

Five judges write rare dissent over court's decision not to take appeal

By Catholic News Service

DENVER - Five federal judges on the 10th U.S. Circuit Court of Appeals wrote a rare dissent from the majority's decision not to re-hear an appeal of a July ruling against the Little Sisters of the Poor over the contraceptive mandate in employee health insurance.

A three-judge panel of the 10th Circuit had said that the Little Sisters and their fellow plaintiffs against the federal government are not substantially burdened by the process set out by the Department of Health and Human Services by which they can avoid requirements to provide contraceptive coverage to employees as mandated by the Affordable Care Act.

The court followed that ruling in August by allowing the plaintiffs to continue to be protected from having to follow the requirement while they appeal to the Supreme Court.

The HHS rules allow explicitly religious entities an exemption. Religious nonprofit organizations such as the Little Sisters, who operate long-term care facilities open to people of all faiths, do not meet the HHS requirements. The exemption is allowed for institutions such as churches and dioceses that are primarily involved in inculcating the faith and primarily serve and employ people of the same faith. Instead, HHS created what it calls an accommodation.

Under the accommodation, such organizations can file a form with HHS or send a letter simply saying they intend not to provide the coverage. At that point, other systems kick in for providing employees with contraceptive insurance, with no further effort or cost to the religious employers. The Little Sisters object to the requirement, saying the act of asking for the accommodation implicates them morally in the provision of something that violates their beliefs.

In a Sept. 3 order, the majority of the 10th Circuit judges declined to rehear the case “en banc,” or as a whole. But five of the 12 judges disagreed and wrote a four-page dissent to explain.

In the dissent, the five judges said the entire appeals court should rehear the case and questioned whether they should tolerate “letting courts examine the reasoning behind a religious practice or belief and decide what is core and what is derivative.” They went on to suggest that under the reasoning used by the court to rule against the Little Sisters, a Christian could be required to work on Dec. 25, because of scholarly belief that Jesus was born in March and that therefore Christmas work “does not substantially burden his core belief.”

Attorneys for the Little Sisters, Southern Nazarene University and Reaching Souls International have appealed to the Supreme Court. They did not ask the Circuit Court to rehear their petition, but the court took the poll of the full panel of judges on its own.

The Supreme Court is not expected to add any cases to its docket until shortly before the next term opens in October.

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