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What will Chief Justice Roberts do in Little Sisters of the Poor v. Pennsylvania?

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Today the Supreme Court heard oral arguments in *Little Sisters of the Poor v. Pennsylvania*. It felt like déjà vu. Three year ago, I was in the Court for arguments in *Zubik v. Burwell*. (The Little Sisters had a companion case.) The short-handed Court punted the case, hoping that the political process could work the case out. (I wrote about that decision here.) Three years later, the political process still has not worked the case out. Chief Roberts may be eyeing another middle ground. And it is a familiar option.

The Accommodation and the Exemption

Let's start with some terminology. There are two relevant carveouts from the contraceptive mandate: the accommodation and the exemption. Under the **accommodation**, employers do not have to pay for contraceptive coverage. Instead, they can opt-out of paying by signing a form. Then, in most cases, the insurer would pay for the coverage. Female employees would still gain access to contraception. Under the **exemption**, employers could opt out altogether. Female employees would not gain access to contraception. The Obama administration gave the exemption to houses of worship, but the accommodation to religious non-profits.

In *Hobby Lobby*, the Court found that the mandate violated RFRA. The Court found that that the "accommodation," which had originally been give to religious non-profits, may also work for the for-profits.

As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections….We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims. At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.
As far as I am aware, for-profits like Hobby Lobby are content with the accommodation. (SG Francisco hinted at this point.) However, religious non-profits like the Little Sisters seek the full exemption.

Resolve Those Differences

At several junctures, the Chief expressed frustration that the parties could not "resolve" their "differences." Roberts asked Paul Clement:

CHIEF JUSTICE ROBERTS: Well, the problem is that neither side in this debate wants the accommodation to work. The one side doesn't want it to work because they want to say the mandate is required, and the other side doesn't want it to work because they want to impose the mandate. Is it really the case that there is no way to resolve those differences?

Justice Breyer sounded a similar tone of frustration.

I really repeat, if there's anything you want to add, the Chief Justice's question. I don't understand why this can't be worked out.

RFRA Theory Sweeps Too Broadly

At the outset of the case, Chief Justice suggested to SG Francisco that the government's RFRA theory would "sweep too broadly."

JUSTICE ROBERTS: –before you get to that, I'd like to ask you a question on your RFRA point. I wonder why it doesn't sweep too broadly. It is designed to address the concerns about self-certification and what the Little Sisters call the hijacking of their plan.

But the RFRA exemption reaches far beyond that. In other words, not everybody who seeks the protection from coverage has those same objections. So I wonder if your reliance on RFRA is too broad.

In other words, the new rule went far beyond exempting the Little Sisters. It also exempted people who may not share their religious beliefs.

Justice Kagan returned to that theme during her time.

JUSTICE KAGAN: --the Chief Justice's first question, which was about whether this rule **sweeps too broadly**. And I understand your concern about giving agencies some leeway so that there's --they don't have to think through thousands of accommodations in their head and then find the narrowest one possible for every person. But that's not really the situation we're in with respect to this.

There was an existing accommodation in place, and some employers had objections to that accommodation, the Little Sisters and some others. And even assuming that those objections needed to be taken into account, the **rule sweeps far more broadly than that** and essentially **scraps the existing accommodation even for employers who have no religious objection to it**.

And sort of by definition, doesn't that mean that the rule has gone too far?

SG Francisco replied that the accommodation was not scrapped. It is still available for employers that request it. Kagan was skeptical.

JUSTICE KAGAN: --**do you have any evidence** that the current exemption is being taken --availed --that only employers of the Little Sister kind who have complicity objections are now

taking advantage of the exemption? I would think that there would be a lot of employers who would say, you know, we don't have those complicity beliefs, but now that they're giving us an option, sure, we'll take it.
SG Francisco answered that would be irrational. Firms like Hobby Lobby would be happy to accept the accommodation.

GENERAL FRANCISCO: Your Honor, I respectfully think that that would be **irrational**, given that employers would then be depriving their employees of a valuable benefit that doesn't cost them anything, because it doesn't cost any money to add contraceptive coverage to an insurance plan. It's a cost-neutral coverage provision.
"Cover only those who have objections to the existing accommodation"

Then, Kagan offers an alternate version of the rule:

JUSTICE KAGAN: But why couldn't you just have just have written the rule to **cover only those who have objections to the existing accommodation**? In other words, those who have these complicity-based beliefs that the Little Sisters have?
Francisco replied that the government should have "flexibility in the face of potentially competing statutory obligations." The Chief cut him off mid-sentence. Justice Gorsuch, who was up next, asked "to hear the rest of your answer." Francisco continued:

I think we at the very least have a strong basis for believing that the prior regime violated the Religious Freedom Restoration Act, and that gives us the discretion to adopt a traditional exemption, which, after all, is the type --is the way that the governments have traditionally accommodated religious beliefs.

And I think that's particularly clear here since, one, RFRA both applies to and supersedes the ACA, and, two, even if you don't think that the ACA authorizes exemptions, even though we think that they --it does, there's nothing in the ACA that prohibits exemptions.
Clement suggests the rule may be different for non-profits

Later in the argument, Justice Breyer asked a long question about the APA. Then he expressed frustration that the plaintiffs did not raise a substantive APA challenge:

JUSTICE BREYER: Now you have interests on both sides. The question is whether this is a reasonable effort to accommodate. And that, I think, is arbitrary, capricious, abuse of discretion, but that is the one thing that **isn't argued before us in these briefs or in this appeal**.

So what do I do?
Clement's addressed that point. In doing so, he hinted at Justice Kagan's middle ground.

CLEMENT: That is not the nature of the challenge. **They haven't brought that kind of substantive APA challenge**. So I think what you would do is you would reject the challenge that is before you, because I don't think any of the grounds that have been litigated before you are valid, and you could make clear in your opinion that if somebody down the road has an objection to the scope of the exemption, **say they work for a for-profit company and with respect to that for-profit company**, they're not getting their services and they think that's because the APA

--because the --the rule here is too broad, **that would be a separate APA challenge that I don't think rejecting the challenge here would foreclose**. So I think that's the --the path forward.
Here Clement is talking about an employee of a for-profit company, like Hobby Lobby. Clement suggests that this employee could bring an as-applied APA challenge. Though the new rule may be reasonable for groups like the Sisters, it may not be reasonable for for-profits like Hobby Lobby. Clement represented Hobby Lobby, so he is in a unique position to draw this distinction.

Later, Justice Gorsuch asked Paul Clement about the APA. And once again, Clement distinguished the analysis between non-profits like the Sisters and for-profits like Hobby Lobby.

MR. CLEMENT: And there's an obligation on HRSA to take into account RFRA as well as its authority under the ACA. And so it seems to me that an exemption for religion --that of the kind that's in the final rule here, I think, is going to be **insulated from an arbitrary and capricious challenge in a way that exempting, say, just large employers or employers incorporated in Delaware. I think all of those would be irrational and --and arbitrary and capricious under the --under the APA.** But, here, the -the agency has complied with RFRA consistent with its authority under the ACA, which seems to give it a particularly strong case for its actions here to not have been arbitrary and capricious.
Once again, Clement is willing to treat for-profit employers differently. It would be irrational to exempt "large employers." But rational to exempt religious non-profits.

Do these concessions provide a middle ground?

Exempt all religious non-profits; accommodate the rest

I filed an amicus brief for the Cato Institute and the Jewish Coalition for Religious Liberty. We made arguments about the non-delegation doctrine, which are not relevant here. (I'll be happy for a cite by a Thomas or Gorsuch concurrence.) But we did raise one relevant point: the Obama administration was out of its league to give the exemption to houses of worship, but saddle religious non-profits with the accommodation. We wrote:

The only available remedy for those **whose free exercise is substantially burdened** by the enforcement of the statute is an exemption, not a half-hearted accommodation. *See* Blackman, *Gridlock*, *supra*, at 254–256 (contrasting the different ways in which the executive branch and Congress can accommodate RFRA violations). The expanded exemptions were a **reasonable** way to accomplish that goal
Our position focused on those "whose free exercise is substantially burdened." We thought the blanket exemptions were "reasonable," but not the only way to proceed.

I think Kagan, and perhaps Roberts, may be hinting at this middle ground. First, the government's RFRA theory is too broad. People are exempted who may not share the Sisters's steadfast religious beliefs. Second, *Zubik* held that the Obama administration's exemption/accommodation dichotomy was too stingy. Perhaps the middle ground is what Kagan suggested: "Cover only those who have objections to the existing accommodation." In other words, exempt all religious non-profits who raise these objections, and give the accommodation to the rest.

How would this opt-out work? The non-profits could be asked if the accommodation substantially burdens their free exercise. If the answer is yes, they would be exempted. I do not think groups like the Sisters would object to this burden. Indeed, they have told courts for nearly a decade they have religious objections to the mandate. The Sisters can attach an appendix to their opt-out form.

How should the Court proceed? A remand back to the agency would be counter-productive. The issue would be tied up in litigation for years. "This case, in litigation for [almost] a decade, has gone on long enough."

Could this outcome be accomplished without a remand? Yes. Indeed, there is a precedent close at hand. On January 24, 2014, the Court issued an order in *Little Sisters of the Poor v. Sebelius*. That case effectively modified the opt-out regime for the Sisters. It provided:

The application for an injunction having been submitted to Justice Sotomayor and by her referred to the Court, the Court orders: If the employer applicants inform the Secretary of Health and Human Services in **writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing** against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. **To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators.** The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

I offered this description in *Unraveled* (p. 245):

Simply stated, if the Little Sisters notify the government in writing that they "have a religious objection to providing coverage for contraceptive service," which they obviously do, they are exempted from the contraceptive mandate altogether.
The Court could simply enter the same order from 2014, as part of the permanent rule. Or, as Justice Kagan said, "Cover only those who have objections to the existing accommodation." The Sisters would be exempt. And Hobby Lobby would be accommodated.

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