Hobby Lobby Post Script

As recounted in the *HL* opinion, regulations issued under Affordable Care Act by the Obama Administration exempted from the contraceptive mandate: churches (including houses of worship, such as synagogues and mosques) and their integrated auxiliaries, associations of churches, and any religious order that engages exclusively in religious activity. In addition, other non-profit organizations that objected to the required contraception coverage could file a document titled "Form 700" with their insurance company notifying them of the non-profit's objection. The insurance company would then provide the contraceptive coverage directly to employees without any involvement of the employer, including any distribution of literature or extra payments by the employer.

The ruling in *HL* was largely based on the Majority's conclusion that, since the "accommodation" had been made available to non-profit organizations, it could also be made available to closely held for-profits corporations like Hobby Lobby. Writing for the Majority, Justice Alito expressed no reservations about the "accommodation"; indeed, by implying it could constitute the "least restrictive means" for the government to achieve its women's health care objective, his opinion seemed to rely on it.

However, in *Zubic v. Burwell*, a case that was had been working its way through the federal courts about the same time as *HL*, non-profit religious organizations that did not qualify for an automatic exemption from the contraceptive mandate challenged the "accommodation" because it required them to form file Form 700 in order to be exempted. They argued the mere act of filing the form would make them complicit in providing contraception and, therefore, would be sinful. In 2015, a three-judge panel of the Third Circuit Court of Appeals ruled against the plaintiffs, finding:

> The submission of Form [700] does not make the [non-profit religious organizations] "complicit" in the provision of contraceptive coverage. If anything, because they specifically state on the form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage. Ultimately, the regulatory notice requirement does not necessitate any action that interferes with the [non-profit religious organizations'] religious activities. (Emphases in original.)

In 2016, *Zubic* reached the Supreme Court along with several other cases that raised the same objection. The Court sensing the possibility of a compromise, vacated the decisions of the Third Circuit and other Courts of Appeal and sent the cases back to the lower courts to see if a settlement could be achieved. In its temporary disposition of the case, the Court did not rule on whether or not the "accommodation" was valid under RFRA. (With the death of Justice Scalia, the Court had lost its conservative majority and was split 4-4, so the remand was actually a punt that would put the case on hold until another McConnell-approved justice could be seated.)

In 2017, with no compromise reached in *Zubic* and the case continuing to exist in something akin to judicial suspended animation, the Trump Administration issued two new rules under the ACA:

> The first rule greatly broadened the automatic religious exemption from the contraceptive mandate so that it would include: All nonprofit or for-profit businesses, including publicly traded companies.
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> The second rule added a new "moral" basis for an automatic exemption from the contraceptive mandate so that it would include: All nonprofits and all non-publicly traded companies that have "moral" objection to birth control.

Shortly after the rules were promulgated, Pennsylvania and New Jersey challenged the exemptions under the Administrative Procedure Act (APA) arguing that the Trump Administration failed to give the public adequate notice of the new rules and time to comment. The district court concluded that the states were likely to prevail in the case and issued a preliminary injunction preventing the Administration from implementing the rules anywhere in the nation.

In 2019, the Third Circuit Court of Appeals upheld the nationwide preliminary injunction, finding that the Administration lacked authority to issue the rules because the ACA and RFRA neither require nor even permit the religious exemption. In addition, the Court held that, since RFRA did not require an alteration in the regulatory mechanism, the Administration did not have good cause or statutory authority to issue the rules without notice and comment, and that the failure to conduct notice and comment on the rules required their invalidation. The Third Circuit's decision was immediately appealed to the Supreme Court.

On July 8, 2020, in an opinion by Justice Thomas, the Supreme Court in *Little Sisters of the Poor v. Pennsylvania*, ruled 7-2 that the Trump Administration had the authority under ACA to promulgate the rules granting blanket religious and moral exemptions from the contraceptive mandate. The Court chose not to decide whether RFRA provided an independent basis for granting the exemptions. Finally, the Court found unpersuasive Pennsylvania's argument that the new rules were invalid because the Administration had failed to follow the proper notice and comment process under the Administrative Procedure Act.

In his concurrence in the opinion, Justice Alito argued that the Court should have gone further and decide that RFRA did not just allow the exemptions but required them. In addition, Alito would have ruled that "insuring that all women have access to all FDA-approved contraceptives without cost-sharing" is not a compelling governmental interest under RFRA, although in his Majority opinion in *Hobby Lobby*, Alito had assumed, without deciding, that it was.

In her concurrence in the judgment, Justice Kagan (joined by Justice Breyer) agreed that the ACA gave the Administration the legal basis for promulgating the new rules. However, she went on to conclude that since the Administration had failed to show a basis for expanding the religious exemption to include publicly traded corporations or for creating a brand new "moral" exemption, the rules were probably arbitrary and capricious and therefore invalid, although that issue was not yet before the Court.

Justice Ginsburg in her dissent (joined by Justice Sotomayor) argued that, although the government in enacting laws like RFRA may provide protection for religious free exercise which can go beyond what's required by the First Amendment, it cannot do so at the expense of third parties. And in recognizing religious objections to the contraceptive mandate, the government was in fact placing a burden on third parties - - hundreds of thousands of women whose contraception coverage under employer health plans was being eliminated.

My Comment:

In *HL*, the Majority were at pains to have their decision appear to be limited to RFRA's applicability to closely held corporations. Accordingly, they dismissed the Dissent's concern that the logic of the Court's decision would be extended beyond closely held corporations to publicly traded corporations, writing: "These cases, however, do not involve publically traded corporations, and it seems unlikely that the . . . corporate giants will often assert RFRA claims."

However, the Trump Administration's rules dramatically demonstrate where the logic of the *HL* decision leads and raise the question of whether the Majority, in rejecting out of hand the Dissent's alarm, were naïve or tacitly receptive to such an extension of RFRA.

In this connection, the transition from Justice Alito's bland assurances in *Hobby Lobby,* that exempting employers from the contraceptive mandate would have "precisely zero" consequences for female employees since they "would still be entitled to all FDA-approved contraceptives without cost-sharing" to his opinion in *Little Sisters*, upholding rules that provide no mechanism for obtaining such contraceptive coverage, has aptly been described as "bait-and-switch."

Further, the Majority in *Little Sisters* did not specifically address the "moral" exemption, perhaps assuming, without any support in RFRA, that "moral" and "religious" are interchangeable bases for claiming exemption from the mandate.

Although it seems that *Little Sisters* in one guise or another has been going on nearly as long as *Jarndyce v Jarndyce,* it's not over yet. Remanded to the Third Circuit to determine whether the promulgation of the rules was arbitrary and capricious, the case will undoubtedly return to the Supreme Court. In the July decision, Justices Kagan indicated in her concurrence that the rules were probably arbitrary and capricious, while, in his concurrence, Justice Alito wrote they were not. Given the makeup of the Court, it's unlikely that the rule creating a broad religious exemption will be ruled arbitrary and capricious. The fate of the "moral" exemption, which has no textual foundation in RFRA, is less certain.

It is obvious that the Trump Administration's extension of the religious ground for exemption to all for-profit corporations and its creation of a new moral ground of exemption for all non-profits and non-publically traded companies will greatly expand the number of employers that can opt out of the ACA's contraceptive mandate. Equally obvious, is that the rationale for using RFRA to create exemptions from the ACA is logically extendable to all other laws of general application.

The Supreme Court has steadily expanded RFRA's reach and its decisions under that act have consistently cautioned that the substance of a religious belief cannot be examined - - judicial inquiry must be restricted solely to the question of whether the belief is "sincerely held". Consequently, it's expectable that laws of general application, like the Civil Rights Act, will be challenged by religionists, including corporation with tens of thousands of employees, asserting beliefs that may be sincerely held, but also embody racial, ethnic, religious, or gender biases that are repugnant to a democratic society. In this regard, while the Supreme Court surprised just about everyone earlier this year by ruling in *Bostock v. Clayton County* that the Civil Rights Act of 1964 prohibits an employer from firing an employee for being gay or transgender, it remains to be seen what the outcome would be if a similar firing were based on the employer's religious beliefs. In light of the Supreme Court's steady expansion of RFRA's reach, it is far from certain that a challenge to Title VII based on religion would be rejected by the Court.

The prospect of such "anarchy" is what Justice Scalia warned of in *Employment Division v. Smith* (1990):

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

The Supreme Court's readiness to bless RFRA opt-outs from laws of general application makes Justice Scalia's warning even more pertinent today than it was thirty years ago and raises the

prospect that additional carve-outs may so enhance free exercise that the other religious component of the First Amendment, the “establishment clause”, becomes implicated.