# Materials for Reunion Session on Democracy and the First Amendment

Burt Neuborne

This session will explore the love-hate relationship that exists between American Democracy and the Supreme Court’s construction of the modern First Amendment. All agree that the free flow of political speech is crucial to the proper functioning of democratic choice. We all remember Justice Holmes’ celebration of a “free market in ideas” as necessary for the proper functioning of democracy. Intense protection of political speech makes the First Amendment democracy’s friend. But, as construed by the current Supreme Court, the First Amendment can also function as democracy’s dysfunctional parent – stifling one day; absent the next. Witness the Court’s failure to protect voting as a First Amendment right, leading to current nationwide efforts to disenfranchise poor voters of color; its failure to develop a First Amendment theory of fair representation, resulting in massive partisan gerrymandering; and the Court’s appalling campaign finance jurisprudence that makes a mockery of political equality.

I plan to summarize the current relationship between democracy and free speech and suggest ways to improve the current system.

Much of the material covered in this session is discussed in greater detail in Burt Neuborne: **Madison’s Music: On Reading the First Amendment** **(The New Press 2015)**, available on Amazon.

The enclosed book review in *Judicature* thoughtfully summarizes the main themes of **Madison’s Music.**

For an overview of the relationship between Democracy and the First Amendment, see Burt Neuborne, *Felix Frankfurter’s Revenge: An Accidental Democracy Built by Judges*, 35 NYU Rev. L. & Soc. Change, 602 (2011) (available on Internet).

To hone your First Amendment chops for our discussion, I enclose a summary of last term’s First Amendment cases.

**First Amendment Cases – 2019 Term**

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## A. Free Speech Cases

## Overview

Compared with the term’s Religion Clause cases, discussed below, the term’s six Free Speech cases provide slim pickings. Taken as a whole, they seem to indicate a reluctance to push the boundaries of existing, highly protective free speech doctrine.

### United States v. Sineneng-Smith

### No. 19-67

This case arises out of what appears to be an ugly scam foisted on the Philippine immigrant community in San Jose, California. The defendant is an immigration consultant (not a lawyer) serving low income Philippine immigrants, many of whom worked without immigration authorization as home health aides. For a fee of approximately $6,000, Sineneng-Smith offered to file applications for labor certification as the first step to achieving permanent resident status. Such a program did exist for one year, ending in 2001. Knowing that the program had ended in 2001, Sineneng-Smith continued to accept fees for filing applications she knew to be hopeless until 2008, collecting $3.3 million from her clients.

She was indicted for tax fraud, wire fraud, and three counts of violating 8 U.S.C. 1324, making it a felony to:

…encourage or induce an alien to come to, enter into, or reside in the United States

knowing or in reckless disregard of the fact that such coming to, entry, or residence

would be in violation of law.”

At the District Court, the defendant argued that the statute, properly construed, did not cover filing futile applications for people already in the United States. She also denied that they were completely futile, arguing that if Congress reactivated the program, people with labor certificates would be in a favorable position to adjust status. If the statute was construed to bar filing futile administrative applications for people already in the country, she argued that it violated the First Amendment, the Petition Clause, and was unconstitutionally vague. The District Court convicted on two counts under 1324, sentenced her to 18 months on each count, to run concurrently. The tax fraud and wire fraud sentences also ran concurrently.

After oral argument in the 9th Circuit, at which the District Court arguments were repeated verbatim, a bright clerk must have alerted the judges to the potential for 1324 to be used against immigration advocates seeking to aid persons who are in the country without documents. Read literally, 1324 could apply to a grandmother urging her undocumented grandson to stay in the country. The panel directed re-argument, and appointed three amici – the Federal Defenders, the Immigration Defense Project, and the National Lawyers Guild - to brief the overbreadth issues. Not surprisingly, on re-argument, defendant’s counsel adopted the amici’s position on overbreadth. The 9th Circuit then delivered a classic overbreadth opinion, invalidating 1324 on its face because it purported to bar substantial amounts of protected speech, thus delivering a windfall to Sineneng-Smith, whose exercise in consumer fraud was not protected by the First Amendment. (I assume the windfall would have been reduced by a re-sentencing on remand on the tax fraud and wire fraud counts).

When the Supreme Court granted cert, observers expected a major opinion on the First Amendment overbreadth doctrine. The Roberts’ Court had deployed the doctrine aggressively to void statutes facially when the text purported to ban both protected and unprotected speech. I don’t want to count the number of times I’ve argued, often successfully, that a statute was facially void as unconstitutionally overbroad because it could be used against Romeo and Juliet, even though my client’s speech might be unprotected. But the Court ducked. Instead of confronting the overbreadth issue, Justice Ginsburg, writing for a unanimous Court, rebuked the 9th Circuit for violating the principle of “party presentation” that allows the parties, not the court, to shape the legal issues for decision. By *sua sponte* wresting the case from Sineneng-Smith’s “competent” counsel, and shifting its emphasis from the “self-regarding” vagueness argument of failing to provide adequate notice to the in-court defendant, to the “other-regarding” argument of facial overbreadth, designed to protect third-parties, the 9th Circuit had engaged in an abuse of discretion. The 9th Circuit opinion was vacated, and the case remanded for yet another re-argument.

What will happen when Sineneng-Smith’s lawyer stands up and insists on making an overbreadth argument on remand? Has she waived the overbreadth issue by failing to raise it at the District Court and at the first oral argument? Is Justice Ginsburg correct in arguing that the vagueness doctrine is strictly self-regarding? Isn’t an unconstitutionally vague statute regulating speech both a threat to the in-court defendant, and to out- of-court third persons who will refrain from speech because they fear the reach of a vague statute? Are vagueness and overbreadth such watertight compartments?

Justice Thomas, once a staunch supporter of First Amendment overbreadth, filed a concurrence agreeing that the 9th Circuit had abused its discretion, but going further to urge a full-scale reconsideration of the doctrine. Thomas argues that First Amendment overbreadth is not supported by the constitutional text, violates the rule against relying on someone else’s rights, and poses serious standing issues.

### U.S. Agency for International Development v. Alliance for Open Society, Int’l

### No. 19-177

This case is a triumph of formalism over functionalism. In 2003, Congress enacted a multi-billion world-wide program to combat AIDS/HIV, tuberculosis, and malaria. 22 USC 7601 et seq. The program is administered largely by public health organizations organized in the United States who receive USAID grants for work abroad, often in partnership with indigenous institutions. Often, the United States organization is obliged by local law to operate through a local affiliate organized under the laws of the host country. Authoritarian regimes often use such an “in-country” restriction to impose a degree of control over the programs. Often, the United States organization voluntarily elects to work closely with local institutions with a greater knowledge of local conditions. The program has been a great success, constituting the largest American foreign aid program since the Marshall Plan.

From the beginning, grantees have been subject to two conditions: (1) a probation on using any USAID funds to advance prostitution or sex trafficking; and (2) a duty to have a policy explicitly opposing prostitution and sex trafficking. No grantee has challenged the first restriction. The policy requirement has, however, elicited sustained objection from groups arguing that it is impossible to gain the trust and confidence of prostitutes (a major source of infection) while simultaneously calling for criminalization of prostitution. In AID v. AOSI, Int’l, 570 U.S. 205 (2013), the Court struck down the policy requirement as applied to American grantees. The Court reasoned that eligibility to participate in a government-funded program could not, consistently with the First Amendment, be conditioned on agreement with a government policy. The issue in this case is whether the 2013 case shields local affiliates of American grantees from being forced to adopt policies favoring the criminalization of prostitution as a condition of receiving USAID funds.

Five Justices, speaking through Justice Kavanaugh, ruled that local affiliates of American public health organizations were fully-separate foreign legal entities that lacked First Amendment rights. The majority rejected the argument that the American organizations suffered a cognizable First Amendment harm because they would necessarily be associated with the policies issued by their wholly-controlled local affiliates, noting that misattribution cases like *Hurley v. Irish-American Gay, Lesbian, and Bi-sexual Group of Boston,* U.S. 515 (1995).almost always involve government-imposed coercion. Thus, reasoned Justice Kavanaugh, the decision rests on “two pillars” of American law – our deep commitment to recognizing the separate legal nature of closely-linked corporate affiliates; and the fact that foreigners do not enjoy the extra-territorial protection of the United States Constitution.

Justice Breyer dissented, joined by Justices Ginsburg and Sotomayor. Justice Kagan, who had worked on the issues prior to her appointment, recused herself. Justice Breyer argued that it was impossible to ignore the likelihood that an affiliate’s policies will be attributed to a corporate parent. He questioned Kavanaugh’s insistence that we never ignore intra-corporate lines, especially in anti-trust settings. He also questioned the blanket assertion that foreigners lack rights under the United States Constitution, noting that it remains an unanswered issue in many contexts.

### Barr v. American Ass’n of Political Consultants

### No. 19-631

In *Sineneng-Smith*, the Supreme Court balked at an effort by lawyers to use the overbreadth doctrine to invalidate a statute on its face. In *Barr*, the Court balked at an intellectually similar effort to use the First Amendment equality doctrine to knock out a federal statute.

The Telephone Consumer Protection Act of 1991 banned virtually all robocalls to cell phones. In 2015, Congress amended the statute to permit robocalls by people seeking to collect U.S. debt, or U.S. guaranteed debt. The amended statute was challenged by political consultants who wanted to use robocall. Plaintiffs argued that the statute treated speakers differently on the basis of content in violation of the First Amendment. The Supreme Court has long held that unequal treatment of speakers on the basis of content is unconstitutional unless the differential treatment satisfies “strict scrutiny.”

The District Court upheld the statute, finding that the United States had a compelling interest in enforcing its debts. The 4th Circuit reversed, finding the discriminatory treatment of similarly situated speakers to violate the First Amendment. The 4th Circuit ruled, however, that the debt collection exception was severable and that the proper First Amendment remedy was elimination of the exception, not facial invalidation of the statute. A fragmented Supreme Court upheld the 4th Circuit without a majority opinion.

Four Justices (Kavanaugh, Roberts, Alito, and Thomas, for the most part) ruled that the differential treatment of speakers on the basis of content violated the First Amendment because it could not survive strict scrutiny. The plurality agreed that the debt collection exception was severable and that the proper remedy was to strike down the exception, rather than invalidating the entire statute. Ironically, therefore, the result of the successful First Amendment challenge is to lessen the amount of permitted speech.

Justice Sotomayor provided the fifth vote by holding that the differential treatment was subject to intermediate, not strict scrutiny; but that the government could not satisfy any form of heightened scrutiny because the exception was not narrowly tailored to advance a significant government interest. She agreed with the plurality on severability and remedy.

Three Justices (Breyer, Kagan, and Ginsburg) would have upheld the differential treatment because the commercial nature of the regulation did not call for strict scrutiny. Instead, Justice Breyer argued that content-based differences in commercial regulations generally require a form of energized review closest to intermediate scrutiny, but not requiring the use of least drastic means. They agreed, though, that if the debt collection exception is deemed unconstitutional, severability and a narrow remedy of striking the exemption is most appropriate.

Justice Gorsuch, writing for himself on the merits, and joined by Justice Thomas on the issue of remedy, applies strict scrutiny to what he characterizes as discrimination against political speakers wishing to use robocalls. He argues that the massive invasion of privacy tolerated by permitting huge numbers of debt collection calls in connection with government debt, or government guaranteed debt renders it impossible to defend a ban on political robocalls. The appropriate remedy, he argues, is to protect the disfavored political speakers by enjoining the statute’s use against them. The Court’s severability ruling, argues Gorsuch, harms debt collectors without giving them a chance to defend themselves, provides no meaningful relief to the plaintiffs, and has the anomalous effect of rewarding plaintiffs who win a First Amendment case with a remedy allowing less speech.

### Chialfo v, Washington

### Colorado Dep’t of State v. Baca

The Court was unanimous in upholding the right of states to require electors to pledge to support a given Presidential candidate, remove “faithless” electors who refuse to honor the pledge, and impose sanctions for failure to comply with the pledge. Thirty-two states currently have enacted pledge requirements; 15 provide for sanctions to enforce the pledge. In *Ray v. Blair*, 343 U.S. 214 (1952), the Court had upheld the pledge requirement, but had reserved decision on how to enforce it.

Justice Kagan, writing for seven Justices, found that the broad language of Article II, sec. 1, cl. 2 granting state legislatures the power “as the legislature may direct” to select Presidential electors provided state legislatures with the power to require pledges and to enforce them. Justice Kagan notes that the Founders may have subjectively assumed that electors had a right to cast an independent ballot, but also notes that they ‘failed to reduce their thoughts about Electors’ discretion to the printed page.” Justice Kagan rejected the argument that the Founders’ use of the terms “electors,” “vote,” and “ballot” in the constitutional text to describe the actions of electors connoted the right of electoral choice. She noted that the literal meaning of each term was consistent with constrained behavior. Finally, Justice Kagan noted that the overwhelming practice of electors has been to vote for the candidate to whom they are linked. While 180 historical examples of faithless electors exist, including one challenged vote counted by Congress, she noted that they were submerged in 23,000 historical votes in accordance with the linked candidate.

Justice Thomas concurred, arguing that the Constitution is silent on the issue of Elector discretion. Accordingly, he argued, the question is controlled by the 10th Amendment, leaving to the states all powers not given to the federal government. Finally, joined by Justice Gorsuch, the Thomas concurrence upheld the use of fines to coerce compliance, but took issue with a state’s power to replace an elector as a means of enforcing the pledge.

### Thompson v. Hebdson (per curiam)

### No. 19-122

Without hearing oral argument, the Court vacated the 9th Circuit’s opinion and remanded to the Circuit to consider whether Alaska’s $500 limit on campaign contributions to candidates and groups violated the Court’s campaign finance jurisprudence. The 9th Circuit had upheld the contribution limit in 2018, declining to be bound by *Randall v. Sorrell*, 548 U.S. 230 (2006) invalidating Vermont’s $400 limit because no opinion had commanded majority support. Instead, the 9th Circuit used its own precedents to uphold the $500 limit as plausibly linked to preventing quid pro quo corruption, or its appearance.

The 9th Circuit’s public spanking in *Sineneng-Smith* may well have been linked to the Circuit’s cavalier treatment of Supreme Court precedent in *Thompson*.

### Carney v. Adams

### No. 19-309

### scheduled for argument next term

The shift to remote oral argument necessitated the re-scheduling of *Carney* to next term. The case involves a First Amendment challenge to provisions of the Delaware Constitution requiring judges sitting on multi-member appellate courts be no more than a bare majority of one of the major parties, reserving the remaining seats for members of the other major party. The Court ultimately dismissed the case on standing grounds

### Fullerton v. City of Philadelphia

### No. 19-123

### Scheduled for argument next term

First Amendment challenge to Philadelphia’s termination of a contract with religiously-affiliated child services agency for refusing to process adoptions for gay couples. Since the challenge is to a city’s action, neither RFRA (which applies only to the federal government), nor the Free Exercise clause is applicable (under existing law, free exercise challenges apply solely to rules intentionally impacting religion), leaving the free speech clause of the First Amendment as the plaintiff’s principal source of law.

## B. Religion Clauses

The real First Amendment action this term took place in the Religion Clauses, and the statutory codification of federal free exercise rights in RFRA. In three significant cases, the Court: (1) ruled that the Free Exercise Clause requires states to provide equivalent opportunities for tuition subsidies for religious schools once it decides to provide tuition subsidies for secular private schools (*Espinoza v. Montana Department of Finance*); (2) broadly excluded many teachers in religious schools from the protection of laws prohibiting discrimination in employment (*Our Lady of Guadalupe School v. Morrissey-Berru*); and (3) upheld the procedural legitimacy of federal regulations authorizing private employers to decline, on the basis of religious conscience, to provide their employees with free medical insurance coverage for contraception (*Little Sisters of the Poor v. Pennsylvania*).

### Espinoza v. Montana Department of Finance

### No. 18-1195

In *Espinosa*, the Montana legislature provided a $3 million Montana state tax credit for contributions to privately-administered scholarship funds designed to assist poor and disabled persons to attend private schools. A single qualifying scholarship fund, the Big Sky Fund, emerged. Most, but not all, Big Sky’s grants went to parents wishing to send their children to religious schools. The Montana Supreme Court treated the tax credits as government subsidies and ruled that tax-subsidized scholarships to attend religious school violated a provision of the Montana Constitution prohibiting taxpayer aid to religious institutions. The Montana Court considered enjoining scholarships for religious schools but concluded that the legislature would wish the entire program terminated if religious schools were excluded. Accordingly, the entire program was declared facially unconstitutional.

Chief Justice Roberts, writing for Justices Thomas, Alito, Kavanaugh, and Gorsuch, reversed the Montana Supreme Court, ruling that Montana’s refusal to provide equivalent scholarship funding to religious schools violated the Free Exercise Clause. The Chief Justice ruled that religious schools had been denied access to the scholarship funds solely on the basis of their *status* as religious institutions, in violation of the equal treatment rule established in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. \_\_\_ (2017) (invalidating the exclusion of religious schools from eligibility for playground funds).

The Chief Justice distinguished *Locke v. Davey*, 540 U.S. 714 (2004), upholding Washington’s refusal to permit state scholarship funds to be used to fund theological training of pastors, holding that *Locke* turned on the religious *use* to which the funds were to be put (funding education of clerics), as opposed to the religious *status* of the institution benefitted by the funds. Since *Espinoza* pre-dated the Court’s opinion in *Guadalupe* recognizing that most parochial school teachers fall within the “ministerial exemption” from Title VII because they are expected to teach religion, he was not called up to explain in *Espinoza* whether funding a parochial teacher’s salary, when the teacher was expected to teach religion, rendered the “use” of the Montana scholarship funds closer to *Locke* than to *Trinity-Lutheran*.

Justice Gorsuch joined the Roberts’ majority, but disagreed with the majority’s emphasis of the difference between *status* and *use*. The Gorsuch concurrence argues that the distinction is irrelevant, since the Free Exercise clause would forbid discrimination on the basis of use, as well as status. Tellingly, his only cite to *Locke v. Davey* is to Justice Scalia’s dissent. It appears that Chief Justice Roberts was not prepared to overturn *Davey* or to seek to distinguish between educating clerics in *Davey* and subsidizing the teaching of religion in post-*Guadalupe* cases involving religious schools. As it stands, today, there are five votes barring discrimination on the basis of religious status; but only one on the basis of religious use.

Justice Thomas joins the Roberts’ majority opinion, but concurs far more broadly, arguing that the *Establishment* Clause does not apply to the states.

Justice Alito also joins the Roberts’ majority but argues, as well, that Montana’s unyielding ban on aid to religious institutions is a holdover from 19th century anti-Catholic bias that drove the adoption of the Blaine Amendments. He argues that if racism drains a statute of legitimacy, anti-Catholic bias should drain the Blaine Amendments of legitimacy, as well.

Justice Ginsburg, joined by Justice Kagan, dissented, arguing that the case was closer to *Locke* than to *Trinity Lutheran* and that the Free Exercise Clause should not be read as forcing states to subsidize religious institutions. She argues, as well, the decision of the Montana Supreme Court to terminate the entire program eliminated any possible discrimination, rendering it unnecessary to consider the Free Exercise issue. The Chief Justice responded by insisting that it was necessary for the Montana Court to reject the Free Exercise challenge in the first place in order to have invalidated the entire program under the state constitution.

Justice Breyer dissented, arguing that the Court should recognize the tension between the Free Exercise and Establishment Clauses and recognize a state’s power to act in good faith to avoid Establishment Clause problems without violating the Free Exercise Clause.

Justice Sotomayor’s dissent argues that the decision of the Montana Supreme Court to eliminate the program ended any live federal controversy; and that *Trinity Lutheran* was wrongly decided and should not be expanded. The Chief Justice’s response to the live federal issue question was to stress that invalidation by the Montana Court did not remove the statute from the books, so that the effect of the U.S. Supreme Court’s Free Exercise decision is to reinstate everyone’s eligibility for the program.

### Our Lady of Guadalupe School v. Morrissey-Berru

### No. 19-267

In *Kedoff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952), the Supreme Court recognized that the Free Exercise Clause restricts the power of the government to intrude on the governance and doctrinal independence of houses of worship. In *Hossanna-Tabor v. Evangelical Church and School v. EEOC*, 565 U.S. 131 (2012), the Court drew on the principle of religious governance autonomy to recognize a “ministerial exemption” from the reach of Title VII for a teacher in a religious school with the title of Minister who had undergone substantial theological training and whose duties included providing substantial theological guidance and pastoral care to her students.

In *Our Lady of Guadalupe School*, Justice Alito, writing for seven members of the Court (Roberts, Thomas, Alito, Kavanaugh, Gorsuch, Breyer and Kagan), expanded the “ministerial exemption” to cover many, perhaps most teachers in religious schools, as long as they engage in substantial activities connected to the teaching of religion. Since the standard contract governing teachers in religious schools often includes elements of religious instruction and personal mentoring, the potential effect of *Guadalupe* is to strip virtually all teachers in religious schools of protection under Title VII, and an unknown set of other statutory protections. Moreover, since the ministerial exemption rests on an interpretation of the Free Exercise Clause, it is unclear whether Congress can modify the result.

Justice Thomas concurred, joined by Justice Gorsuch, urging courts to defer to the judgment of religious institutions as to whether a given employee was important enough to the church’s faith-based mission to qualify for a “ministerial exemption.” Under the majority’s approach, courts retain the power to make factual findings on an employee’s interaction with religious duties. In *Guadalupe*, each plaintiff taught elementary religious courses, prayed with students, and counseled them on religious issues.

Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that the minimal connection with religious instruction performed by the plaintiffs did not warrant exempting them from protection against alleged age discrimination and being fired because of contracting breast cancer. The dissenters argued that *Hossanna-Tabor* had established a careful test to screen for teachers playing a leadership role in providing religious instruction and worship assistance to students in religious schools. They charged the majority with converting such a careful fact-based test into a delegation of authority to religious employers to exempt their employees by assigning them duties with minimal religious significance.

At the close of her dissent, Justice Sotomayor notes the anomalous relationship between *Espinoza*, where religious institutions successfully invoked principles of equality to require funding from the government, and *Guadalupe*, where the same religious institutions demand an exemption from the ban on discriminating on the basis of age, sex, and race in the hiring and firing of many thousands of employees. There is, I believe, an even more profound tension between *Espinoza* and *Guadalupe*. Title VII was intended primarily to redress discrimination in the private sector. Public employees were already protected by the Equal Protection Clause. To the extent *Espinoza* forces governments to fund religious schools, the government funds almost certainly carry with them the equality protections of the 5th and 14th Amendments. While it is conceivable that the legal gymnastics of the majority in *Guadalupe* may exempt teachers in private religious schools from the reach of Title VII, I think it inconceivable that a “ministerial exemption” exists to the 14th Amendment. Until now, no privately-funded religious school would run afoul of the 14th Amendment because of the “state action” doctrine. In a world governed by *Trinity-Lutheran*,as expanded by *Espinoza*, where governments must fund religious groups to the same extent as comparable secular institutions, religious groups will soon find themselves enmeshed in questions of whether they can use their new-found government largesse in discriminatory ways in carrying out governmentally-funded activities. Indeed, if religious schools insist on acting in a discriminatory matter, private religious schools may lose their equal right to public funding under *Espinoza*. After all, in *Bob Jones University v. U.S.*, 461 U.S.574 (1983), the Court upheld denial of tax-exempt status to a religious school that insisted on using its insulated status to discriminate. *Fullerton v. City of Philadelphia*, scheduled for next term, may turn on precisely that issue.

### Little Sisters of the Poor v. Pennsylvania

### No. 19-431

Ironically, the religion case with the largest immediate impact is the least interesting legally, at least at this stage. *Espinoza* holds out the prospect of dramatic increases in funding religious institutions to perform secular tasks, but it applies only in the relatively rare settings where government seeks to impose restrictions on religious funding that go beyond the requirements of the Establishment Clause.

*Guadalupe* potentially withdraws Title VII protection from the nation’s 100,000 parochial-school teachers but the case is fact-bound. It remains unclear how many teachers will actually fall under its coverage.

*Little Sisters*, on the other hand,has the immediate impact of denying cost free employee health insurance for contraception under the Affordable Care Act (ACA) to an estimated 126,000 previously covered women, many of whom are unable to afford substitutes. As initially enacted, the ACA required cost-free employee medical insurance for preventive health measures, delegating the precise definition of covered preventive health measures to a group of administrative medical experts. The administrative experts included contraception as a preventive technique, but eventually provided a narrow accommodation to churches, authorizing them notify their insurance carriers of a desire to opt out of providing contraception insurance. Under the original accommodation, once the relevant insurance carriers were notified, the insurance carriers grudgingly agreed to provide cost-free, seamless contraception coverage to the affected employees.

The initial effort at religious accommodation was attacked on two levels. First, confining it to institutions of worship was deemed too narrow, failing to cover religious non-profits like Little Sisters. Second, it was deemed, by some, unduly intrusive, requiring religious dissenters to execute documents and otherwise facilitate ultimate coverage, rendering them “complicit” in the ultimate coverage.

While the dispute over the adequacy of the first accommodation was percolating, the Supreme Court decided *Hobby Lobby v. Burwell*, 573 U.S. 682 (2014), ruling that RFRA compelled an extension of the church/religious non-profit accommodation to private employers (including closely-held family corporations), enabling them to opt out of contraception coverage by notifying their insurance carrier to provide seamless coverage to the affected employees at no cost. Indeed, Justice Alito stressed that *Hobby Lobby* entailed a “costless” way to respect religious conscience. Once *Hobby Lobby* was decided, negotiations continued on procedures allowing employers to opt out of paying for contraception coverage without deeming themselves complicit in the resulting grant by their insurance carrier of cost-free contraception coverage to their employees.

In 2016, the clock ran out on the Obama administration’s efforts to forge an acceptable opt out mechanism. In 2018, the Trump administration issued regulations exempting any covered employer from any ACA duty to provide cost-free contraception coverage if such coverage violated the employer’s religious or moral scruples. Unlike the initial accommodation, the Trump administration version of the exemption regulations did not trigger seamless, cost-free coverage for affected employees by the employer’s insurance carrier. The regulations simply exempted the covered employer from a legal duty to provide contraception insurance. Under the regulation, an estimated 126,00 affected women lost cost-free contraception coverage and became personally responsible for the cost of restoring it.

The lower courts issued a nationwide injunction against the exemption regulation, rejecting the argument that the ACA authorized administrative agencies to grant religious exemptions from coverage and finding that RFRA did not require the exemptions. In *Little Sisters of the Poor*, seven Justices upheld the authority to promulgate the administrative regulation and rejected challenges to its procedural legitimacy. Justice Thomas wrote for a five Justice majority (Thomas, Roberts, Alito, Kavanaugh, and Gorsuch), upholding the authority of the administrative agency to provide for exemptions from coverage. He reasoned that the grant of broad authority to the agency to define the precise scope of the preventive medical measures covered by the ACA in the first place carried with it the authority to issue regulations granting exceptions to coverage. The majority found it unnecessary to decide whether the religious exemptions were required by RFRA.

Justice Kagan, joined by Justice Breyer, agreed that the administrative agency had power to issue regulations granting the exemption, but only because they applied *Chevron* deference to the agency’s construction of its power under the ACA. Justice Kagan noted that, on remand, the exemption regulation was vulnerable to challenge as “arbitrary and capricious” because it seemed broader than necessary to deal with the religious objections of most employers; applied to publicly-held corporations; and covered non-religious moral scruples.

Justice Alito, joined by Justice Kavanaugh, concurred, arguing that the religious exemptions were both authorized by the ACA and compelled under RFRA because no compelling interest exists in forcing religious dissenters to provide employees with cost-free medical insurance covering contraception. If such a compelling interest exists, Justice Alito insists that it be advanced by the less drastic means of federally-subsidized contraceptive insurance coverage for the employees of dissenting employers, costing an estimated $126 million. He does not discuss whether such an expenditure would violate the Establishment Clause by subsidizing the employer’s religious beliefs.

Justice Ginsburg, joined by Justice Sotomayor, dissented, arguing that the ACA does not authorize administrative agencies to carve out religiously-driven exceptions. Justice Ginsburg argues, as well, that the religious exemptions are not required by RFRA. She notes that The Court has never granted religiously-based exemptions that have had the effect of shifting economic costs to dissenting third-parties.

If the lower courts follow the trail suggested by Justice Kagan, they can enjoin the exemption regulations as “arbitrary and capricious,” reject the argument that a religious exemption is required under RFRA, and enjoin the implementation of the exemption regulations until the Presidential election. President Biden would almost certainly rescind them.

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Early returns from the 2020 Term indicate a strong tilt toward protecting religiously-centered rights, most dramatically a series of orders on the so-called “shadow docket” striking down efforts to ban or stringently regulate indoor worship during the Covid pandemic.