Legal Mojo | *Supreme Court Commentary:* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania

Lauren Fielder*

On July 8, 2020, in a 7-2 decision, the U.S. Supreme Court in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*[1] held that the U.S. Departments of Health and Human Services, Labor, and the Treasury "had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections."[2]

The Affordable Care Act (ACA), created by the Obama administration in 2010, includes a provision that requires covered employers to provide women with preventive care and screenings without any cost sharing requirements.[3] The ACA does not specify what preventative care screenings entail and relies on the Health Resources and Services Administration (the "HRSA"), a division of the U.S. Department of Health & Human Services, to make this determination. The HRSA created Women's Preventive Services Guidelines ("Guidelines") in 2011, requiring health plans to provide coverage for all U.S. Food and Drug Administration-approved contraceptive methods.

This mandate quickly became controversial because religious organizations and businesses claimed that the requirement to provide contraceptives infringed on their right to the free exercise of religion. The HRSA responded by creating what is known as the church exemption, which exempts a church or an integrated auxiliary, a convention or association of churches, or "the exclusively religious activities of any order" from the application of the requirement.[4] The HRSA issued guidelines in 2013, known as the "self-certification accommodation," that expanded the exemption for eligible religious organizations.[5]

Several religious organizations challenged the self-certification accommodation, including the Little Sisters of the Poor ("Little Sisters"). Little Sisters is a group of Catholic nuns whose mission is to take care of the elderly poor. They claimed that completing the self-certification form would be an action that would "cause others to provide contraception or appear to participate in the Departments' delivery scheme,"[6] and claimed that the requirement to provide contraceptives or participate in the self-certification accommodation plan was a violation of the Religious Freedom Restoration Act of 1993 (RFRA).[7]

Little Sisters was not the only group that challenged the Guidelines under the RFRA. *Burwell v. Hobby Lobby Stores, Inc.*[8] and *Zubik v. Burwell*[9] were Supreme Court cases about exemptions to the ACA contraceptives provision.[10] In light of the decisions in *Hobby Lobby* and *Zubik*, the Departments of Health and Human Services, Labor, and the Treasury (the "Departments") that jointly administer the relevant ACA provision issued two interim final rules that expanded the church exemption and created a moral exemption for employers "with sincerely held moral objections to providing some or all forms of contraceptive coverage."[11] Pennsylvania (later joined by New Jersey) sued, claiming that the interim final rules were invalid on substantive and procedural grounds. Pennsylvania argued that the rules were substantively defective because the Departments lacked statutory authority to promulgate the exemptions and argued that the rules were procedurally flawed because the Departments did not comply with the Administrative Procedure Act (APA) for notice and comment procedures. The district court issued an injunction against implementing the final rules, and the U.S. Court of Appeals for the Third Circuit affirmed.[12]

Justice Thomas, writing the majority opinion, joined by Chief Justice Roberts, and Justices Alito, Gorsuch, and Kavanaugh, held that "the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections."[13] The majority opinion first addresses whether the Departments have the authority to promulgate the exceptions. The main controversy here is whether the Departments through the HRSA are only allowed to determine

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what preventative care includes or are also entitled to exempt or accommodate employers based on religious objections.[14] The majority opinion stressed that a plain reading of the ACA gives broad discretion to the HRSA to define preventive care and screenings and create exemptions and accommodation, noting that Congress could have limited the HRSA's discretion but did not.[15] Thomas also explains that "it is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA," and therefore, the Departments "must accept the sincerely held complicity-based objections of religious entities."[16] The majority then considered whether the 2018 final rules were procedurally invalid and found that the "rules contained all of the elements of a notice of proposed rulemaking as required by the APA."[17]

Justice Alito's concurrence, which was joined by Justice Gorsuch, agreed with the holding of the majority but would have carried it further, explaining that not only were the Departments allowed to create exemptions and accommodations, the RFRA required the Departments to do so.[18]

Justice Kagan's opinion, concurring in the judgment, joined by Justice Breyer, upheld the "HRSA's statutory authority to exempt certain employers from the contraceptive-coverage mandate, but for different reasons," and she questioned "whether the exemptions can survive administrative law's demand for reasoned decisionmaking."[19] Her opinion raises the probability of future litigation on this issue.

Justice Ginsburg's dissent, joined by Justice Sotomayor, argued that the Departments' exemptions and accommodation are inconsistent with Congress' "staunch determination to afford women employees equal access to preventive services, thereby advancing public health and welfare and women's well-being,"[20] and explained that the result of the religious exemption at issue before the Court will leave between 70,500 and 126,400 women of childbearing age without cost-free contraceptives.[21]

Looking to the future, a new presidential administration may result in a different approach to the Departments' exemptions and accommodations, although Justice Alito's concurrence hints that a more conservative Court may carry the *Little Sisters* holding further, mandating the exemptions and accommodations. Kagan's concurrence correctly points out that litigation in this area is far from over. As the Supreme Court continues to balance women's reproductive rights with the religious rights of organizations and businesses, we can expect more jurisprudence that prioritizes religious rights over women's rights to contraception. The recent death of Justice Ruth Bader Ginsburg and Amy Coney Barrett's confirmation to the Supreme Court will undoubtedly shift the balance even further in this direction.

* Lauren Fielder is Assistant Dean for Graduate & International Programs and Senior Lecturer at The University of Texas School of Law in Austin, Texas. She has been teaching constitutional law and other subjects for 15 years. Professor Fielder would like to thank Cate Marshall for her research assistance. She can be reached at LFielder@law.utexas.edu.

[1] *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, slip op. (2020) (hereinafter, "Little Sisters").
[2] *Id.* at 2.
[3] *See* 42 U. S. C. §300gg–13(a)(4).
[4] Little Sisters at 4.
[5] *Id.* at 6. Eligible religious organizations were defined as those that "(1) [o]ppos[e] providing coverage for some or all of the contraceptive services…on account of religious objections; (2) [are] organized and operat[e] as … nonprofit entit[ies]; (3) hol[d] [themselves] out as…religious organization[s]; and (4) self-certif[y] that [they] satisfy[y] the first three criteria. *Id.*
[6] *Id.* at 7.
[7] *See id.*

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[8] *See* 134 S.Ct. 2751 (2014).
[9] *See* 136 S.Ct. 1557 (2016).
[10] "In *Burwell v. Hobby Lobby Stores*… [the Supreme] Court held that the contraceptive mandate substantially burdened the free exercise of closely held corporations with sincerely held religious objections to providing their employees with certain methods of contraception. And in *Zubik v. Burwell*…. [the Supreme] Court opted to remand without deciding the RFRA question in cases challenging the self-certification accommodation so that the parties could develop an approach that would accommodate employers' concerns while providing women full and equal coverage." Syllabus to Little Sisters, at 1-2 (2020).
[11] *Id.* at 2.
[12] *See id.*
[13] Little Sisters at 2.
[14] See *id.* at 14.
[15] See *id.* at 18. The court stated, "The only question we face today is what the plain language of the statue authorizes. And the plain language of the statute clearly allows the Departments to create the preventive care standards as well as the religious and moral exemptions." *Id.*
[16] *Id.* at 20.
[17] *Id.* at 23.
[18] See Alito, J., concurring in Little Sisters, at 19 (2020).
[19] Kagan, J., concurring in Little Sisters, at 1 (2020).
[20] Ginsburg, J. dissenting from Little Sisters, at 21 (2020).
[21] See *id.* at 2.

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