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Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al. Supreme Court of United States

Marguerite A. Nuse

Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al., Petitioners
v.
Sylvia Burwell, Secretary of Health and Human Services, et al.

Supreme Court of United States

Maggie Nuse
Religion and the First Amendment
August 16, 2016

Justice Ginsburg delivered the opinion of the Court.

In these cases, we must decide whether the Accommodations available to nonprofit religious organizations regarding the contraceptive mandate in the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (Lexis 2015), violate either the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb et seq. (Lexis 2015), or the Establishment Clause in the First Amendment to the United States Constitution. U.S. Const. amend. I (Lexis 2015). In deciding whether RFRA has been violated, we must consider whether the Accommodations place a substantial burden on nonprofits and, if so, whether that burden is incurred through the least restrictive means of serving a compelling governmental interest. The Establishment Clause is violated when church and state are sufficiently entangled. We hold that the Accommodations violate neither RFRA nor the Establishment Clause and are therefore enforceable.

To reach this holding, we first must decide whether the Accommodations available to nonprofit religious groups impose a substantial burden on the groups, and we hold that they do not. We reject the Little Sisters' argument that the Accommodations place a substantial burden on them because they must choose between sacrificing their morals and paying a hefty penalty. Brief for Petitioners in No. ___ p. 1. To the contrary, the Accommodations alleviate any burden the ACA creates.

Supposing that the Accommodations do inflict a substantial burden on the religious nonprofits, which they do not, the next step in the analysis would be to determine whether the government has a compelling interest in requiring the mandate and whether it achieves this interest by the least restrictive means. We hold that the governmental interest which is furthered by the mandate, full healthcare for women, is compelling. Additionally, the means by which the

U.S. Department of Health and Human Services ("HHS") achieves this compelling interest are the least restrictive methods of doing so.

In our holding, we also reject the Little Sisters' contention that the Accommodations violate the First Amendment's Establishment Clause by exempting churches from the mandate but not exempting all religious nonprofits. Brief for Petitioners, No. ___ p. 33. Many other areas of law, such as taxation and employment discrimination, make a similar distinction between groups with a primarily religious purpose and other religiously affiliated nonprofit organizations. The wall of separation between church and state has not been tarnished. Therefore, the distinction the HHS has made is constitutional.

Our decision today concludes that the Accommodations provided to religious nonprofit organizations violate neither RFRA nor the Establishment Clause. The decision of the 10th Circuit Court is affirmed.

I.

A.

The Patient Protection and Affordable Care Act was enacted in 2010 as an attempt by Congress to improve the type and quality of insurance employers are required to provide their employees. At the same time, Congress wanted to make sure that these increased benefits would not impose any additional costs on the employees. Specifically, the ACA requires employers to provide "minimum essential coverage," which includes furnishing "preventive care and screenings." 26 U.S.C. §4980H(a), 42 U.S.C. §300gg-13(a)(4) (Lexis 2015). Congress chose to include these preventive services in the ACA because it determined that broader and more consistent use of preventive services is critical to improving public health and that people are

more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); See Priests for Life v. HHS, 772 F.3d 229, 259- 260 (D.C. Cir. 2014) (PFL). Instead of defining the types of preventive care which must be covered, Congress authorized the Health Resources and Services Administration ("HRSA") to make this determination. HRSA, in turn, released the Women's Preventive Services Guidelines which set forth that employers must provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8725. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Within this contraceptive mandate, HRSA carved out an exemption for "religious employers." HRSA has defined this term as "an employer that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." These sections refer to "churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order." Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1161-1162 (10th Cir. 2015).

In addition to the exemptions, the HHS established an accommodation for religious nonprofit groups who do not qualify as a religious employer yet object to the contraceptive mandate on religious grounds. A religious nonprofit organization qualifies for the accommodation if it: (1) has religious objections to "providing coverage for some or all of the contraceptive services required to be covered" under the mandate, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) "self-certifies that it satisfies the first three criteria." Id. at1162. The accommodation can be utilized by both

insured group health plans and self-insured group health plans in one of two ways: the organization may either self-certify or send notice to the HHS.

Religious nonprofit groups may execute their accommodation by self-certifying through an "EBSA Form 700 Certification" (the "EBSA Form"). The most pertinent sentence of the EBSA Form states: "I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization." The organization must provide a copy of the EBSA Form to the health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans). The EBSA Form also instructs the health insurance issuer or third party administrator ("TPA") that certain regulations require the issuer or TPA to provide the contraceptive coverage themselves without cost sharing to the employees. Id. at 1163.

Following backlash from various groups concerning the filing of the EBSA Form, another accommodation was developed for objecting religious nonprofit organizations. As set out in Wheaton College v. Burwell, 134 S. Ct. 2806 (2014), religious nonprofit groups do not have to file and deliver an EBSA Form but can instead directly notify the HHS of their objection (the "Wheaton accommodation"). It is then upon the HHS to contact the applicable insurance issuer and require that issuer to provide the coverage. The objecting group must only provide the HHS with the minimum information necessary for the department to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies set out in the regulations. Little Sisters, 794 F.3d at 1164. The HHS then notifies the issuer or TPA of such objection and requires them to provide the contraceptive coverage.

Through this accommodation scheme, health insurance issuers bear the costs of contraceptive coverage while TPAs can be reimbursed by the objecting organization. In either the EBSA Form accommodation or the Wheaton accommodation (collectively, the "Accommodations"), employees receive the coverage specified in the ACA while bearing no costs, and the objecting employers are relieved of their duty to directly provide such coverage while still complying with the ACA.

B.

In 1993, Congress enacted RFRA as a response to a specific case: Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Prior to Smith, courts analyzed First Amendment Free Exercise claims regarding governmental actions by employing a balancing test. Under this test, courts would weigh the burden a governmental action placed on the practice of religion against the compellingness of the governmental interest underlying the action. See Sherbert v. Verner, 374 U.S. 398 (1963). The Court in Smith rejected this balancing test and instead introduced a new First Amendment standard, holding that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." Smith, 494 U.S. at 888. Unsatisfied with this result and the message that it sent, Congress set out to re-instill the pre-Smith balancing standard. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993). Almost directly addressing Smith in the creation of RFRA, Congress stated that "laws [that are] 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." Hobby Lobby, 134 S. Ct. at 2761. Further, and even more clearly, RFRA states that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." However,

RFRA goes on to allow the government to substantially burden a person only if it is done through the least restrictive means to achieve a compelling governmental interest. 42 U.S.C. § 2000bb-1(b) (Lexis 2015).

In analyzing a claim of a RFRA violation, the initial burden rests on the plaintiff to demonstrate that the governmental action imposes a substantial burden on the plaintiff's sincere exercise of religion. This Court has explained that a substantial burden is imposed on a religious exercise if the governmental action: "(1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." Hobby Lobby, 134 S. Ct. at 1125-26. If the plaintiff can establish this prima facie showing, the burden then shifts to the government to demonstrate that the law promotes a compelling governmental interest in the least restrictive method possible. See Karen A. Jordan, The Contraceptive Mandate: Compelling Interest or Ideology?, 41 J. Legis. 1, 5 (2014/2015).

It is important to note that the presence of a substantial burden is a question of law. Wheaton, 134 S. Ct. at 2807 (Sotomayor, J. dissenting). The issue is not whether the plaintiff's faith is being correctly interpreted, but whether the law imposes a substantial burden on that plaintiff's exercise of religion. "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." Hobby Lobby, 134 S. Ct. at 1137.

It is also important to note the word "substantial." When Congress was in the process of drafting RFRA, they initially simply used the word "burden" with no modifier. The additional adjective was later added by Congress before the bill was passed for a specific reason. Little

Sisters, 794 F.3d at 1176. Not all burdens imposed by governmental actions are necessarily *substantial* burdens. The pre-Smith standards restored by RFRA permit the government to impose de minimis administrative burdens on religious groups without violating their religious liberty. Id. at 1175. After the plaintiff demonstrates the presence of a burden on religious exercise, it is up to the courts to determine whether that burden is indeed substantial.

Once the plaintiff makes a prima facie showing of a substantial burden, the burden of proof shifts to the government to demonstrate that the interest promoted by the burdensome law is a compelling public interest which is achieved through the least restrictive means possible. Contraceptive Mandate, 41 J. Legis. at 5. There are no clear-cut tests to determine whether a governmental interest is compelling and whether the means used to achieve such interest are as restrictive as possible. Instead, courts are somewhat free to make such determinations on a case by case basis. Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 Tex. L. Rev. 247, 274 (1994). If the government can meet its burden, the challenged law withstands the RFRA claim.

C.

There are three separate plaintiffs in the case before us. We believe it is relevant to consider the background of each plaintiff in order to better understand their objections and the application of the Accommodations to each.

1.

As explained in the 10th Circuit Court below, "The Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore belong to an order of

Catholic nuns who devote their lives to care for the elderly." Little Sisters, 794 F.3d at 1167. The employees of the Little Sisters receive their healthcare through a self-insured church plan which is not subject to ERISA. Brief for Petitioners at No. ___ p. 11. This plan is administered through a Catholic TPA organization.

The Catholic faith prohibits sterilization, contraception, and abortion. As a Catholic organization, the Little Sisters find it morally reprehensible on religious grounds to provide their employees contraceptive coverage in its healthcare plans. Id. at p. 10.

Under the ACA contraceptive mandate, the Little Sisters are now required to provide contraceptive coverage to their employees. However, since it is a religious nonprofit organization coming within the qualifications for an accommodation, the Little Sisters may relieve themselves of their obligation by either providing their TPA with an ESBA Form or by directly contacting the HHS to inform them of their invocation of the accommodation. If the Little Sisters fail to either provide the coverage themselves or properly request an accommodation, they may be subject to fines up to millions of dollars. Id. at p. 1.

2.

Four universities, Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-Atlantic Christian University, have brought suit together. The court below explained "…they are in slightly different positions insofar as Mid-America Christian University uses a church plan and contracts with a TPA, Oklahoma Baptist University and Oklahoma Wesleyan use health insurance issuers, and Southern Nazarene contracts with a TPA but uses a health insurance issuer for student coverage and employee claims above $100,000." Little Sisters, 794 F.3d at 1168.

Each of these "Christ-centered institutions of higher learning" objects to the coverage on moral and religious grounds. Id. at 1168. Each of the universities is qualified to invoke an accommodation. However, each also objects to the Accommodations on the same moral and religious grounds. Failure to provide the coverage or exercise their right to an accommodation can lead each university to a penalty of $100 per employee per day. Id. at 1169.

3.

The third party to this litigation includes Reaching Souls, a nonprofit group which trains people to and provides care to orphans in Africa, India, and Cuba, and Truett-McConnell College, a private liberal arts college. Both of these groups use a self-insured church plan to provide healthcare to their employees, which is administered by a TPA.

These groups, based on their religious convictions, object to providing contraceptive coverage that can cause abortions, and similarly object to the accommodation scheme on the same moral grounds. Id. at 1171.

D.

Each of these three groups (collectively referred to as the "Little Sisters") has sought a preliminary injunction to protect them from the enforcement of the contraceptive mandate even through the protection of the accommodation scheme. We have granted certiorari to resolve the issue of whether nonprofit religious organizations may be exempt from the accommodation scheme.

II.

We now turn to the merits of the case. Two issues are presented before us: (1) whether the regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate satisfies RFRA; and (2) whether the Establishment Clause of the First Amendment allows HHS to make distinctions among various nonprofit religious employers. We address each issue in turn and find that the Accommodations are in accordance with both RFRA and the Establishment Clause.

A.

1.

RFRA requires that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. SEC 2000bb-1 (Lexis 2015).

In applying RFRA, the first step in our analysis is to determine whether the Accommodations inflict a substantial burden on the plaintiffs' exercise of religion. The Little Sisters argue that they sincerely morally object to any participation in providing contraceptives to women, however indirect their role may be. But, if they do not participate in any way, they will be forced to pay lofty penalties. Thus, the Little Sisters contend, they are forced to choose between their sincere religious beliefs and their funds – a choice which inflicts a substantial burden on them. Brief for Petitioners at No. ___ p. 23. The Little Sisters argue that the Accommodations do not relieve them of any complicity, for the Little Sisters are in a contractual relationship with the parties providing the contraceptive coverage. They further argue that the

lower courts erred in holding that no substantial burden exists, for the HHS has conceded that the Little Sister's beliefs are sincere. Therefore, because the Little Sisters are sincerely burdened by the accommodation scheme, the burden of proof shifts to the government.

The Little Sisters make a few errors in their reasoning. First, they deflate the standard which must be met by confusing the meaning of "substantial burden." In the Little Sisters' argument, they assume that the existence of a substantial burden is analogous to the existence of a sincere belief. They contend that the lower court was in error because the Little Sisters do sincerely believe that participating in the Accommodations would be morally abhorrent. This is incorrect. Whether a substantial burden exists does not wholly rest upon whether there is a sincere religious belief; this is part of the inquiry, but it is not the be all and end all. To receive RFRA's protection, the plaintiff must show that the religious belief is sincere, but additionally must demonstrate that this sincere belief is substantially burdened; it is not enough to just show a sincere belief. As set out above, the question of whether a substantial burden exists is a question for the court. While a court cannot question the correctness of a religious belief, it can assess the burden felt by a person with those religious beliefs.

In Hobby Lobby, this Court found that the contraceptive mandate of the ACA, with no Accommodations, imposed a substantial burden on the plaintiff. In doing so, the Court referenced the case Thomas v. Review Bd., 450 U.S. 707 (1981). This case set the precedent that a court cannot decide at what point work becomes objectionable on moral grounds to the worker; the directness of a worker's involvement is not relevant when considering the objectionableness of the work. Similarly, the Court in Hobby Lobby found that a court could not decide at what level of participation organizations violate their religious beliefs. The Court went on to hold that because Hobby Lobby sincerely felt that their religious beliefs would be violated

by complying with the contraceptive mandate, and Hobby Lobby must choose between this violation or paying large sums of money, a substantial burden was imposed on the company. Hobby Lobby, 134 S. Ct. 2751.

In the case at bar, we are not deciding whether the Little Sisters are violating their religious beliefs. The Little Sisters have argued that their beliefs are sincere and that they sincerely feel these beliefs are being violated, and we find that they are. The proper question before us is not whether there is a sincere burden felt by the Little Sisters, but whether the Accommodations place a *substantial* burden on the Little Sisters.

"In determining whether a law or policy applies substantial pressure on a claimant to violate his beliefs, the court considers how the law or policy being challenged actually operates and affects religious exercise." Little Sisters, 794 F.3d at 1177. In drafting RFRA, Congress specifically chose to use the word "substantial" to modify "burden" in order to exclude de minimis burdens; only great burdens, or substantial burdens, are protected by RFRA. Id. at 1176. With this in mind, we turn to the burden the Accommodations place on the Little Sisters.

While we recognize that the Accommodations may cause a burden sincerely felt by the Little Sisters, this burden is not enough to qualify as a substantial burden. The contraceptive mandate itself, with no accommodation scheme, would cause a substantial burden, as this Court held in Hobby Lobby, 134 S. Ct. at 2779. The Accommodations, however, *relieve* the Little Sisters of this substantial burden by releasing them of their duty to provide their employees with the contraceptive coverage. While the Little Sisters are in a contractual relationship with the parties, it does not necessarily follow that they are complicit in all contraceptive coverage. However, if the Little Sisters feel so strongly about this theory of complicity, they could ask the insurers to outsource the contraceptive portion of the insurance plan to a different party with no

relationship with the Little Sisters. See University of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015). Because unobjectionable options clearly exist for the Little Sisters to avoid monetary penalties, the connection between the Little Sisters and the actual provision of the coverage is too attenuated to be considered a substantial burden.

Were the ACA to cause the Little Sisters to behave in a certain way or perform some action which in itself violates their religious beliefs, this case would turn out differently. However, as the 6th Circuit Court explained, under the Accommodations, "The only difference in conduct is on the part of the insurance issuer or third-party administrator" Mich. Catholic Conf. v. Burwell, 755 F.3d 372, 388 (6th Cir. 2014). Rather than forcing religious nonprofits to act in a certain way, the Accommodations relieve the nonprofits from such actions. Because they do not force the organizations to modify their behavior, they do not impose a substantial burden on the Little Sisters.

Furthermore, the Little Sisters neglect to recognize a significant fact. The Little Sisters are not responsible for their employees' entitlement to contraceptive coverage. The coverage is triggered by the ACA. See E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir. 2015). When the Little Sisters submit an EBSA Form or notify the HHS of their exercise of the accommodation, they do not cause the employees to receive the coverage. "Employees and beneficiaries will receive contraceptive coverage, but that coverage will be 'despite plaintiffs' religious objections, not because of them.'" Michigan Catholic, 755 F.3d 372 at 389 (citation omitted). The employers are a mere link in the chain created by the ACA. By electing the accommodation, the nonprofit entity removes its link from the chain and the other links come together. By removing itself from the process of providing the coverage, any burden placed on the organization is relieved.

Simply filing a form or mailing a notice of objection cannot be the type of burden Congress had in mind when drafting RFRA. The majority of courts have concluded the same. As the 2nd Circuit Court explained, "Cases finding a substantial burden under RFRA have … involved much more significant burdens on religious objectors." Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 219 (2d Cir. 2015). In past cases when this Court has found religions to be substantially burdened, it is because people have been prevented from engaging in their religious practices. (See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 425-26, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006); Holt v. Hobbs, 135 S.Ct. 853, 862 (2015)). These burdens on religious beliefs are much greater than the burdens placed on the Little Sisters herein. In the case at bar, the Little Sisters are free to exercise their religion.

Accordingly, we hold that the Accommodations do not place any substantial burden on religious nonprofit organizations.

2.

Since the Accommodations do not place a substantial burden on the Little Sisters, the analysis is complete and the Accommodations do not violate RFRA. Assuming, arguendo, that the Accommodations do place a substantial burden on the Little Sisters, the next step would be to analyze if a compelling governmental interest is achieved through these means. We find that there is a compelling governmental interest: namely, providing women full healthcare coverage.

It is well established that one of the primary concerns of our government is the health and safety of the people. When creating the ACA, Congress specifically found that more people would take advantage of preventive services if they were provided as part of their general healthcare plans provided by their employers. It naturally follows that requiring employers to

include this type of coverage in their healthcare plans would improve the public health. Therefore, there is a compelling governmental interest in requiring employers to provide full healthcare coverage to their employees.

To apply this general sentiment to the specific services set out in the ACA, we need look no further than my dissent in Hobby Lobby:

> …the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain.

Hobby Lobby, 134 S. Ct. at 2787 (Ginsburg, J. dissenting) (citations omitted). It is undeniable that the contraceptive coverage promotes the public health, and is thus a compelling interest.

While the majority in Hobby Lobby did not explicitly hold that the government's interest in providing women full healthcare is compelling, they assumed as much. Justice Kennedy, in his concurrence, went further than the majority. He held that the government sufficiently demonstrated that their interest is compelling. Id. at 2785 (Kennedy, J. concurring). In line with these views, we expressly find that providing women full healthcare is indeed a compelling governmental interest.

3.

Finally, assuming arguendo that we need to address the last prong of the RFRA standard, the Accommodations are indeed the least restrictive methods of accomplishing the compelling governmental interest.

The ESBA Form does not require much information. In fact, it only requires the bare minimum of information necessary to provide the coverage mandated by the ACA. This accommodation could not possibly be any less restrictive if it is still to be effective. Further, even if a nonprofit finds the EBSA Form too outrageous, the group can choose to forego the EBSA Form and instead simply notify the HHS of its election to take the accommodation. We cannot think of any less restrictive method through which the government can achieve its goals.

In Hobby Lobby, this Court used the EBSA Form accommodation as an example of a less restrictive means of providing the contraceptive coverage. The Court stated that the accommodation was an alternative to providing the full coverage which has a greater respect for religious liberty. Id. at 2759. Further, the Court went on to say that the effect of this accommodation on women "would be precisely zero." Id. at 2760. Since that decision, this Court has gone a step even further in respecting religious liberty by implementing the Wheaton accommodation. Today, we are following the Hobby Lobby decision by finding that the Accommodations are indeed the least restrictive means of implementing the compelling governmental interest.

Justice Scalia's dissent suggests that the HHS should fully exempt all religiously affiliated nonprofit organizations from the contraceptive mandate of the ACA, just as houses of worship are exempt. To fully exempt all religious nonprofits would be both too costly and impractical. First, if it were the government's obligation to provide the coverage directly for all such employees, the burden on the government would be tremendous. Second, if we adopt Justice Scalia's stance, then it is quite predictable that the next case will be a challenge from a for-profit corporation eligible for the Accommodations seeking to be fully exempt. If this Court continues to allow more and more groups to be fully exempt from the ACA, we would be

undermining Congress's goal in enacting the ACA in the first place. It is not the Court's place to rewrite the Act. Not every group claiming a religious burden can be fully exempt; the line must be drawn somewhere in order for the ACA to work. We believe that the Accommodations available to religious nonprofits, such as the Little Sisters, strike the appropriate balance.

B.

In addition to their RFRA claim, the Little Sisters also raise a constitutional argument. They argue that by extending the exemption only to churches and their auxiliaries, the Accommodations violate the Establishment Clause of the First Amendment. However, the law has been making this distinction in many areas for years. Therefore, this claim is dismissed.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I (Lexis 2015). This clause was written into the Constitution to prevent the entanglement of church and state, including the prevention of government from interfering in church matters. Under the Establishment Clause, the government cannot set guidelines for churches or discriminate against or in favor of one religion over another. There must be a clear wall of separation between church and state. See Everson v. Bd. of Educ., 330 U.S. 1, 67 S.Ct. 504 (1947).[1]

The Little Sisters argue that HHS is discriminating among nonprofit religious employers by fully exempting some groups but merely providing the Accommodations to others. The Little Sisters fail to recognize that the distinction made by the HHS is a long-standing differentiation made in various areas of law, such as taxation and employment discrimination. It is a widely

[1] See Construction and Application of Establishment Clause of First Amendment -- U.S. Supreme Court Cases, 15 A.L.R. Fed. 2d 573, 19 (1978). Ginsburg's jurisprudential history demonstrates that she supports a "wall of separation" approach to determine whether the Establishment Clause has been violated.

recognized notion that organizations whose primary purpose is religious should be treated differently than other groups, even if the other groups also have religious ties. Were the government to interfere, condone, or promote any or all religions, that would give rise to a valid Establishment Clause claim. However, we see no indication here that the HHS is violating the wall of separation between church and state, and thus the HHS is not acting in violation of the Establishment Clause of the First Amendment.

Under the Internal Revenue Code, certain nonprofit organizations are exempt from taxation. It is not a requirement to be exempt that these organizations are religious, but a category of exempt nonprofits are those established for religious purposes. See 26 U.S.C. § 501(c)(3) (Lexis 2015). This exempt category does not include all religiously affiliated nonprofit organizations; rather, it only includes those which are formed for religious *purposes.* Thus, nonprofit organizations which have religious ties but are not organized for primarily religious purposes, such as places of worship, are not exempt. This is de facto the same rule which the ACA sets out. Since the courts have never been concerned that the IRC is in violation of the Establishment Clause, there should be no concern that this same distinction is made in a different context.

Similarly, Title VII of the Civil Rights Act of 1964 has an exemption for religious groups. See 42 U.S.C.A. § 2000e-1(a) (Lexis 2015). Title VII was enacted to eliminate discrimination in employment based on categories such as race, religion, age, and gender. Section 702 provides an exemption from religious discrimination for religious organizations. However, not all organizations with religious ties are automatically exempt. To qualify as an exempt religious organization, the group must have a "purpose and character [which] are primarily religious." EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988). In

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, this Court specifically held that this line drawing, this Title VII exemption, did not violate the Establishment Clause. The ACA, by fully exempting places of worship but not exempting other religious organizations, draws a line, just as Title VII draws a line. As our brethren held in Amos, we too hold that this type of line drawing is not in violation of the Establishment Clause.

If this Court chose to adopt the reasoning advanced by the Little Sisters and did fully exempt all groups claiming to object on religious grounds, the government would never be able to enact any measure disfavored by any group with religious views, for every organization could claim to be exempt on religious grounds. This Court has never endorsed a blanket exemption for all religiously tied organizations in any context, and we refuse to do so now. Again, the line must be drawn somewhere, and Congress's choice to draw that line in the same way it has been drawn in other areas of law is not unconstitutional.

In the past, the only times this Court has found Establishment Clause violations when the State has drawn a line among religious organizations have been when preference is given to certain denominations but not others. As this Court explained in Larson v. Velente, 456 U.S. 228 (1982), there is an underlying "principle of denominational neutrality" within the Establishment Clause. Id. at 246. This principle is violated whenever a government does not treat all religious denominations in the same manner. The ACA does not make any distinctions between denominations, nor do the Little Sisters contend it does. Since there has been no improper denominational line drawing, there has been no Establishment Clause violation.

Further, no U.S. Circuit Court of Appeals has found an Establishment Clause violation within the accommodation scheme, including the 8th Circuit. See Sharpe Holdings, Inc. v. HHS,

No, 14-1507, 2015 WL 5449491 (8th Cir. Sept. 17, 2015). We will not upset this longstanding precedent and agreement of the circuits with our decision today.

For the foregoing reasons, the Accommodations stand.

Justice Kennedy, with whom Justice Breyer joins in Part I, concurring in the judgment[2]

I.

While I agree with the final result of the majority opinion, I wholly disagree with the rationale used to get there. Requiring nonprofit religious organizations to file an EBSA Form or to notify the HHS of their objection does impose a substantial burden on these groups. Echoing the majority in Hobby Lobby, I made clear in my concurrence that the government's interest in the contraceptive mandate of the ACA is compelling. Today I expressly hold that the government's interest in providing women with full health coverage is indeed compelling. While the EBSA Form was not the least restrictive means of serving this interest, the accommodation set out in Wheaton, 134 S. Ct. 2806, is the least restrictive means of serving the compelling governmental interest. Because the interest is so compelling and the least restrictive method is being used to promote this interest, the burden is justified. As such, RFRA is not violated.

II.

To address the Little Sisters' claim that the Accommodations violate the Establishment Clause, I invoke the coercion test set out in my concurrence in County of Allegheny v. ACLU, 492 U.S. 573 (1989). Under this coercion test, the "government may not coerce anyone to support or participate on any religion or its exercise." Id. at 627. Whenever the government coerces people to believe in certain religious beliefs or participate in certain religious practices,

[2] Breyer's jurisprudence on the Establishment Clause illustrates that he believes a multitude of factors should be taken into consideration when determining whether that Clause has been violated. Coercion is one such factor, but it is not the end all be all in his eyes. See Good News Club v. Milford Central School, 533 U.S. 98, 127 (2001); Van Orden v. Perry, 545 U.S. 677, 698 (2005).

the Establishment Clause is violated. This theory of coercion was made clear in Lee v. Weisman, 505 U.S. 577 (1992). In that case, the questionable action was a prayer recitation at a public school graduation. We held that while the students were not physically coerced into participating in the prayer, such as requiring them to recite the prayer or stand up for it, the prayer did cause psychological coercion. When children are surrounded by their peers, parents, and teachers, they can be easily pressured into conforming to the school's religious practice (the practice in this instance being the prayer). "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." Id. at 596. The Establishment Clause was violated because the students were coerced into participating in a religious practice.

The case at bar can be easily decided when applying the coercion test. No reasonable person would think that the act of providing women healthcare is a religious exercise. The ACA does not require anyone to believe in a certain religion. Similarly, the Accommodations do not coerce the Little Sisters, legally or psychologically, to participate in a religious practice. However, the Little Sisters do not even make such an argument. The Little Sisters contend that the Establishment Clause violation stems from the government's distinction between houses of worship and other types of religious nonprofits. In this way, the Little Sisters misinterpret and misapply the Establishment Clause. Since the Accommodations are in no way coercive, they do not violate the Establishment Clause.

For the foregoing reasons, I concur in the result.

Justice Scalia, joined in whole by Justice Alito and Justice Thomas, joined in parts I and III by Chief Justice Roberts, dissenting

The majority's decision today takes a step backwards from our country's founding principal of tolerance towards religious freedom and goes directly against our decision in Hobby Lobby. Therefore, I respectfully dissent from the majority's ruling.

I.

The majority contends that there is no substantial burden placed on nonprofit religious organizations thanks to the accommodation system. However, it is not the Court's role to decide whether a group feels a burden on their religious conscience. The Court may only determine whether the belief is sincere, not whether it is valid. See Thomas v. Review Bd., 450 U.S. 707 (1981). On this point, the majority has already conceded that the Little Sisters' belief that the Accommodations place a substantial burden on them is sincere. This should be the end of the analysis. But, the majority goes on to hold that the link between the Little Sisters and the actual providence of contraceptives is too attenuated to be considered a substantial burden. This goes absolutely against the central holding of one of the most important cases in this jurisprudence: Thomas, 450 U.S. 707. In that case, this Court held that the court cannot decide at what point a worker's involvement becomes objectionable; yet that is exactly what the majority is doing today. The Court is overstepping its boundaries and creating a frightening precedent: one where a court may ignore a citizen's sincere religious belief when applying a statute created for the purpose of protecting that sincere religious belief. Furthermore, the fact that Congress has exempted some religious groups and has provided this accommodation scheme implies that they

understood that the ACA would impose a burden on religious groups. If the interest is as compelling as the HHS insists, then it must be only a substantial burden that could cause them to exempt and accommodate some groups.

The Little Sisters claim their burden is caused by the choice the Accommodations force them to make: They must choose between betraying their religious convictions and paying a large monetary penalty for not providing the coverage. This monetary burden is comparable to the burden felt by Hobby Lobby. In Hobby Lobby, 134 S. Ct. 2751, this Court found that the imposition of these pecuniary penalties did cause a substantial burden. To hold that in Hobby Lobby a monetary burden was enough to qualify as a substantial burden under RFRA but that the same burden in this case is not enough is utter jabberwash. The majority claims to honor this Court's precedent, yet their holding today suggests otherwise.

II.

The majority goes on to hold that the interests asserted by the ACA are compelling. As the majority assumed in Hobby Lobby, I too will assume that the interest is compelling, for *I* respect the precedent this Court sets forth. However, I will note that the interest cannot be all that compelling, considering Congress has already worked exemptions into the ACA. If it was THAT compelling, there would be no exemptions.

III.

The Accommodations are not, as the majority holds, the least restrictive means to accomplish the government's compelling interest. The majority in this opinion attempts to use the majority opinion in Hobby Lobby to support its holding and in doing so, turns the Hobby

Lobby opinion on its head. While Justice Alito did say that the EBSA accommodation "provide[s] greater respect for religious liberty," he did not say that the accommodation is the least restrictive means, or that it does not impose a substantial burden on religious groups. In fact, he made it very clear in his opinion that he was specifically not making any finding with respect to the effect of the Accommodations on the religious nonprofits. Id. at 2782.

There exists a very obvious less restrictive method to enforce the ACA – let the government handle it. Churches and their auxiliaries are wholly exempt from providing the contraceptive coverage. There is no sufficient reason why this exemption cannot be extended to religiously affiliated nonprofit groups. Churches are exempt because the government recognizes that asking them to provide the coverage would be too great a burden on their religious consciences. This very same logic extends to religious nonprofits. The nuns of the Little Sisters have devoted their lives to the Catholic faith and for what it stands. Surely, the HHS and the majority cannot mean that nuns are lower on the totem pole of religion than priests or rabbis; yet that is exactly what their ruling is implying. I cannot, in my good conscience, stand for such a contention.

Because RFRA has been violated so egregiously, there is no need to address the Establishment Clause argument. Enough damage has been done to this Court's precedent and this country's history to warrant a reversal on statutory grounds.

Accordingly, I would hold that the Accommodations offered to religious nonprofit organizations violate RFRA.

Chief Justice Roberts, dissenting

I have joined in part with Justice Scalia's dissent. However, I would come to a very different conclusion on the issue of whether the interest promoted is compelling.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, (2006), this Court faced a RFRA challenge to a ban on a drug used in a religious ceremony. The Court held that the prohibition placed a substantial burden on the church's free exercise of religion. We then went on to find that the interest underlying the general prohibition on the drug was not compelling enough to outweigh the substantial burden on the group. Specifically, the Court stated that "Congress' determination that [the drug] should be listed [in the Controlled Substance Act] simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." Id. at 432. The fact that the drug was named in the Controlled Substance Act ("CSA"), 21 U.S.C.S. § 812(c) (Lexis 2015), was not sufficient proof that the government had a compelling interest in prohibiting this religious group from using the drug in their ceremonies.

To this end, the Court also pointed out that there was already an exemption in place for the religious use of a drug otherwise prohibited under the CSA: Peyote. The Court explained that "It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" Id. at 433, quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993), quoting Florida Star v. B.J. F., 491 U.S. 524 (1989). The Court reasoned that if an exemption existed under the statute to relieve some groups of the burden, the government's need to impose the substantial burden upon other groups could not be

all that compelling. In light of these reasons, the Court held that RFRA allowed the religious group to use the drug in their religious rituals notwithstanding the CSA.

In the case at bar, the HHS maintains that it has a compelling interest in providing preventive healthcare to women. However, one cannot assume that the interest is compelling just because the preventive healthcare is included in the ACA. The HHS has the burden of showing that there is a compelling interest in requiring the Little Sisters in particular to partake in the contraceptive mandate. The HHS has not met this high standard. Furthermore, exemptions do exist to the contraceptive mandate. As in O Centro, 546 U.S. 418, the fact that numerous religious employers (all churches, synagogues, temples, mosques, and their auxiliaries throughout the entire nation) are fully exempt necessarily leads to the inference that this interest is not a highly compelling interest; for if it was, such a broad category would not be exempt.

In conjunction with parts I and III of Justice Scalia's dissent, I too dissent from the majority opinion and would hold the Accommodations invalid under RFRA.