The "Little Sisters' Legal Odyssey" to Consolidate Power in the Executive Branch: Round I or Game Over?

Prepared by:
Diane M. Soubly
Butzel Long

LORMAN®

Published on www.lorman.com - December 2021

LORMAN®

Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

VOL. 33, NO. 3 AUTUMN 2020

BENEFITS LAW JOURNAL

Litigation

The "Little Sisters' Legal Odyssey" to Consolidate Power in the Executive Branch: Round I or Game Over?

Diane M. Soubly

On July 8, 2020, in *Little Sisters of the Poor v. Pennsylvania*, the U.S. Supreme Court approved 2017 Interim Final Rules (IFRs) and their virtually identical 2018 Final Rules that exempt all private employers and all health care issuers and third-party administrators with religious or moral aversion to contraception from "complicity" with what the Court labeled an "administratively created contraceptive mandate" in the Affordable Care Act (ACA).

Media and legal commentators gave the decision scant attention and announced that the Court had postponed a "real" decision on the so-called contraceptive mandate until long after the 2020 election. The July 8 decision itself, however, presents a clear and present danger to the separation of powers doctrine and settled rule of law. Enabled by the five conservatives on the Court, the

Diane M. Soubly is Of Counsel based in Butzel Long's Ann Arbor office, practicing in the areas of ERISA and employee benefits litigation, labor and employment law and litigation, and appellate litigation. She is one of a select few attorneys nationally who have been elected Fellows of both the College of Labor and Employment Lawyers and the American College of Employee Benefits Counsel. Diane is also an adjunct professor of law at Chicago-Kent School of Law.

Trump administration has succeeded in reversing prior and more contemporaneous ACA regulations addressing the mandate and never obviated by Congress, and in elevating the policy judgments of its political base over Congress's nondelegable statutory value judgments in the ACA.

The Little Sisters decision will likely result in increased litigation for plans, health care issuers, third-party administrators, and employers. This column explores the consequences of the result-oriented decision that prejudges the merits of the dispute before the case returns to the Court, vitiates protections in the Administrative Procedures Act (APA), and concentrates legislative power in the executive branch. Is this just round one, or is the game over?

Writing for the five-person majority of the U.S. Supreme Court in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,[1] Judge Thomas lauded the Little Sisters of the Poor's seven-year "fight for the ability to continue in their noble work without violating their sincerely held religious beliefs" as the Court found that "the Federal Government ha[d] arrived at a solution that *exempts the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate*." The Court held that the Departments of Health and Human Services, Labor, and Treasury (the Departments) possessed "the statutory authority to craft [the religious] exemption, as well as the contemporaneously issued moral exemption"[2] from the preventive care services for women added to the ACA of 2010 by the Women's Health Amendment as one of 10 categories of mandatory "essential health benefits" (EHBs)[3] for an ever-dwindling number of nongrandfathered plans and for public exchange plans..

Rejecting lack of open-mindedness about contraceptives as a procedural defect and finding that the "fulsome explanations" offered by the Departments and the abbreviated 30-day comment period (far less than the 90-day comment period) sufficed, the Court further held that "the [2017 Interim Final Rules (IFRs)] promulgating these exemptions [were] free from procedural defects."[4] In a brief final footnote, the Court stated that it "not need reach" the respondent states' "additional argument that the Departments lacked good cause to promulgate the 2017 IFRs."[5]

Because the Court upheld the authority of the Departments to exempt from the mandate all nongovernmental employers and health care issuers and third-party plan administrators with religious and moral or ethical objections to contraception, and because the Court vacated the national injunction affirmed by the Court of Appeals for the Third Circuit against the enforcement of the 2017 IFRs and the

2018 Final Rules virtually identical to the IFRs, thousands of women stand to lose no-cost contraceptive coverage.

This column first fact-checks the myths about ACA reinforced in the Thomas opinion and the Alito concurrence and analyzes some of the illogical bases of the positions taken by the petitioners. Next, the column catalogs merits issues prejudged by the slender *Little Sisters* majority in the guise of addressing the statutory authority under the APA for the Departments' recanting and replacement of prior Department regulations with broad exemptions from the mandate. The column then explores the executive branch's unilateral replacement of accommodations for religious beliefs with expansive "exemptions" from the no-cost-sharing contraceptive coverage for virtually all nongovernmental employers and health care issuers and third-party plan administrators, who can now self-certify their religious and moral aversion to contraception without notice to the government. Finally, the column analyzes whether the *Little Sisters* decision violates the separation of powers doctrine and long-standing administrative law principles as it concentrates legislative functions within the executive branch.

FACT CHECKING, ANYONE?

The Thomas opinion and the concurring Alito opinion accept as fact both a nonevident premise and critical false dilemmas advanced by the Little Sisters and their amici, based on popular myths debunked long ago about the requirements of the ACA, in an effort to show that the government—through regulations—had literally forced the Little Sisters into a penalty box because of their religious beliefs.

Myth No. 1. In the very first sentence describing the ACA in Part I.A. of the majority opinion, Justice Thomas repeats the old and debunked shibboleth that "[t]he ACA *requires* covered employers to offer 'a group health plan or group health insurance coverage' that provides certain 'minimum essential coverage.' [citing] 26 U.S.C. § 5000A(f)(2); §§ 4980(H)(a), (c)(2)."[6] As benefits litigators and plan designers well know, the ACA does not require employers to offer health care coverage to employees. In fact, employers often weigh the cost of providing ACA-compliant group health care coverage per employee against the cost of possible penalties in deciding whether to offer group health plans or insurance coverage.

Myth No. 2. The Thomas opinion and the concurring Alito opinion accept false dilemmas advanced by the Little Sisters and their amici: that the ACA mandate and any participation in self-certification of its religious beliefs forces the religious-order employer

operating various nursing homes nationally to become "complicit in contraception" because it must choose between adhering to its sincerely held religious beliefs regarding contraception and providing its employees with health insurance or risk substantial penalties under the ACA.

Contrary to the myth perpetuated in *Burwell v. Hobby Lobby Stores, Inc.*[7] and in the Thomas opinion and the Alito concurrence, the ACA also does not *compel* employees to seek alternative coverage on the public exchanges. Rather, employees can find contraceptive coverage with no cost-sharing (and satisfy their individual mandate, now at zero but adjustable upward by Congress at any time, if it so chooses) through enrollment in off-exchange plans (a/k/a "private exchanges"), or individual plans or insurance riders, perhaps even purchased from Associated Health Plans touted by the Trump administration that offer such coverage.[8] Employees who seek those alternative coverages do not subject their employers to ACA penalties: only full-time employees who enroll in a Silver Plan on a public exchange may trigger any penalty at all under Tax Code Section 4680(h). As a result, an employer need not choose between its religious beliefs and the risk of substantial ACA penalties, because its employees seeking contraceptive coverage need not purchase coverage under a public exchange plan at all, let alone at the Silver Plan level.

Nor does the employer itself who claims that its religious freedom includes providing its employees with health insurance coverage suffer any penalties. The *Hobby Lobby* majority (in an opinion authored by Justice Alito) assumed the truth of that free exercise claim from statements of the Hobby Lobby petitioners in seeking certiorari. However an employer can exercise that religious belief by providing health insurance coverage to employees consistent with its religious beliefs and by allowing an individual opt-out for employees whose views on contraceptive coverage differ from the beliefs of the owners, along with notice of alternate off-exchange plans and other sources not subject to the ACA's public exchange penalties, but with no endorsement thereof—*i.e.*, similar to the safe harbor exception conduct that preserves the non-ERISA nature of certain welfare benefit plans. As in *Hobby Lobby*, where the majority asserted that Hobby Lobby and two other substantially smaller nonprofit closely held corporations could face $475 million in taxes (*i.e.*, the Section 4980(H) penalty) if they exercise their religious beliefs, and where the free exercise of their religious beliefs included providing health insurance coverage to their employees, so here the Court accepts again those same claims based upon false dilemmas.[9]

A nonevident premise and false dilemmas thus underpin the faulty analysis in Hobby Lobby, the Thomas opinion, and the Alito concurrence.

ILLOGICAL POSITIONS

Calling an employer with religious beliefs or moral scruples "complicit" in contraception because of the ACA mandate does not make the employer so.

Both the Thomas opinion and the Alito concurrence appear to accept, on blind faith, the Little Sisters' claim of "complicity in contraception." As the Thomas opinion explains their stance, the Little Sisters claim that completing the [government's] certification under the 2013 Final Regulations for the contraceptive mandate, premised upon the 2011 Health Resources and Services Administration (HRSA) guidance, would force the Little Sisters to violate their religious beliefs by *'tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme*.'"[10] The Little Sisters argued that filing the certification form with the federal government stating their religious aversion to contraception would send their employees who wish to practice contraception to seek another source of no-cost contraceptive coverage. In other words, signing the form is "taking an action that directly causes others to provide contraception," as described above. However, if the Little Sisters self-certify under the 2017 IFRs and the 2018 Final Rules *the identical result occurs*: their employees who wish to do so then seek another source of no-cost coverage. In other words, self-certifying is also the same "taking [of] an action that directly causes others to provide contraception." Under their own definition of complicity, the Little Sisters remain "complicit in contraception," whether they sign a government form or self-certify without notice to the government.

Furthermore, to the extent that the Little Sisters follow one of several conflicting religious pronouncements on the subject and view life as beginning at the moment of conception, i.e., when the egg is fertilized, they should have no quarrel with contraceptives that prevent such fertilization *before* life begins. The plaintiffs in *Hobby* Lobby, who also sought to protect the free exercise of their Christian religious beliefs, objected to only four of the 20 contraceptives as causing abortion of a fertilized fetus. Here, the Little Sisters sought a broad exemption from offering all contraceptives at no cost.

GAME OVER?

Dismissive talking heads (including legal commentators) gave short shrift to the *Little Sisters* decision, portraying it as a merely procedural "first round" with the "real" decision on the merits yet to come long after the 2020 election. As has become the "new normal" in Supreme Court opinions, however, the various opinions in the case, all of which bear careful reading, signal the merits outcome.

The Thomas opinion and the Alito concurrence address, arguably often in *dicta*, the issues of whether the Religious Freedom Restoration Act (RFRA)[11] trumps the mandate, whether the mandate constitutes a compelling interest, and whether the accommodation of completing the Departments' form constitutes a substantial and undue hardship. It remains a distinct possibility that the Justices will declare some or all of their expressed views on these issues preclusive when the case returns to the Court.

Super-Statute Status

In another decision from the 2019 term, widely touted as extending Title VII protection to members of the LGBTQ+ community, at least five members of the Court appear to treat the RFRA as a "super-statute." At the end of the lead opinion in *Bostock v. Clayton County, Georgia,* Justice Gorsuch provides a "road map" on how to argue RFRA issues in antidiscrimination act cases.[12] In fact, Justice Thomas believes that the text of the statute demonstrates that RFRA can trump the ACA:

> Placing Congress'[s] intent beyond dispute, RFRA specifies that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." § 2000bb-3(a). RFRA also permits Congress to exclude statutes from RFRA's protections. § 2000bb-3(b).
>
> It is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA. The ACA does not explicitly exempt RFRA, and the regulations implementing the contraceptive qualify as "Federal law" or "the implementation of [Federal] law." § 2000bb-3(a); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 297–298 (1979). Additionally, we expressly stated in *Hobby Lobby* that the contraceptive mandate violated RFRA as applied to entities with complicity-based objections. 573 U.S., at 736. Thus, the potential for conflict between the contraceptive mandate and RFRA is well settled.[13]

Gutting the Compelling Interest of Women's Health

Despite Justice Kennedy's express explanation in his separate concurrence in *Hobby Lobby* that the majority opinion there did not diminish the compelling interest for the contraceptive mandate as part of the ACA EHB of preventive services for women, the Thomas opinion and the Alito concurrence in *Little Sisters* find no such compelling interest.

The Alito concurrence cavils that Congress should have expressly included universal coverage of no-cost contraceptives in the ACA EHB on preventive health services for women's health in order to demonstrate the requisite compelling interest for RFRA purposes.[14] For the concurrence, the mandate appears seriously under-inclusive, so that "the ACA's very incomplete coverage speaks volumes."[15] The concurrence recounts that the mandate does not reach women who do not work outside the home, or all working women, or all Employee Retirement Income Security Act (ERISA)–covered health plans (excepting employers with less than 50 employees or grandfathered plans).[16] This under-inclusive argument ignores the basic tenet that Congress may choose to rectify one compelling problem one step at a time. Moreover, Congress did not dictate universal coverage for any of the 10 EHBs in the ACA (including but not limited to preventive services for women's health). The concurrence obdurately refuses to acknowledge that Congress can and did choose to commission, through HRSA, further evidence-based studies of gender inequality in bearing the cost of contraceptive products, some of which physicians prescribe to rectify medical issues unrelated to conception.

Given the attack on the compelling interest for the mandate in the Thomas opinion and the Alito concurrence, the government may well abandon that mandate, just as the agencies abandoned the accommodation approach to religious concerns espoused in prior ACA regulations and never revoked by Congress in favor of broad exemptions to the mandate.

Finding the Needs of Conscientious Objectors Compelling

In contrast to their disparagement of women's health as a compelling interest based on under-inclusiveness, the conservative justices find the needs of conscientious objectors sufficient to justify expanding beyond *Hobby Lobby* to broad "administratively created" exemptions available to virtually all nongovernmental employers and to health care issuers and third-party administrators and individuals with religious or moral scruples against contraception.[17] The Thomas opinion and the Alito concurrence reference conscientious objectors who have "agreed" to palatable alternative service in wartime rather

than combat service, and the Alito concurrence provides a single example of one such conscientious objector and implies that he happily participated in the making of steel for wartime use.[18] Both opinions fail to acknowledge the unavoidable penalties faced by the conscientious objector—*i.e.,* the various penalties imposed upon conscientious objectors at different periods during the twentieth century, including military service imprisonment for those who refused noncombat service during World War I, forced and uncompensated labor while confined to civilian camps during World War II, and other unpaid alternative service after 1947.[19] In contrast, the Little Sisters face potential penalties that may never materialize, if employees seek health care coverage not offered by their employers elsewhere than on the public exchanges, and if no full-time employee purchases a Silver Plan on a public exchange.

Finding Filling Out a Form Substantial Hardship

The Thomas opinion and the Alito concurrence both accept the false dilemmas of a complicity-based concern posited by the Little Sisters, as discussed above.

DAMAGE TO THE SEPARATION OF POWERS

Contrary to another case issued just this term and also authored by Justice Thomas, the *Little Sisters* decision concentrates power in the executive and permits the executive to vitiate the statutory value judgments of Congress. The *Little Sisters* decision repeatedly describes the mandate as an "administratively created mandate" based on a crabbed reading of the ACA EHB provision for preventive services and expressly (if not almost gleefully) recognizes that no party raised any constitutional arguments relating to the statutory delegation. Against the statutory value judgment of Congress, the decision simply accepted the Departments' sole articulated reason for creating exemptions over accommodation—*i.e.,* putting an end to protracted litigation. By encouraging employers to choose the exemption rather than the accommodation, the decision permits the Departments to recant prior more-contemporaneous regulations never obviated by Congress.

Contrary to prior and more-contemporaneous regulations relating to ACA, the Trump administration's 2017 IFRs and the final 2018 Rules broadly exempt virtually all private employers, all health care issuers, and all third-party administrators with religious beliefs or moral scruples from the contraceptive mandate.[20] The five reliable conservatives

on the Court, two of whom Trump appointed,[21] incorrectly analogized the issuance of 2010 IFRs (that met the "good cause" requirement for IFRs with a looming effective date of certain ACA provisions in less than six months) with the issuance of the 2017 IFRs. The latter IFRs' immediate effectiveness after a 30-day comment period introduced substantial confusion during open enrollment periods.

In approving the Departments' power to construct exemptions from the so-called "administratively imposed [ACA] contraceptive mandate," the decision permits the Trump administration to contravene Congress's statutory value judgments in ACA by executive fiat.

Failing to Defer to Congress's Statutory Value Judgments

In December 2019, in an opinion authored by Justice Thomas, the Supreme Court reinforced that the Court should respect the value judgments of Congress. In *Rotkiske v. Klemm*,[22] the Court refused to add a discovery exception to a "violation occurred" statute of limitations on the ground that the Court should not second-guess the value judgment of Congress in choosing not to add a discovery exception. In contrast, the *Little Sisters* decision view the ACA EHB on preventive services in isolation, announces that no party had raised constitutional arguments on delegation of powers by Congress, and does not respect Congress's value judgment.

The language in the challenged EHB section of the ACA lends itself to two equally plausible interpretations in naming HRSA: that Congress (as Justice Kagan recognized in her concurrence) would seek to develop the contraceptive mandate in consultation with HRSA; or that Congress delegated to HRSA only what it could delegate, consistent with principles of nondelegable powers. Congress cannot delegate powers to create a benefit. For example, the Supreme Court concluded in *Ragsdale v. Wolverine World Wide, Inc.*,[23] that only Congress, and not the Department of Labor (DOL), could create the 12-week Family and Medical Leave Act (FMLA) benefit, so that the DOL had usurped Congress's nondelegable power of creating a benefit through its regulation providing that an employer's failure to designate a leave as an FMLA leave resulted in an additional 12 weeks of family and medical leave. So, here, the power to create each of the 10 EHBs under the ACA remains a nondelegable power of Congress, not a power of the Departments. Moreover, even if the power to create the EHB were delegable, Congress has never acted to revise or to revoke the Departments' prior, more-contemporaneous regulations, including the contraceptive mandate, with no cost-sharing and an accommodation for religious employers only, under the narrower definition of religious

employer in the earlier regulation. That absence of Congressional action to curb the prior regulations, in the words of Justice Alito, "speaks volumes."

"Administratively Created"

Calling the ACA contraceptive mandate "administratively created" does not make it so. Both the Thomas opinion and the Alito concurrence adopt catch-phrases such as "administratively created" to convince their readers by the steady drip of repetition that Congress delegated the power to determine "exemptions" from the program of preventive services for women recommended by experts to the executive branch. Intent upon elevating religious belief over scientific study, the opinions mischaracterize the nature of the delegation by Congress to HRSA in the women's health EHB provision.

In its haste to arrive at the result that the 2017 IFRs and the 2018 Final Rules withstand judicial scrutiny for alleged procedural defects under the federal Administrative Procedures Act (APA), the Thomas opinion asserts as fact that the ACA gave "sweeping authority" and virtually unfettered "broad discretion"[24] to HRSA to approve the preventive services for women EHB added by the Women's Health Amendment to the ACA.[25] That assertion flows from the express delegation by Congress to HRSA to flesh out, after evidence-based study, the programs of preventive services for women's health. Had Congress disagreed with a program or service recommended by HRSA, it could have eliminated that program from the EHB. Had Congress determined to revise the contraceptive mandate, it retained the power to do so. In all the years that the contraceptive mandate existed, each attempt to repeal it failed. That failure represented Congress's statutory value judgment.

In its 2011 Guidelines, HRSA adopted the recommendations supported by 15 health care professionals (with the lone dissent from a health economist, not a medical provider) in a report for the Institute of Medicine that preventive women's health services should include the contraceptive mandate.[26] Under the Obama administration, Title X-funded family planning services at clinics sought to make contraceptives more available to low-income minority women to close the gap between the accessibility to contraceptives enjoyed by white women compared to minority women, as a Guttemacher Institute study of contraceptive use between 1995 and 2010 recommended.[27]

As the Ginsburg dissent emphasizes, HRSA possesses expertise in the area of preventive services for women but no expertise in the area of delineating accommodations for religious beliefs or moral objections. Nonetheless, the Thomas opinion and the Alito concurrence

leap from that statutory delegation to the agency (with expertise in determining the content of those programs after commissioned study) to the conclusion that the ACA delegates to HRSA and its parent agency, the Department of Health and Human Services, the discretion to create the religious and moral exemptions, in which the agencies have zero expertise. One does not necessarily follow the other in that non sequitur.

In short, a delegation of responsibility by Congress does not transfer the power of statutory value judgments from Congress to the delegatee (in this case, HRSA), because Congress always retains the power to revise or repeal the program created under such a delegation. Congress did not reverse or revise the prior and more contemporaneously promulgated contraceptive mandate regulations. As the Thomas opinion concedes, "[no] party has pressed a constitutional challenge to the breadth of the delegation involved here today."[28]

The majority's analysis rests entirely on its massaging of the text of the ACA for what it does not expressly state: an irrevocable delegation by Congress of a delegable power to the executive.

Protracted Litigation as Justification

In the 2017 IFRs and the 2018 Final Rules, the Departments tautologically justified reversing prior Department regulations narrowly defining religious employer and replacing accommodation for religious beliefs with exemptions as the only way to end years of protracted litigation. That protracted litigation amounted to "lawfare" against the mandate, funded by religious groups (primarily Catholic, as the various lists of cases offered by Justice Thomas demonstrates[29]). Perhaps, to avoid rampant forum shopping, courts should have transferred to a Multi-District Litigation (MDL) panel the duplicative litigation brought in dozens and dozens of cases teed up to provide conflicting results in the federal circuits for a Supreme Court clearly interested in RFRA issues. Having embarked on their "legal odyssey" well before their photo op with Trump in the Rose Garden in May of 2017, the Little Sisters repeatedly rejected the reasonable accommodation previously offered to them under the prior regulations on the basis of false dilemmas (*i.e.,* that they must pay substantial ACA penalties for exercising their religious beliefs) and on the basis that the government form itself in fact caused their complicity in contraception. They bided their time and repeatedly rejected all other compromises in negotiations while they waited for a more sympathetic president to appoint a fourth and fifth conservative justice who supported RFRA as a super-statute to the Court.

The Little Sisters "legal odyssey" has in fact reduced the availability of no-cost contraceptive coverage (even for contraception that prevents pregnancy *before* life begins) to American women on a grand scale. All nongovernmental employers and health care issuers may now choose an exemption over an accommodation. Eight years after the ACA's passage and years after prior regulations had provided an accommodation of religious views, an agency peopled by appointees of a president who sought to fulfill a campaign promise to his political base completely reversed course, proclaimed that the accommodation created and refined by former agency action more contemporaneous to the passage of the ACA must fall in light of litigation costs, and vitiated the statutory mandate to provide preventive health services to women of all incomes.[30]

Encouraging Employers to Replace Accommodation with Broad Exemption

As the Ginsburg dissent (joined by Justice Sotomayor) recognizes from its opening sentence, under long-standing precedent the Court has followed "a balanced approach of accommodating religious beliefs without "overwhelm[ing] the rights and interests of others who do not share those beliefs."[31] Rejecting that balanced approach, the Court slips the constraints of that settled law in favor of elevating the religious beliefs or moral scruples of an employer, seemingly capable of religious beliefs or moral scruples after *Hobby Lobby*[32] (in a bizarre extension of the anthropomorphic view of corporations in *Citizens United*), over the rights and interests of thousands of women who will lose no-cost contraceptive coverage, now that the Court has vacated the injunction against the enforcement of the 2017 IFRs and the 2018 Final Rules even prior to a decision "on the merits."

The Thomas opinion and the Alito concurrence recognize that the challenged regulations retain the mandate, continue to permit accommodation, and additionally fashion broad exemptions that extend the narrow *Hobby Lobby* accommodation for the religious beliefs of the owners of closely held for-profit employers far beyond its moorings, to virtually any nongovernmental employer. However, as the Ginsberg dissent explains, under the 2017 IFRs and the virtually identical 2018 Final Rules drafted by the Internal Revenue Service, the Employee Benefits Security Administration, and the Centers for Medicare & Medicaid Services, any such employer, including a publicly traded for-profit company "can avail itself of the religious exemption previously reserved for houses of worship. 82 Fed. Reg, 47792 (2017) ([IFR]); 45 CFR §147.132(a)(1)(i)(E) (2018)."[33] Nonprofit and closely held for-profit organizations with "sincerely held moral convictions" against

contraception also qualify for the 2017 exemption. 45 CFR §147.133(a)(1)(i)(a), (a)(2).[34] Furthermore, as Justice Kagan points out in her concurrence, "the Departments themselves acknowledged the prospect that some employers without a religious objection to the accommodation would simply self-certify and switch to the exemption. See 83 Fed. Reg. 57576-57577."[35]

Assuming as they do that the contraceptive mandate presents no compelling interest for women's health, the 2017 IFRs and the 2018 Final Rules fail to offer any alternative for the thousands of women who will lose no-cost contraceptive coverage when employers self-select the religious or moral exemptions without any governmental oversight, rather than an accommodation: "Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage. See 45 CFR 147.132."[36] As Justice Kagan succinctly recognized in her concurrence in the judgment only, "Remember that the accommodation preserves employees' access to cost-free contraceptive coverage, while the [2017] exemption does not."[37]

In short, the 2017 IFRs and the 2018 Final Rules merely shift the overblown "risk" of monetary penalties (*i.e.*, public exchange ACA penalties) from nongovernmental employers (that are likely to elect the broader exemption) to the often low-income women who will lose no-cost contraceptive coverage under regulations that provide absolutely no alternative mechanism for their continued access to such coverage. While the Alito concurrence takes the dissent to task for a problem that prepaid cards presented to pharmacies to pay for no-cost contraceptive coverage can prevent, the fact remains that the 2017 IFRs and the 2018 Final Rules provide for no such alternatives, leaving women worse off under the later regulations.

DAMAGE TO ADMINISTRATIVE LAW PRINCIPLES

The *Little Sisters* decision also violates administrative law principles. It permits political manipulation of regulatory guidance by sanctioning later regulations that reverse the prior contemporaneous regulations relating to a federal statute. As the Kagan concurrence discusses, the 2017 IFRs and the 2018 Final Rules violate the APA, given their irrationality and overbreadth.

In *General Electric Co. v. Gilbert* in discussing coverage for pregnancy and childbirth expenses,[38] the Supreme Court briefly addressed one long-standing principle of administrative law: that, because agency personnel have access to legislators who sponsor and who consider legislation at or near the time of the legislation's adoption, the more reliable regulations in terms of carrying out the intent of a

statute are promulgated more contemporaneously with the legislation. This administrative law principle also guards against political manipulation that may infect later regulations by an executive branch headed by the party that pushed for the defeat of the legislation. The very first Executive Order issued by Trump directed the executive branch to delay and dismantle the ACA in order to fulfill his campaign promise to his political base. Just in time for the 2020 election, it appears as if the Republican-appointed conservative justices have vacated the injunction against those later regulations that seek to implode an ACA mandate critical to women's health through death by a thousand cuts.[39]

Justice Kagan concurred that the Departments could promulgate the broad exemptions in the 2017 IFRs and the 2018 Final Rules, but would have reached the issue of whether those later regulations violate the APA given their irrationality and overbreadth and "question[ed] whether the exemption can survive administrative law's demand for reasoned decision[-]making."[40] Although Justice Kagen asserts that "HRSA adopted the original church exemption on the same capacious understanding of its statutory authority as the Departments endorse today."[41] She also notes that the Departments' 2011 regulation, fashioned in consultation with HRSA, defined a very circumscribed class of "religious employer" that must satisfy all of the following three criteria:

> (B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:
>
> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenvetsof the organization.[42]

Under that definition, Hobby Lobby, which claimed that its employees shared the religious tenets of the organization, would qualify for the accommodation. Under the 2017 IFRs and the 2018 Final Rules many nongovernmental employers would not qualify under that more restrictive definition; therefore, their "safe haven" from the contraceptive mandate remains the moral exemption, and Justice Kagan would find that exemption too overbroad to sustain under administrative law principles.

CONCLUSION

The *Little Sisters* decision guts the protection of a full notice-and-comment period in the APA procedures intended to guard against executive over-reach. The decision ignores legislative history in favor of the originalism approach that reviews one provision of a statute in isolation through the lens of dictionary meanings. The decision violates the long-standing administrative law principle that enforces regulations more contemporaneous with a statute because agency personnel would have access to federal legislators at or near the time of the statute's passage to understand the purpose and the context of the statute, and because later regulations revoking the earlier regulations would amount to political manipulation by a newly elected executive and his executive branch.

No matter which way political strategists spin the *Little Sisters* decision as the November 2020 elections loom, no protections stand in the way of the Departments' immediate enforcement of the 2018 Final Rules, because the five-person majority also vacated the nationwide injunction against their enforcement. All nongovernmental employers (plan sponsors) and health care issuers and third-party administrators may now simply self-certify their aversion to contraception to become exempt from the mandate. Should Trump win the election and/or should Republicans retain control of the Senate, the case will return to the Court on the merits in its 2020 term with no change in the five-person majority that has in essence prejudged those merits. Should Trump lose the election and Republicans lose control of the Senate, Congress can act to reverse the *Little Sisters* decision, as it has done in the past—*e.g.,* in the Pregnancy Discrimination Act of 1978, the Civil Rights Act of 1991 (reversing or modifying five Supreme Court opinions), and the Lily Ledbetter Act—in overturning Supreme Court decisions interpreting a Congressional statute in a manner with which Congress disagreed; however, such legislative action takes time and would likely have prospective effect.

Either way, once again, as in 2017 when the Departments released the immediately effective 2017 IFRs in October of 2017, the *Little Sisters* decision—in which the Court granted almost immediate review—issued after plan sponsors, health care issuers, and third-party administrators had already negotiated over and finalized ERISA-governed plans for the 2021 Plan Year.[43] Far from a mere procedural skirmish, the *Little Sisters* decision injects uncertainty into plan design decisions for the foreseeable future.

Even more ironically, for regulations creating broad exemptions expressly justified by the need to end costly litigation, plan designers and benefits litigators should expect an uptick in litigation because of

the demise of the no-cost contraceptive mandate as more employers choose the exemption over the accommodation.

In sum, arrogating a nondelegable Congressional power to the executive by recanting an accommodation in favor of broad, allegedly "administratively created" exemptions from law enables the tyrannical executive and facilitates "power grabs of authority," arguably "instituted for political, and not for the so-called moral ends to which [the executive] office has been perverted—an office autocratic in procedure, opposed to the spirit of the Constitution, contrary to common justice and to common sense."[44]

NOTES

1. 591 U.S. ____, 140 S.Ct. 2367, 2386 (2020) Case No. 19-431, together with Case No. 19-454, *Trump, President of the United States, et al v. Pennsylvania et al.,* (Thomas opinion) (hereinafter *Little Sisters*) (italics added).

2. *Id.*

3. The enumerated EHBs did not, in the original draft bill, include preventive care specific to women; thus, to correct that omission, Senator Barbara Mikulski introduced the Women's Health Amendment, now codified at 42 U.S.C. § 300gg-13(a)(4).

4. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2385–2387 (rejecting alleged procedural defects).

5. *Id.,* at 2386, n. 14.

6. *Id.,* at 2373.

7. 573 U.S. 682, 134 S.Ct. 2751 (2014).

8. As late as October 2019, the HRSA website at www.hrsa.gov made clear that the 2017 IFRs applied to exempt religious employers from the contraceptive mandate altogether applicable to public exchange plans because of injunctions issued by court decisions, injunctions now vacated.

9. *Hobby Lobby*, 573 S.Ct. at 720-722, 134 S.Ct. 2776-2777.

10. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2376.

11. 42 U.S.C. §§ 2000bb-2000bb-4.

12. *Bostock v. Clayton County, Georgia*, 2020 WL 314668 (Sup. Ct. 2020).

13. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2383.

14. Alito Concurrence, 140 S.Ct. at 2392–2395.

15. *Id.*, at 2392.

16. *Id.*, at 2393–2394.

17. It should be noted that the Government did not defend the so-called "Moral Exemption" on RFRA grounds before the Court.

18. Alito Concurrence, 140 S.Ct. at 2391.

19. *See, for example*, Siuslaw National Forest & Natural History Department, Portland State University, *Camp 56: An Oral History Project: World War II Conscientious Objectors and the Waldport, Oregon Civilian Public Service Camp*, pp. 3–11, *available at https:/silo.tips/download/camp-56-an-oral-project*.

20. 83 Fed. Reg. 57540 (2016).

21. Trump successfully appointed Justice Gorsuch in place of Judge Merrick Garland after the Republican-controlled Senate refused to advance then President Obama's nominee upon Justice Scalia's passing. Himself the frequent object of sexual misconduct allegations, Trump successfully appointed Justice Kavanaugh after hearings into his alleged sexual misconduct against Professor Christine Ford failed to dissuade Republican Senators that he lacked the character and temperament for a Supreme Court justice. It is noteworthy that Chief Justice Roberts held onto ethical complaints against then Judge Kavanaugh until after his confirmation, including those determined to be substantive, before the Chief Justice referred the complaints to the Tenth Circuit Court of Appeals (from which Justice Gorsuch was elevated) for inquiry. The Tenth Circuit inquiry panel opined it had no jurisdiction of the then 83 ethical complaints against Justice Kavanaugh because its jurisdiction did not extend to US Supreme Court justices. *https://www.forbes.com/sies/stevedenning/2019/01/01/council-reviewing-the-Kavanaugh-ethics-charges-punts-back-to-chief-justice-roberts*.

22. *Rotkiske v. Klemm*, 140 S.Ct. 355, 361 (Dec. 2019).

23. 535 U.S. 81, 122 S.Ct. 1155 (2002).

24. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2380–2381.

25. 124 Stat. 119; 155 Cong. Rec. 28841 (2009).

26. Diane M. Soubly, "'Through the Lens of Advocacy': Will the Affordable Care Act 'Explode' from Executive Action?" *Benefits Law Journal,* Vol. 30, No. 4, Winter 2017, p. 72.

27. *See:* Jennifer J. Frost, *U.S. Women's Use of Sexual and Reproductive Health Services: Trends, Sources of Care and Factors Associated with Use, 1995–2010*, Guttmacher Institute, May 2013. *https://www.guttmacher.org/report/us-womens-use-sexual-and-reproductive-health-services-trends-sources-care-and-factors*.

28. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2382.

29. *Id.,* at 2375–2379.

30. It is again noteworthy that the Trump administration's AHP "skinny" plans typically do not contraceptive coverage under the executive actions creating such plans in spite of their poor record of coverage and of network health care professional availability.

31. Id., Ginsburg Dissent, 140 S.Ct. at 2400.

32. 573 U.S. 682 (2014).

33. *Little Sisters*, Ginsburg Dissent, 140 S.Ct. at 2403.

34. *Id.,* n. 9.

35. Kagan Concurrence in Judgment, 140 S.Ct. at 2398, n.3.

36. Ginsburg Dissent, 140 S.Ct. at 2403.

37. Kagan Concurrence in Judgment, 140 S.Ct. at 2399.

38. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-144, 97 S.Ct. 401 (1976) (not following later administrative regulations that vitiate early regulations.

39. *Supra* n.26.

40. *Id.,* 140 S.Ct. at 2397.

41. *Id.*, citing 76 Fed. Reg. 46623 (2011).

42. § 147.130(a)(1)(iv)(B); 26 Fed. Reg. 46623, at 46626.

43. In contrast, the 2018 Final Rules did not become effective until January 1, 2019. *Little Sisters*, Thomas opinion, 140 S.Ct. at 2386.9999.

44. After Arthur Comstock succeeded in banning George Bernard Shaw's *Mrs. Warren's Profession* from the New York stage, and the Examiner of Plays in the Lord Chamberlin's Office refused to license its performance in London under the Theatre Acts of 1843 on the ground that the profession of prostitution should not be celebrated on the stage, Shaw penned "The Censorship of Plays," *The Times*, 29 October 1907, in which he decried, in the quotation above in the text, the imposition of religious beliefs in the law and the authority of one man to require that citizens who did not agree with those beliefs nonetheless act in accordance with them. Quoted in *Mrs. Warren's Profession*, edited by I. W. Connolly, Broadview Press Ltd (Toronto, 2005), p. 209.

LORMAN®

2510 Alpine Road Eau Claire, WI 54703
www.lorman.com 866-352-9539 customerservice@lorman.com