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Obama administration: Sisters' suit against HHS mandate has no basis

by Joshua J. McElwee

Washington — The Obama administration on Friday called on Supreme Court Justice Sonia Sotomayor to lift an order blocking part of a federal mandate requiring coverage of contraceptive services in health care plans, arguing that a suit brought by an order of Catholic sisters against the measure has "no legal basis."

The Department of Justice was responding to Sotomayor's order, issued temporarily Tuesday evening, in regards to a suit from the Little Sisters of the Poor, a religious order based in Colorado.

Sotomayor's order concerns a mandate from the Department of Health and Human Services, issued as part of the health care reform law, that contraceptive care, such as prescriptions for birth control pills, must be fully covered as part of any insurance plan.

While some religious organizations are exempt from this rule or given an accommodation, a number of nonprofit Catholic groups say those exemptions are not enough. A number of for-profit groups have also filed suit against the mandate, saying it does not give any protection for for-profit employers with religious objections to contraception.

The Little Sisters argued in their complaint that while the mandate provides them an exemption as a nonprofit church group, it also requires that they first sign papers indicating they are seeking such accommodation.

The act of signing those papers, the sisters' lawyers argued, would effectively be an act of cooperation with birth control as, under the Health and Human Services department's exemption scheme, the government would then place the burden on providing contraceptive services to the sisters' insurers and

not on the sisters themselves.

The sisters are "not substantially burdened by the requirement that they sign the certification form expressing their religious objection to contraceptive coverage in order to exempt themselves from the contraceptive-coverage provision," the government argues.

In a 37-page brief from Solicitor General Donald B. Verrilli Jr., the Justice Department also states that the sisters' lawyers created a "flawed analogy" by comparing the sisters' situation to those faced by Quakers who because of religious beliefs cannot join the military or Jewish prisoners who because of kosher laws cannot eat pork.

"The question in all of those cases would be whether the religious objector could be required to sign a certification form in order to secure the religion-based exemption he sought," Verrilli states.

"It is applicants' position ... that would lead to absurd results in those cases, for it would seemingly mean that the Quaker could not be made to attest to his status as a conscientious objector before being absolved of his military obligations; that the Jewish prisoner could not be required to fill out a form saying he had a religious objection to the consumption of pork before he was provided an alternative meal."

"When extending religious accommodations, the government must be allowed to provide for regularized, orderly means of permitting eligible individuals or entities to declare that they intend to take advantage of them," Verrilli states.

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"That is what the self-certification under the regulations accomplishes, and it does so by requiring only that employer-applicants say something that they have said repeatedly in this litigation, namely, that they object on religious grounds to providing contraceptive coverage to their employees."

Lawyers for the sisters said in a statement Friday that the government's requirement that the nuns declare they will not provide contraceptive services amounts to a "permission slip" for the insurers to provide that coverage.

"The government now asks the Supreme Court to believe that the very thing it is forcing the nuns to do -- signing the permission slip -- is a meaningless act," said Mark Rienzi, counsel for the sisters, in a statement.

"But why on earth would the government be fighting the Little Sisters all the way to the Supreme Court if it did not think its own form had any effect?" he asked. "The government's brief offers no explanation for its surprising insistence on making the Little Sisters sign a form the government now says is meaningless."

Rienzi also serves as senior counsel for the Washington-based Becket Fund, which represents many organizations suing over the mandate. There are 91 such lawsuits in courts across the country.

Friday's response by the Justice Department to Sotomayor's order leaves it up to Sotomayor to pursue more findings on the sisters' case, seek to refer it to the full court, or drop her order.

The Supreme Court is due to hear this spring two cases by for-profit employers that are challenging the mandate on separate grounds.

[Joshua J. McElwee is *NCR* national correspondent. His email address is jmcelwee@ncronline.org. Follow him on Twitter: @joshjmac.]

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