

Employer Religious and Moral Exemptions to the Provision of Contraceptive Care Remain Intact

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In a recent seven-to-two opinion in the case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et al.*, the U.S. Supreme Court upheld the rights of certain employers to claim exemption from providing contraceptive care under the preventive care mandate of the Affordable Care Act (ACA) based on religious or moral objections. General Background of the Case The ACA requires covered employers to provide women with preventive care and screenings without any cost sharing requirements (the **Preventive Care Mandate**). The ACA relies on preventive care guidelines (Guidelines) supported by the Health Resources and Services Administration (HRSA), an agency of the federal Department of Health and Human Services, to determine what preventive care and screenings should include. The Guidelines mandate that health plans provide coverage for all FDA approved contraceptive methods. When the Departments of Health and Human Services, Labor, and the Treasury (collectively, the **Departments**) incorporated the Guidelines, they also gave HRSA the discretion to exempt religious employers, such as churches and synagogues, from providing contraceptive coverage under the Preventive Care Mandate (**Religious Exemption**). In October 2017, the Departments promulgated two interim final rules (IFRs) under the Preventive Care Mandate. The first IFR significantly expanded the Religious Exemption to include all types of non-governmental employers, including for-profit corporations (regardless of their size or whether they are publicly traded or privately held). The second IFR created a similar moral exemption for certain non-governmental employers, including privately held, for-profit employers, with sincerely held moral objections to providing some or all forms of contraceptive coverage (**Moral Exemption**). The Departments issued final rules, leaving the IFRs largely intact that were effective as of January 14, 2019 (**Final Rules**). See our prior blog post regarding the Final Rules [here](#). Prior to the Departments' issuance of the Final Rules, the Commonwealth of Pennsylvania had filed suit against the federal government, alleging that the IFRs were procedurally and substantively invalid under the federal Administrative Procedure Act (APA). Once the Final Rules were issued, the State of New Jersey joined Pennsylvania's suit. Together they filed an amended complaint, alleging that the rules were (i) substantively unlawful because the Departments lacked statutory authority under either the ACA or the Religious Freedom Restoration Act (RFRA) to promulgate the Religious Exemption and the Moral Exemption (collectively, the **Exemptions**) and (ii) procedurally defective because the Departments failed to comply with the APA's notice and comment procedures. The federal district court in Philadelphia issued a preliminary nationwide injunction against the implementation of the Final Rules, and the government, joined by one of the homes operated by the Little Sisters of the Poor which had intervened in the suit, appealed that decision. The U.S. Court of Appeals for the Third Circuit affirmed the district court's opinion. Opinion of the U.S. Supreme Court Justice Clarence Thomas wrote the opinion of the Court, in which four other Justices (Roberts, Alito, Gorsuch, and Kavanaugh) joined. The Court held that the verbiage of the Preventive Care Mandate grants sweeping authority to HRSA to both (i) define the preventive care that applicable health plans must cover in the form of the Guidelines, and (ii) identify and create exemptions from its own Guidelines. The Court rejected the argument asserted by Pennsylvania and New Jersey (collectively, the **States**) that the ACA only authorizes HRSA to identify the particular preventive care services that health plans must provide, not to create any exemptions from such care, on the basis that no such limitation was contained in the

text of the ACA statute. The Court determined that, because the ACA provided a basis for upholding the Exemptions, it need not examine whether the RFRA independently required that the Exemptions be upheld. The Court further found that the Final Rules promulgating the Exemptions were free from defects under the APA. The States had contended, among other arguments, that the Final Rules were procedurally invalid because the Final Rules made only minor alternations to the IFRs, and there was no evidence that the Departments maintained an “open mind” during the post-promulgation process. The Court rejected the States’ application of an “open-mindedness test” as a procedural requirement that has no basis in the APA. Concurring and Dissenting Opinions

- Justice Alito filed a concurring opinion, joined by Justice Gorsuch, in which he stated that the Court should have decided the additional question of whether (i) the RFRA compels the Religious Exemption, and (ii) if the RFRA requires the Religious Exemption, the Departments acted in an arbitrary and capricious manner in granting it.
- Justice Kagan filed a concurring opinion, joined by Justice Breyer, in which she agreed with the majority’s judgment, but not with its reasoning. Instead, she found the verbiage of the Preventive Care Mandate to be ambiguous with respect to any delegation of authority to the Departments to create the Exemptions, but deferred to the Departments’ “longstanding and reasonable interpretation” of the Preventive Care Mandate in that respect. However, Justice Kagan suggested in her concurring opinion that a fair argument could be asserted that, in promulgating the Final Rules to provide for the Exemptions (and, in particular, the Moral Exemption), the Departments had failed to draw a rational connection between the problem they had identified and the solution they had chosen, thus rendering the Departments’ actions “arbitrary and capricious”.
- Justice Ginsburg filed a dissenting opinion, joined by Justice Sotomayor, in which she criticized the Court’s holding on the basis that the ACA only authorizes HRSA to identify the particular preventive care services that health plans must provide, not to create any exemptions from such care.

Case Disposition The Court reversed the judgment of the Third Circuit and remanded the cases for further proceedings consistent with its opinion. It is uncertain whether the *Little Sisters* decision will resolve challenges to the Exemptions once and for all. As noted in the separate concurrences filed by Justices Alito and Kagan, it is likely that additional lawsuits will be brought, which allege that the Final Rules concerning the Exemptions are flawed on yet another ground, namely, that the Departments issuance of the Exemptions was arbitrary and capricious and thus violates the APA. Furthermore, future administrations could also attempt to modify the Exemptions. The Court’s opinion is available [here](#).