».

[273] See EISGRUBER C. L., SAGER, L.G., «Equal Regard», in FELDMAN, S. M., *Law and Religion. A Critical Anthology*, New York University Press, New York and London, 2000, p. 211: «In a nation with many groups, many values, and many views of the commitments by which a good life is shaped, the shared understanding among *some* groups that they are each bound by the commandments of a (different) god they believe deserves/demands obeisance is unacceptably sectarian as a basis for the constitutional privileging of religion».

[274] See EISGRUBER C. L., SAGER, L.G., «Equal Regard», p. 211.

Although the polarization of conservative and liberal narratives raises the weighty question about the meaning and the scope of religious freedom, the RFRA remains a powerful tool that offers protection to religious minorities and to progressive religious claims[275]. Recent case law offered an expanded protection of religious freedom to both mainstream religions and minority ones[276]. Although *Hobby Lobby* and *Little Sisters* mirror a Court that inclines to favoring majority narratives, «religious rights judicially created cannot necessarily be confined to conservative causes»[277].

Furthermore, amendment of the RFRA would not preclude further claims founded on the Free Exercise Clause, that would likely be subject to forthcoming judicial standards of review the Supreme Court will adopt[278].

On the other hand, an overexpansion of religious exemptions, without taking into due account the negative externalities on third parties, could raise concerns under the Establishment Clause[279]. According to some judges, «[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation» of the First Amendment[280]. However, the Supreme Court held that that «[a]t some point, accommodation may devolve into "an unlawful fostering of religion"»[281]. The crucial point concerns the blurred boundary between what is mandated and what is allowed under the RFRA and the «intersection of RFRA, Free Exercise, and Establishment Clause jurisprudence.»[282]

Although nowadays the Establishment Clause is increasingly given a «narrow interpretation», aimed at «reinforcing the goals»[283] of religious exercise,

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[275] See Carmella, A., «Progressive Religion…», p. 544.

[276] Cfr. *Holt v. Hobbs*, 574 U. S._(2015).

[277] See Corbin, C. M., «A Religious Right…».

[278] See *Fulton v. City of Philadelphia*, 922 F3d 140 (3d Cir. 2019), *cert. granted*, 24 February 2020, where the Supreme Court granted *certiorari* and will likely revisit *Smith*'s standard of judicial review; Killion, V. L., «The Federal Contraceptive Coverage Requirement…».

[279] See First Amended Complaint for Declaratory and Injunctive Relief ¶ 129, *California v. HHS*, 351 F. Supp. 3d 1267 (N. D. Cal. 2019) (No. 17-cv-05783): «By promulgating the new IFRs, Defendants have violated the Establishment Clause because the IFRs do not have a secular legislative purpose, the primary effect advances religion, especially in that they place an undue burden on third parties—the women who seek birth control, and the IFRs foster excessive government entanglement with religion». See Killion, V. L., «The Federal Contraceptive Coverage Requirement…».

[280] See 42 U. S. C. 2000bb-4.

[281] See *Corporation of Presiding Bishop v. Amos*, 483 U. S. 327, 335 (1987).

[282] See *California v. HHS*, 351 F. Supp. 3d, at 1291-92.

[283] See Carmella, A., «Progressive Religion…», p. 563.

some commentators underline that «permissive accommodations» have to cope with Establishment Clause constraints[284].

There is an increasing debate among commentators as to whether «discretionary» exemptions, even though allowed under the Establishment Clause, could impose burdens on third parties[285]. According to some, the Establishment Clause should be applied as a default rule that prevents any religious accommodation when it imposes a significant burden on third-party non-beneficiaries, and one that requires the search for a least restrictive alternative.

Also, the role of the moral clause in the «playing in the joints»[286] between free exercise of religion and establishment clause is at stake[287]. The final rules note that «[o]ver many decades, Congress has protected conscientious objections including those based on moral convictions in the context of health care and human services, and including health coverage, even as it has sought to promote access to health services»[288]. However, according to some judges, the inclusion of a moral clause under the RFRA and Religion Clauses protection is doubtful[289]. Judges are skeptical about the fact that this was provided by administrative agencies and not by the lawmaker, and they argue it is not consistent with the language and the scope of the ACA.

However, legislative alternatives that could recalibrate the competing interests, granting contraception but avoiding imposing substantial burdens on entities objecting to (separate contraceptive coverage or expansion of programs that grant free access to contraception), could be available[290]. On this point, «the process of crafting and passing legislation» has been correctly defined as «the locus of compromise par excellence»[291].

Commentators argued that in the near future Congress could easily put an end to this «never-ending conflict» by embracing an approach that is centered on individual choices[292] so as to «remove» the objecting employers from the

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[284] See GEDICKS, F. M., VAN TASSELL, R. G., «RFRA Exemptions…», pp. 343-384.

[285] See ESBECK, C. H., «Do Discretionary Religious Exemptions Violate the Establishment Clause?», in *Ky. L. J.*, 106 (2018), p. 603 ff.

[286] See *Locke v. Davey*, 540 U. S. 712, 717 (2004).

[287] See KILLION, V. L., «The Federal Contraceptive Coverage Requirement…».

[288] See 83 Fed. Reg. at 57,594.

[289] See *California v. HHS*, 351 F. Supp. 3d, at 1297.

[290] See *Burwell, Secretary of Health and Human Service, et al. v. Hobby Lobby Stores, Inc., et al.*, at 728–3: «The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections». KILLION, V. L., «The Federal Contraceptive Coverage Requirement…».

[291] See SEPINWALL, A., «The Challenges of Conscience…», p. 220.

[292] According to BEAN, T. J., FRETWELL WILSON, R., «The Administrative State…», p. 234, this approach is based on the idea of putting accommodation in the hands of individual employees,

«causal chain» of providing coverage, and enlarge the range of those who benefit from the coverage, and also avoiding open contradictions with the Hyde Amendment[293]. In the United States, individual choice has traditionally been considered a pivotal «solvent of intergroup conflict» and many controversial issues, even involving religion, have been managed as matters of individual choice[294]. An emblematic example is public funding to religious schools through individual choices of families, which prevents direct funding of religion and violations of the Establishment Clause[295]. Giving employers the opportunity to opt out from contraceptive coverage has a negative impact on vulnerable classes. However, empowering the employees' individual choices would remove the conflict between competing claims and offer a path to «navigate the conflicts» between religion and health care[296]. A mechanism of individual notification would safeguard employees' individual secular choices without imposing substantial burdens on entities objecting to insurance coverage for contraceptive services, would «reduce the potential for both RFRA and Free Exercise challenges»[297], and would prevent pervasive judicial supervision over the substantial nature of burdens on employers'consciences.

Removing the debate on contraception «from the logic of clashing rights»[298] could help lawmakers and courts to focus on the real status of reproductive rights, their scope and their limits[299].

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through individual notification of the employee to the third-party administrator or directly to the HHS, so the federally facilitated exchange insurer would be burdened with the cost of individual contraceptive coverages: «Congress could amend the Employee Retirement Income Security Act (ERISA) to mirror the accommodation: codifying an *organizational* exemption for all religious employers while providing *individual* employees of all objecting employers, including churches, coverage under a stand-alone contraceptive plan. Like the accommodation, the cost of this stand-alone coverage would be funded by the insurers who run ACA exchanges».

[293] See Bean, T. J., Fretwell Wilson, R., «The Administrative State…», p. 255.

[294] See Minow, M., «Foreword», p. xvi.

[295] See *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002).

[296] Minow, M., «Foreword», p. xviii.

[297] See Killion, V. L., «The Federal Contraceptive Coverage Requirement…».

[298] See Schlink, B., «Conscientious Objections», in Mancini, S., Rosenfeld, M. (Eds.), *The Conscience Wars,* p. 102 ff.

[299] According to Corbin, C. M., «A Religious Right…», the *Russo* case is an apparent victory for progressive forces, which masks an effective lowering of the standard of judicial review adopted in previous case law concerning reproductive rights. Previously, in *Whole Woman's Health v. Hellerstedt*, the Court held that a state cannot set up restrictions that impose an «undue burden» on the right to abortion, referring to two Texas provisions, which required admitting privileges for physicians performing abortion and upgraded standards (safety, staffing and parking) for health facilities providing abortions. In *June Medical Services, L. L. C. v. Russo*, the Court upheld *Whole Woman's Health v. Hellerstedt*, 579 U. S. _ (2016), reaffirming the fundamental right to an abortion and the importance of the rule of precedent. However, the crucial question concerns which standard of judicial review governs the right to abortion and whether abortion cases are recognized the same

For now, in light of the Supreme Court decision in *Little Sisters*, conscientious objectors can refuse to provide health plans covering contraceptive services and no alternative coverage will be provided to the employees of such employers.

However, given the political landscape, it is unlikely that tensions between religious freedom and reproductive rights will end and new legal challenges are likely to arise independently following the end of the Trump presidency. Trump was the interpreter of political goals shared and supported by secular, as well as religious, «powerful political players» that have traditionally influenced public policies regarding religious freedom[300]. Also, due to recent retirements and new appointments under the Trump Administration, there is a full conservative majority in the US Supreme Court and no judge retains a controlling vote.

Although Biden is expected to «restore the Obama Biden policy that existed before the *Hobby Lobby* ruling, namely providing an exemption for houses of worship and an accommodation for non-profit organizations with religious missions»[301], the crucial question remains as to what the Biden Administration will mean for religious freedom, continuity or change, and whether the new administration will move toward reducing the exemptions. The new administration has, in fact, the option of pursuing one of two rival conceptions of religious freedom: religious freedom at the top of a hierarchy of all individual rights, as the first freedom or equal care of all human rights[302].

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high level of scrutiny granted to religious claims. Although *Whole Woman's Health v. Hellerstedt* adopted a high level of scrutiny, it seems that the current Supreme Court lowered it compared to previous case law. In *June Medical Services LLC v. Russo,* the Court formally respected the rationale adopted in *Whole Woman's Health*. The Court also clarified that the undue burden standard invoked in *Planned Parenthood v. Casey* requires courts to balance the burdens that are imposed by a statute with the advantages a law provides. According to this rationale, a statute is not consistent with the Constitution if burdens exceed advantages. However, in *June Medical Services*, Justice Roberts, in his concurring opinion, argued that a court had only to assess whether a statute imposes a substantial obstacle to a person's access to abortion. Also, in his view, restrictions to abortion are subject to a rational basis review. See also *Food and Drug Administration et al., v. American College of Obstetricians and Gynecologists, et al.*, 592 U. S. _ (2021).

[300] See HAYNES, J., «Trump and the Politics of International Religious Freedom», in *Religions*, 11 (2020), p. 385.

[301] See ROWAN, N., «Biden Says He Would Undo Contraception Exemptions for Little Sisters of the Poor», in *Wash. Exam'r*, July 9, 2020, https://washex.am/33M1VAI.

[302] See J. HAYNES, J., «Trump and the Politics…», p. 385. At the moment, Biden is taking first steps to expand health care and LGBT rights. On 20 January 2021, Biden issued an executive order aimed at extending federal nondiscrimination protection to the LGBT community, giving a first indication about the addresses of the new administration's policies. See Executive Order, January 20, 2021, *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/. On January 29, 2021, Biden signed an executive order, aimed at

15. MOVING TOWARD AN «EQUALITARIAN» TURN?

In a democratic pluralist context, lawmakers should be committed to searching for solutions of compromise that guarantee the preservation of religious freedom, preventing conflicts of loyalty for religious actors, mitigating the effect of the accommodation of religious freedom on third parties and only leaving to the courts the task of balancing new unpredictable conflicts between competing interests[303]. When the only task of the courts was to balance new conflicts, a reasonable case-by-case accommodation could guarantee a certain level of recognition to interests that cannot find sufficient consideration in general rules[304].

However, the relationship between accommodation and pluralism has to be revisited. The US legal system should not repudiate its long tradition of religious accommodation that allowed the management of religious diversity and the coexistence and integration of different sets of values[305]. The critical question is how a pluralistic society can reconcile religious accommodation and specific public health concerns. Accommodation has been traditionally aimed at «rectifying the status of religious minorities», granting them a «compensatory recognition» in a legal scenario where mainstream narratives are predominant[306]. Clashes between competing values had been an unavoidable part of this «crucial plurality»[307]. This framework empowered the courts to reach balances between private and public interests and between competing sets of values and in restricting «the pervasive role played by the majority religion in shaping seemingly neutral institutions»[308].

The US constitutional framework has experienced a gradual transition from a case law that, in a view of religion as a disability requiring accommodation with respect to general rules, reluctantly granted exemptions as exceptions to idiosyncratic religious convictions and practices, to a legal framework

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strengthening Medicaid and a memorandum rescinding the Mexico City Policy, which prevented the government from funding foreign non-profit corporations providing or promoting abortion. See Luhby, T., «Biden Signs Executive Order to Reopen Affordable Care Act Enrollment», in *CNN*, January 29, 2021, https://edition.cnn.com/2021/01/28/politics/biden-executive-orders-health-care-aca-medicaid/index.html.

[303] See Fretwell Wilson, R., «Bargaining for Religious Accommodations…», p. 257 ff.; Madera, A., «Nuove forme di obiezione di coscienza…», p. 44.

[304] See Minow, M., «Foreword», p. xviii.

[305] See Madera, A., «Nuove forme di obiezione di coscienza…», p. 4.

[306] See Laborde, C., «Egalitarian Justice and Religious Exemptions», in Mancini, S., Rosenfeld (Eds.), M., *The Conscience Wars*, p. 113.

[307] See Minow, M., «Should Religious Groups…», p. 787.

[308] See Laborde, C., «Egalitarian Justice…», p. 125.

recognizing a «general right to conscience exemption»[309]. A general right to exemptions is undoubtedly broader than context-specific statutorily enforced exemptions referring only to specific legal obligations.

The US constitutional framework has traditionally given proper consideration to religious groups in which individuals explore and express their identities, recognizing their unique contribution to the construction of a pluralistic society[310]. However, the crucial question is whether and to what extent, a pluralist system has to move beyond the idea of conscientious objection as a «religious privilege»[311]. This approach raises the concerns of those who argue the «distinctiveness of religion»[312] and reject the understanding that religious and nonreligious convictions are placed «ex ante on an equal footing»[313]. Could an over expansion of accommodation undermine religious protection[314]?

New demands of accommodation for religious and non-religious groups are undoubtedly more costly than individual accommodations, as they could undermine public policies. However, a state rejection of religious and «integrity protecting»[315] demands and an enforcement of generally applicable statutes as «one law for all» would imply the dismantling of the pluralistic ideal and of a «liberal democracy» that is founded on both «state neutrality» and «individual freedom», and it aims to guarantee proper space to different «conceptions of life»[316].

The increasing trend toward an «equalitarian secularism»[317] implies the recognition of the reasonableness of parallel forms of protection. This further protection should not undermine the legal category of religion and the specific

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[309] See ADENITIRE, J., *A General Right to Conscientious Exemption. Beyond Religious Privilege*, Cambridge University Press, Cambridge, 2020.

[310] See MINOW, M., «Should Religious Groups…», p. 787.

[311] See ADENITIRE, J., *A General Right to Conscientious Exemption…*, p. vi; MADERA, A., «Dealing with Atheism…», p. 866; EISGRUBER, C. L., SAGER, L. G., «Does It Matter What Religion Is?,», in *Notre Dame Law Review*, 84 (2009), pp. 807-836; TEBBE, N., *Religious Freedom in an Egalitarian Age*, Harvard University Press, Cambridge (MA), 2017.

[312] See BRADY, K., *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence (Law and Christianity)*, Cambridge University Press, New York, 2015.

[313] See ROSENFELD, M., «The Clash between Religious Absolutes and Democratic Pluralism», in MANCINI, S., ROSENFELD, M. (Eds.), *The Conscience Wars*, pp. 66-69.

[314] See HAMBURGER, P., «More is Less», in *Va. L. Rev*., 90 (2004), p. 835; BLASI, V., «The Pathological Perspective and the First Amendment», in *Colum. L. Rev.*, 84 (1985) pp. 449 ff.; MARSHALL, W. P., *«Diluting Constitutional Rights: Rethinking State Action»,* in *Nw. U. L. Rev.*, 80 (1985), pp. 558 ff.; MADERA, A., «Spunti di riflessione…», p. 712.

[315] See LABORDE, C., «Egalitarian Justice …», p. 109.

[316] See ADENITIRE, J., *A General Right to Conscientious Exemption…*, pp. 1-5.

[317] See SCHWARTZMAN, M., «What if Religion isn't Special?», in *U. Chi. L. Rev*., 79 (2012), p. 1351 ff.

protection granted to «first-order religious actors»[318]. Religious communities will continue to receive specific protection of those legal spaces where they need appropriate margins of self-governance that require a deferential state non-interference[319]. On one hand, embracing the logics of equality does not imply lowering the religious protection, but rather giving proper weight in public discourse to strongly held ideologies[320].

However, although the rationale of anti-discrimination can provide a further argument for the protection of religion, «hegemonic narratives»[321] could face difficulties when taking advantage of the non-discrimination and equality approach, that seems more «compelling» when invoked by minority groups than when asserted by majority groups that urge legislative changes[322].

In any event, the current rationale of accommodation requires the implementation of a public space where different sets of values receive public visibility and can interact and develop a constructive dialogue[323]. Commentators suggest that a «secular government in a plural society needs to set a framework within which individuals and groups negotiate across the multiple sources of norms and meaning affecting them and their communities»[324]. Negotiation can be identified as a «strategy» to reconcile competing interests and also to generate new alternative solutions that avoid «tragic choices»[325]. The «negotiation of conflicts» can promote an active cooperation in the search of common ground in the pursuit of shared common goals. It is not possible to «satisfy… all competitive ideologies», however a «comprehensive pluralism», aimed at «mediating» between «self-regarding and other-regarding concerns» and at

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[318] See *Our Lady of Guadalupe v. Morrisey-Borru*, 591 U. S. _ (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. V. EEOC*, 132 S. Ct. 694 (2012). See Stewart, C., Schaerr, G., «Why Religious Conservative Organizations and Believers should Support The Fairness for All Act», in *J. Legis.*, 46 (2020), p. 147; Madera, A., «L'interazione fra esenzioni religiose e diritti *LGBT* sul luogo di lavoro: nuove traiettorie giudiziarie al crocevia fra narrative plurali», in *Stato Chiese e Pluralismo Confessionale*, 20 (2020), p. 92.

[319] See C. Stewart, C., Schaerr, G., «Why Religious Conservative Organizations…», p. 134; Madera, A., «L'interazione…», p. 92.

[320] See Kuhn, J. P., «The Religious Difference…», p. 1; Madera, A., «Dealing with Atheism…», p. 866; Eisgruber, C. L., Sager, L. G., «Does It Matter…», p. 825.

[321] See Annicchino, P., «The Geopolitics of Transnational Law and Religion…», pp. 258-274.

[322] See Mancini, S., Rosenfeld, M., «Introduction…», pp. 1-19.

[323] See Madera, A., «Nuove forme di obiezione di coscienza…», p. 27; Tebbe, N., Schwarzman, M., Schragger, R., «When do Religious Accommodations Burden Others?», in Mancini, S., Rosenfeld, M., *The Conscience Wars*, p. 329 ff.; Fretwell Wilson R. «When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses teach About Specific Exemptions», in *UC Davis Law Review*, 48 (2014), p. 703 ff.

[324] See Minow, M., «Should Religious Groups…», p. 826.

[325] See Minow, M., «Should Religious Groups…», p. 841; See Calabresi, G., Bobbit, P., *Tragic Choices*.

«achieving ex post the greatest possible peaceful coexistence among the greatest possible number of competing conceptions of the good» is a workable framework[326].

Nowadays the provisions of forms of religious accommodation that are statutorily regulated has undoubtedly facilitated the «social acceptability» of the recognition of the same opportunities to conscientious claims grounded on moral and ethical reasons[327]. However, academics argue that clear standards should be defined, to which secular sets of values should comply with, to receive equal protection, in order to prevent an uncontrolled expansion of accommodation[328].

Furthermore, accommodation has to be «measured» also «in its attention to protecting other citizens who do not share the objectors' beliefs»[329].

In any event, the right to objection cannot become an «absolute right», as it cannot disproportionately affect third parties[330]. However, third-party burdens cannot generate «abstract and decontextualizated concern»[331]; they have to be taken in due consideration within a «fair framework» requiring a complex balance between the «directness and «severity» of the burden, the «centrality and importance of a law promoting egalitarian justice» and the involvement of «cost shifting»[332].

The COVID-19 pandemic has demonstrated in an overwhelming way that in a pluralistic society finding «spaces of compromise» when religious claims conflict with «health concerns» is still a controversial issue[333]. On this point, Justice Sotomayor, during the oral argument in *Little Sisters*, emphasized the devastating implications that an uncontrolled right of employers to object could have in the field of health care, using the example of coverage for COVID-19 vaccine.

When important community interests are at stake (public health, public welfare), judicial responses should take into account the availability or the lack of social safety measures that seek to balance access to fundamental services and claims of religious freedom, so as to prevent the risks of undermining go-

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[326] See ROSENFELD, M., «The Clash between Religious Absolutes…», p. 101.

[327] See QUILLEN, E. G., *Atheism Exceptionalism: Atheism, Religion and the United States Supreme Court*. New York: Routledge, 2018, p. 192 ff.

[328] See TEBBE, N., «Nonbelievers», in *Virginia Law Review* 97 (2011), p. 1156; KIM, S., «To Exempt or Not Exempt…», p. 816; MADERA, A., «Dealing with Atheism…», p. 868.

[329] See SIEGEL R., DEJAIME, N., «Conscience Wars in Transnational Perspective…», p. 190.

[330] See ADENITIRE, J., *A General Right to Conscientious Exemption…*, p. 1.

[331] See MADERA, A., «Some Preliminary Remarks…», p. 135; BARCLAY, S. H**., «**First Amendment "Harms"», p. 358 ff.

[332] See LABORDE, C., «Egalitarian Justice…», pp. 113-120.

[333] See MINOW, M., «Foreword», p. xvii.

vernment ability to pursue public aims. «Reasonableness» of accommodation implies the recognition of «as much religious freedom while allowing social progress»[334]. «Maximizing» the protection of conscience without undermining access implies that «super conscience clauses» have to be counterbalanced with effectively responsive policies aimed at recalibrating the protection of religious exercise with equal opportunities of access to good and services[335]. So, a vital factor for accommodation should be whether or not public policies can provide a secular alternative to guarantee that the fundamental service at stake is available for the community[336].

In a democratic and secular framework, «a new architecture» of fundamental rights, where religious freedom is placed at the top of a hierarchy of fundamental rights, and is removed from every balance with other competing interests seems unworkable[337], as the survival of pluralism is strictly connected with solutions of compromise, which imply «balancing competing interests»[338]. Only reconciliation of competing interests in the long term guarantees the survival of religious freedom, as it does not prevent its confrontation with other important values of contemporary society[339]. Embracing pluralism implies recognition of «true diversity of perspective» in view of constructing «open» and «inclusive societies»[340], and all political forces and the judiciary should converge on this common goal, in order to prevent further pathological forms of the «radicalization» of conflicting values[341].

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[334] See Fretwell Wilson, R., «Unpacking the Relationship between Conscience and Access», p. 255.

[335] See Fretwell Wilson, R., «Unpacking the Relationship between Conscience and Access», pp. 255

[336] See Madera, A., «Nuove forme di obiezione di coscienza…», p. 32; Colaianni, N., «*Il concorso per medici non obiettori all'IVG e il signor Traps*», in *Stato, Chiese e pluralismo confessionale*, 8 (2017), pp. 1-18.

[337] See Haynes, J., «Trump and the Politics…», p. 385; Madera, A., «L'interazione fra esenzioni religiose…», p. 83.

[338] See Harvard Law Review, «Affordable Care Act…», p. 569.

[339] See McGoldrick, D., «Religion and Legal Spaces…», pp. 759-786; Madera, A., «Eccesione...», p. 816.

[340] See Russo, C. J. «Does Religion Have a Place in the Diverse Marketplace of Ideas?», in *Canopy Forum*, September 14, 2020, https://canopyforum.org/2020/09/14/does-religion-have-a-place-in-the-diverse-marketplace-o--ideas/?fbclid=IwAR2aDPa37p24EZGZe9gRZJYfhTs36ggHB mWo-A7a6GD_wg9wJ6netFoNgm8.

[341] See Lupu, I. C., «Moving Targets…», p. 55; Madera, A., «L'interazione fra esenzioni religiose…», p. 27.