# Supreme Court Puts Birth Control Access Further at Risk

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## What is the *Trump v. Pennsylvania* case about?

Under an Affordable Care Act policy, most insurance plans must cover contraception. From the beginning, houses of worship were given an exemption. Religiously affiliated nonprofits and some closely held for-profit corporations were provided with an accommodation to the coverage requirement. Under the accommodation, they simply had to notify the government or their insurance provider of their objection so that contraceptive care could be provided to their employees through other means, without cost to the employer or cost-sharing by the employees.

The Trump administration issued rules that dramatically expanded the exemption and accommodation process by (1) extending the religious accommodation to *any entity* that wants it, including large, publicly traded corporations; and (2) making the notification process *optional*, so that entities that object to providing coverage need not even notify the government or their insurer of their refusal, thereby disrupting the ability to provide the coverage through other means.

Pennsylvania and New Jersey sued the Trump administration, and a religious order that runs a string of nursing homes intervened in the case on the side of the administration. The Supreme Court took this case to decide whether the Trump administration had the authority to expand the exemption and whether it followed the proper procedure when doing so.

## What is the decision in *Trump v. Pennsylvania*?

The Court decided that the Trump administration had the authority to issue rules that would exempt employers and universities from the contraceptive coverage requirement. The majority held that Congress through the Affordable Care Act left it to the relevant federal agencies to determine what health care services must be covered and what exemptions to those requirements should be granted.

## What happens next after this Supreme Court decision?

The Court held that the federal government has the authority under the ACA to carve out exemptions from the contraceptive coverage requirement. In the ordinary course, this would mean that the exemptions would take effect. But the litigation over the exemptions will continue on multiple fronts.

As Justice Kagan points out in her opinion concurring in the judgment, the outcome here does not fully resolve whether the exemptions are ultimately legal. Indeed, Pennsylvania Attorney General Josh Shapiro has pledged to continue to press in the lower courts the claim that the exemptions violate the federal Administrative Procedure Act because they are "arbitrary and capricious."

Moreover, the Supreme Court did not address whether the broad exemption here is constitutional – which it isn't. Denying women and LGBTQ people access to contraception in the name of religion is discrimination. And the First Amendment's Establishment Clause prohibits the government from granting religious exemptions that would harm any third party – all nine justices in *Hobby Lobby* agreed with that principle.

Americans United, the Center for Reproductive Rights, and the National Women's Law Center represent students at the University of Notre Dame who have lost insurance coverage for birth control. Our case, *Irish 4 Reproductive Health v. HHS*, challenges the Trump regulations themselves *and* an illegal backdoor settlement negotiated between Notre Dame and the Trump administration, raising both the administrative and constitutional claims. That case, too, will continue to be litigated.

As the cases challenging the exemptions continue, the lower courts will be called upon to consider the constitutional do-no-harm principle and the procedural requirement that regulations be based on sound reasoning and not merely "arbitrary and capricious" assertions of governmental power. And if a future administration were to rescind the Trump exemption, these issues would certainly resurface then also.

## What harms would the Trump exemption cause?

Birth control protects women's and LGBTQ people's health and helps people plan their families, participate in the workforce, and pursue their education. In other words, it is critical to their health and equality. But under the religious exemption, private employers – including massive, publicly traded corporations and large universities – may exempt

themselves from the contraceptive-coverage requirement based on religious beliefs. And they may claim the exemption without providing any notice that they are doing so.

While many entities won't take the exemption, some will. And the upshot is that employees, students, and their families will be stripped of insurance coverage for birth control.

For many, especially students, losing their insurance coverage means facing increased burdens to get birth control, including incurring significant out-of-pocket costs and dealing with major bureaucratic hurdles. Without insurance coverage, the most effective forms of birth control, such as implants and IUDs, can cost as much as a month's salary on minimum wage. And in the end, students and workers may not be able to afford birth control anymore**.** The Trump administration's expansion of the exemption exacerbates these concerns in several ways. It greatly increases the number of people who may be deprived of necessary health care. And because it removes the notice requirements, the government will not even know that it needs to make alternative provisions for those who are being harmed by the loss of coverage.

### Did the Affordable Care Act require the Little Sisters of the Poor to provide insurance coverage for birth control?

No. The Little Sisters religious order has *never* been forced to do anything with respect to birth control, so this decision also does nothing to benefit that order. The Little Sisters have a "church plan," a particular type of insurance plan that is not subject to the ACA's contraceptive-coverage requirement. Because the contraceptive-coverage requirement didn't apply to them in the first place, they have never needed an exemption. And that means they also had no valid reason to be in the case other than for photo ops.

### Justice Alito, with Justice Gorsuch joining, wrote a concurring opinion that discusses the Religious Freedom Restoration Act. How did it differ from the majority opinion?

Justice Alito's concurring opinion sets out a more radical approach: He says that RFRA compels the exemption.

Under RFRA, the government may not place a substantial burden on religion unless it has a compelling governmental interest and the law or rule is the least restrictive way of

achieving that interest. If the government cannot meet this standard, it must provide an exemption to the law or rule. But an exemption can't be granted if it will harm others.

The majority, however, didn't reach the RFRA question. While noting that there was nothing improper about the federal agencies considering RFRA in this case, the Court concluded it didn't need to decide whether RFRA actually required this sweeping religious exemption.

Justice Alito's view of how RFRA should be applied is troubling. If his view were adopted, it could lead to dangerous exemptions from nondiscrimination protections and guarantees of access to health care. Thankfully the Court did not subscribe to this misuse of RFRA.

### Justices Ginsburg and Sotomayor dissented. What do they think the majority decision got wrong?

The dissent points out that the majority ignored the immense burdens and costs that the religious exemption would inflict on employees and their families. As Justice Ginsburg put it, "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree." The majority sidestepped the constitutional rule, embodied in the Establishment Clause and the Court's jurisprudence, that religious exemptions must not harm others.

The dissent was correct when it explained that one person's religious freedom ends where another person's rights begin: Religious freedom is not a sword with which to hurt others. Americans United will continue its vigorous defense of that bedrock principle, which is necessary to ensure true religious freedom for everyone.

### How do this term's Supreme Court cases affect the outlook for religious freedom going forward? Are the decisions based on consistent reasoning or do they contradict each other?

This term's cases show that the fundamental principle of the separation of government and religion remains under grave threat – and is more important than ever to preserve. While the Court's laudable decision in *Bostock*, which affirmed that LGBTQ Americans are protected by Title VII of the Civil Rights Act of 1964, will extend fundamental workplace protections to many people, its *Morrissey-Beru* decision guarantees that thousands of teachers at religious schools will receive no protection at all from Title VII

or other laws barring employment discrimination. And its *Espinoza* decision will result in many of those religious schools receiving public funds despite having a free hand to discriminate against many of their educators. Likewise, the Court's *Little Sisters* decision will encourage many employers to deny on religious grounds essential birth-control coverage to workers. Together, these decisions demonstrate how the Supreme Court has been redefining religious freedom, converting what is meant to be a shield that protects us into a sword that harms others.