Written by **Jack Kenny** on January 26, 2014

Little Sisters Win Another Round Against Contraception Mandate

The Little Sisters of the Poor and Aged won another temporary victory at the U.S. Supreme Court Friday, when the justices ruled that the religious order need not, for the time being, sign a form authorizing contraceptive coverage in health insurance for its employees. The justices stipulated, however, that the ruling was not on the merits of the Little Sisters' appeal, but is instead a temporary order barring enforcement by the federal government, pending a decision by a federal appeals court. The order affirms and extends the temporary injunction granted on New Year's Eve by Justice Sonia Sotomayor.

The Little Sisters, a Roman Catholic religious order, is an international ministry, with nursing homes in Denver and Baltimore. Under the Affordable Care Act of 2010 (ObamaCare) and a subsequent mandate from the federal Department of Health and Human Services (HHS), employers must ensure that healthcare benefits for their workers include coverage for contraception, sterilization, and abortion-inducing drugs. Non-profits with religious affiliations may be exempted by signing a form authorizing a third-party benefits provider to supply the coverage at no cost to either the employer or the employee. The Sisters have refused to sign the waiver, claiming it would make them complicit in what their church teaches are immoral acts. As their attorney, Mark Rienzi of the Becket Fund for Religious Liberty, argued in the brief he submitted to the Supreme Court, the Sisters "cannot execute the form because they cannot deputize a third-party to sin on their behalf."

The penalty for non-compliance is $100 a day per employee or $6,700 per day for the Little Sisters. That, said Rienzi in an appearance earlier this month on *Fox News Sunday*, would force the Little Sisters to close the nursing homes — a result, he argued, that would be contrary to the purpose of Affordable Care Act as well as a violation of the religious liberty clause of the First Amendment.

"Fewer elderly people will get the health care they need in those beautiful nursing homes the sisters run. The employees [who] used to have jobs at the Little Sisters of the Poor might not have a place to work if the government succeeds in crushing these nursing homes."

Lawyers from the Department of Justice argued the government is doing nothing of the kind. The insurer of healthcare benefits for Little Sister employees is another religious-affiliated group, the Christian Brothers Employee Benefit Trust. The trust does not include contraception or abortion in its healthcare coverage, so the Justice Department argued that the Little Sisters' religious objection to signing the required form is moot.

"As a result, a signed certification will discharge all employer-applicants' responsibilities under the contraceptive-coverage provision, and their employees will not receive such coverage from the third-

party administrator," Solicitor General Donald Verrilli, Jr. argued in a petition for lifting the injunction. "Given these circumstances applicants' concern that they are 'authorizing others' to provide coverage lacks any foundation in the facts or the law." Indeed, the government contends, the Little Sisters can get out from under the mandate "with a stroke of their own pen." Ilyse Hogue, president of NARAL Pro-Choice America, raised that argument in the Fox News segment with Rienzi.

"In this case, no matter what the Little Sisters sign their employees are actually not going to get contraception," the NARAL president said, while professing not to understand "why Mr. Rienzi doesn't instruct his clients to sign the form, because no one is getting contraception. They can get back to doing the great work that they do."

Cecile Richards, president of the Planned Parenthood Federation of America, has also weighed in on the controversy, with a written statement claiming the Little Sisters case "raises a very narrow and specific question about the administrative mechanism that religious groups use to claim their exemption," she said in a statement. issued after Friday's decision. The case is "about paperwork, not religious liberty," Richards argued.

The arguments are interesting, each in its own way. Why not sign the form if it won't change anything? On the other hand, why, as Rienzi asks, has the Obama administration gone to the Supreme Court in an effort to compel the Sisters to sign a document that government lawyers claim would have no practical effect? Indeed, what is NARAL or Planned Parenthood's interest in having the document signed if it would provide no contraception coverage for the Little Sisters' employees? If the Little Sisters were to sign, would the government then go after the Christian Brothers to either provide the mandated coverage or authorize yet another party to do so? The Christian Brothers Employee Benefits Trust Fund is a co-plaintiff with the Little Sisters in the appeal, claiming all the organizations within the trust would be faced with fines totaling $1 million a day if the mandate is enforced.

The controversy is not limited to Catholic institutions or to non-profits with formal ties to religious organizations. There are literally dozens of legal appeals for relief from the contraceptive mandate, including some from owners of for-profit corporations such as the evangelical Christian family that owns the Hobby Lobby Stores and the Mennonite owners of the Pennsylvania-based Conestoga Wood Specialties. The Supreme Court has scheduled a March hearing for the Hobby Lobby appeal.

The authority of Congress to enact a health insurance program is found nowhere in the Constitution, save by the most imaginative stretching of the clause regarding the regulation of interstate commerce. (See for example, the Supreme Court decision in *Wickard v. Filburn.*) But placing the full force of the federal government behind a contraceptive mandate raises important questions about where the reign of the secular authorities ends or if, in fact, it ends anywhere.

In addition to the First Amendment guarantee of "the free exercise" of religion, the appeal on behalf of the Little Sisters of the Poor is based on The Religious Freedom Restoration Act of 1993, which prohibits the federal government from burdening "a person's exercise of religion," unless the government can demonstrate that the burden is the "least restrictive means of furthering … [a] compelling governmental interest."

What is the "compelling governmental interest" behind the contraceptive mandate? The wide availability and use of contraceptives in America today is a well known and frequently discussed fact. Yet the Obama administration's position is as though contraception would be rarer than hen's teeth were it not for the Affordable Care Act and the HHS mandate. The law of the land has "progressed"

radically, from forbidding states from banning the sale of contraceptives, as the Supreme Court did in its 1965 *Griswold v. Connecticut* ruling, to requiring that employees have contraception provided for them, free of charge, by authority of an act of Congress.

The compelling interest of those in government is in expanding government power, often by claiming to be enlarging the sphere of freedom while imposing new obligations and restrictions. By requiring that employee health insurance policies include contraceptive coverage — with no deductibles or added costs — the federal government is underwriting the ideology of sexual liberation and "reproductive freedom" in what is euphemistically called a "sexually active" lifestyle. (Previous generations had another name for it.) Ours is an era in which the federal government has restricted freedom of choice in countless ways, with laws and regulations governing everything from the kind of toilet you may have in your home to the kind of light bulb you may purchase to banning activity on your own land that might disturb the habitat of a kangaroo rat. Yet "sexual freedom" must be not merely protected, but promoted and even subsidized.

"Why should a government that increasingly limits the sphere of freedom, privacy and choice in every other area show such consistent favor to sexual libertarianism alone?" asked the late columnist Joseph Sobran, who then answered his own question. "Because the traditional code is designed to support the family as the basic unit of society, and the family, like religion and private property, is one of the foundations of liberty and resistance to monolithic state power."

"Without religion," Sobran continued, "the state faces no rival moral authority. Without property, freedom has no material basis, and everyone becomes dependent on the state for support. And without the family, the individual belongs almost wholly to the state, with no stable competing loyalty."

In a 1928 case involving unauthorized wiretapping, Justice Louis Brandeis defined the right of privacy as "the right to be left alone." That in essence is what the Little Sisters of the Poor and other conscientious objectors to the contraceptive mandate are asking of a government too big to refrain from micromanaging the lives of our citizens. The animating principle of today's liberal, or "progressive," ideology is the conviction that,, as columnist George Will has aptly put it, every institution — large or small, public or private, religious or secular — must be "properly broken to the saddle of the state."

There remain some among us who dare to resist the government's spurs and saddle when a greater principle is at stake.

Legal battles in weeks and months ahead may yet determine if liberty and the rights of conscience will prevail in America or if, in their absence, all must bend the knee to Caesar.