

ST. LOUIS POST-DISPATCH

Contraceptive-mandate opponents prefer to have the nuns on their side

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If you are looking for sympathetic plaintiffs to headline a major Supreme Court battle — well, it never hurts to have on deck an order of nuns called the Little Sisters of the Poor.

That seems especially true when the subject is the Affordable Care Act's contraceptive requirement. Out of an avalanche of litigation, those urging the court to take up the latest challenge to the health care law have rallied around the petition filed by the Little Sisters of the Poor Home for the Aged.

The sisters even have a papal endorsement: Pope Francis met with about 35 nuns from the order during his recent visit to Washington to show his support for their lawsuit. The sisters scurried out of Mass early at the Basilica of the National Shrine of the Immaculate Conception to be in place to meet the Holy Father.

But the administration of President Barack Obama says there are procedural problems with the Little Sisters' case, which involves whether employees at their facilities for the elderly receive contraceptive coverage under their health insurance plans just like workers anywhere else, and who should provide it. The Little Sisters, with headquarters in Baltimore, have 30 nursing homes in the United States. The lawsuit involves a home in Denver.

More than a half-dozen cases with similar facts are waiting at the Supreme Court, and Solicitor General Donald Verrilli Jr. told the justices that just about any of them would provide a better framework for deciding the issue at stake than the one filed by the nuns.

“The Little Sisters' petition would be an especially unsuitable vehicle because of the unusual and uncertain circumstances of the lead petitioners in that case,” Verrilli wrote.

That set off a tetchy back-and-forth between Verrilli and Paul D. Clement, who is representing the nuns. He was a solicitor general during the administration of George W. Bush.

“After impermissibly trying to pick and choose which religious groups to exempt from the contraceptive mandate, (the government) should not now to be allowed to pick and choose its opponent or which questions it must confront in defending its actions,” wrote Clement, retained by the Becket Fund for Religious Liberty on behalf of the Little Sisters.

It is one of those behind-the-scenes battles at the Supreme Court that can have a major effect on the ultimate outcome.

“These briefs show a passionate debate over which case is the better vehicle for each side, and the right vehicle can make a difference” in a 5-4 case, said Gregory G. Garre, who was a solicitor general in the Bush administration. “Each side no doubt thinks their legal case is stronger if the court agrees to take the case they want.” At issue is the Affordable Care Act's guarantee of preventive care for women, which the Department of Health and Human Services has interpreted to mean that women covered by group health plans be able to obtain contraceptives at no additional cost.

Originally, only religious organizations such as churches were exempted.

But after protests from religious organizations such as colleges, hospitals and charities, the government devised an accommodation.

To be eligible, the organization must certify to its insurance company that it opposes coverage for contraceptives. Alternatively, it can send a letter to the government saying so and providing the name of its insurance company. The insurers and government take over from there to provide the services.

But the groups say either of those options serve as a “trigger” that allows the contraceptives to be provided — and makes them complicit in what they consider sin.

Six appeals courts across the country have agreed with the government, including in the Little Sisters’ case. But last month, one court went the other way, setting the stage for the Supreme Court to step in.

The case will be something of a sequel to the court’s 5-4 decision in *Hobby Lobby v. Burwell* last year that said owners of closely held private companies do not have to violate their religious beliefs to provide contraceptive coverage to their workers.

Clement and Verrilli opposed each other in that case, too.

Verrilli says the better candidate for Supreme Court review is one from the U.S. Court of Appeals for the District of Columbia Circuit involving the Roman Catholic Archdiocese of Washington, which provides a health plan used by numerous groups in the region.

Only the Little Sisters’ petition has attracted significant support from those who oppose the government’s requirement.

Gretchen Borchelt, vice president for Health and Reproductive Rights at the National Women’s Law Center, which supports the government, understands why.

It presents the image “of the government going against what is seen as a group of nuns,” she said, although she adds that “what’s really at stake is their employees.”

When Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, was looking to file an amicus brief opposing the contraceptive mandate, he chose the nuns’ case.

“There are so many cases, but the Little Sisters’ has become the iconic one,” he said.

His argument that government agencies were unsuited to decide which religious groups get exceptions and which do not fit well with the particulars of the case.

“That HHS refused to exempt people who work for the Little Sisters of the Poor — a group of nuns who vow obedience to the Pope! — is a testament to how out-of-their-league the departments were in evaluating and responding to burdens on religion,” he wrote.

Mark Rienzi, a Catholic University law professor and Becket Fund attorney, acknowledged that there are “optics reasons” for the support his clients have received, but added that “there are legal reasons, too.”

Their petition urges the justices to consider not only the nuns’s protection by the Religious Freedom Restoration Act but also under the Constitution.

The justices are scheduled to take their first look at the petitions in a private conference at the end of the month. They don’t have to pick between the Little Sisters’ and the government’s preferred case; they could take both, or choose from the other petitioners who want their moment at the court.