# Obamacare Again?

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In what has become a spring tradition, Obamacare returns to the Supreme Court this month, the fourth time in five years. Fortunately for the religious nonprofits challenging the law's contraceptive mandate—including the Little Sisters of the Poor, a monastic order that cares for impoverished elderly—the results of the Court's second and third encounters with the act can together answer their prayer for relief.

Two years ago, in *Burwell* v. *Hobby Lobby*, the justices ruled 5-4 that the government could not force owners of closely held corporations to provide morally objectionable contraceptives to employees. (Hobby Lobby's owners believe devices that can prevent the implantation of fertilized eggs, such as morning-after pills and IUDs, violate the Christian prohibition on abortion.) The decision was based on the Religious Freedom Restoration Act (RFRA), which bars the government from imposing a "substantial burden" on religious liberty unless it's "the least restrictive means" of advancing a "compelling government interest."

Then last year, in *King* v. *Burwell*, the Court refused to defer to the IRS's reading of the phrase "established by the State" in determining whether Obamacare's tax credits applied to plans bought through federal, not just state-created, exchanges. Chief Justice John Roberts's majority opinion declared the bureaucracy lacked the requisite authority and "expertise" to interpret this "central" part of the act. Administrative agencies cannot give themselves the power to answer questions of profound "economic and political significance." (In its 6-3 decision, the Court found another way to rule in favor of the administration.)

What do these cases have in common? They demonstrate that it's Congress's duty to craft delicate religious accommodations to protect conscience. The bureaucracy simply doesn't have the ability—meaning both authority and know-how—to create legal rules in this area.

The Little Sisters of the Poor, whose case has been consolidated with several others under *Zubik*v. *Burwell* and will be heard March 23, argue that the Obama administration's "accommodation" still violates their religious free exercise. Houses of worship are exempt from

the contraceptive mandate, but nonprofits the government considers insufficiently religious to merit that exemption—such as educational institutions and social-service providers—must structure their insurance coverage in a way that still fulfills the mandate. So another RFRA battle looms, which in the absence of Justice Antonin Scalia seems destined for a 4-4 deadlock that's not just unsatisfying but impracticable: Given the disparate lower-court rulings that would stand with a tie, the mandate would survive in some parts of the country but not others.

Conveniently, there's an alternate argument, based on the *Hobby Lobby* and *King* rulings, that could command a majority opinion: The agencies lack both the expertise and power to exempt some religious groups while forcing others—deemed "less" religious—to be complicit in what they consider sin. By rejecting this bureaucratic assertion of executive authority, *Zubik* can thus be resolved without further politically fraught haggling over RFRA.

To better understand this elegant solution that sidesteps the culture-war debate over reproductive rights and what constitutes an abortifacient, let's step back and look at the history of the mandate at issue.

Congress didn't actually enact a contraceptive mandate. Obamacare's statutory text only requires that insurance cover, "with respect to women, such additional preventive care . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." Congress did not define what constitutes "preventive care." That subsidiary agency within the Department of Health and Human Services recommended that "preventive care" be interpreted to include all federally approved contraceptives. HHS agreed.

Facing a wave of public outrage, HHS belatedly acknowledged that its interpretation would force millions of religious believers to violate the teachings of their various faiths. In response, it worked with the Departments of Labor and Treasury to adjust the relevant regulations. They exempted certain religious employers—houses of worship and their auxiliaries—from the mandate altogether. Religious nonprofits the agencies deemed insufficiently religious to qualify for the exemption would receive an "accommodation" allowing them to discharge the mandate another way: They could notify either HHS or their insurance companies of their objection, and insurers would then offer contraceptive coverage directly to their employees at no cost.

HHS doesn't say that RFRA compels the exemption or the alternative-compliance mechanism. Instead, it asserts that the relevant Obamacare provisions give the agency the authority to decide which religious groups should be exempted and which "accommodated." Still, the government concedes that the accommodation imposes at least a "minimal" burden on religious free exercise.

The alternative-compliance regulation, however, is not authorized by the text of Obamacare. No provision of that statute empowers any administrative agency to distinguish among religious nonprofits, exempting some while burdening others. The statute doesn't authorize HHS or any other department to burden the free exercise of *anyone*. To paraphrase Chief Justice Roberts's opinion in *King*: "It is especially unlikely that Congress would have delegated this decision,"

without clear statutory guidance, to an agency that "has no expertise in crafting" religious accommodations. Or as Justice Anthony Kennedy wrote a decade ago in *Gonzales* v. *Oregon*, in which the Justice Department attempted to trump a state drug-dispensing law: "The idea that Congress gave the [executive branch] such broad and unusual authority through an implicit delegation is not sustainable."

The Obama administration's justifications for discriminating among religious groups reflect its unprecedented home-brewed approach to protecting religious exercise. The agencies concocted an exemption for churches but not associated religious organizations based on its assertion that employees of the latter are "less likely" than the former "to share their employer's . . . faith." That HHS refused to exempt people who work for Little Sisters of the Poor—a group of nuns who vow obedience to the pope!—illustrates how out-of-its-league it was in evaluating religiosity.

Congress has expressly exempted nonprofits, including all the *Zubik* plaintiffs, from the antidiscrimination provisions of federal employment law. The Little Sisters of the Poor can hire exclusively people of their own faith. Yet administrative agencies, with no legal basis, issued a blanket judgment that *all* religious nonprofits have employees less likely to share their employers' religious beliefs. (At the same time, they removed the regulatory requirement that houses of worship primarily employ people who share their faith to avail themselves of the exemption.) There was not even an option for a case-by-case judgment.

Such haphazard and unauthorized guesswork by anonymous civil servants, in the face of longstanding congressional policy to the contrary, cannot justify an infringement of religious freedom. That HHS, Labor, and Treasury's rulemaking was premised not on health, labor, or financial criteria, but on the departments' subjective evaluation about which employees more closely adhere to the religious views of their employers, confirms that the authority claimed by these agencies is, to again quote *Gonzales* v. *Oregon*, "beyond [their] expertise and incongruous with the statutory purposes and design."

Earnest and profound questions regarding "the mystery of human life," as the Supreme Court has discussed in its abortion jurisprudence, are the quintessential issues of "significance" that the Constitution does not intend agencies to resolve absent clear delegation. The administration's attempt to force religious nonprofits to violate religious teaching regarding the start and nature of human life lays claim to an extravagant statutory power affecting fundamental liberties—one that Obamacare simply does not grant.

The combined holdings of *Hobby Lobby* and *King* present a result that most of the justices should be able to support: The administrative state overstepped its bounds, and religious nonprofits deserve at least the same exemption that many for-profit employers now enjoy. In addition to avoiding the ideologically charged battle over RFRA, this alternate path will allow

the Court to set down an important limitation on executive power that will bind the next president, whoever he or she may be.

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