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Religious Liberty Challenges to Health Care in the Age of COVID-19 – Supreme Court Arguments in *Little Sisters of the Poor* *v. Pennsylvania*

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Press Advisory

Date: May 5, 2020

Subject: Religious Liberty Challenges to Health Care in the Age of COVID-19 – Supreme Court Arguments in *Little Sisters of the Poor v. Pennsylvania*

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New York, New York — On Wednesday, May 6, 2020 the Supreme Court will be hearing arguments (telephonically) in the most recent challenge to the Affordable Care Act’s requirement that employee health plans include contraception coverage, *Little Sisters of the Poor v. Pennsylvania*. The case raises the important question of whether religious liberty rights can be used to limit access to health care at a time when the nation – and the world – is experiencing one of the worst global pandemics in human history. For this reason, the issues in this case take on special significance.

The Law, Rights, and Religion Project at Columbia Law School urges Supreme Court watchers to listen to the arguments in the Affordable Care Act case in the shadow of COVID-19. We should pay particular attention to the way in which the lawyers argue the case and the Justices question those lawyers in light of the following:

- The case raises important questions about how the federal government has created exceptions to the “contraception mandate” in order to accommodate a wide range of complex interests, including objections by some religious employers. As governors have issued bans on public gatherings in recent weeks to protect the public from exposure to COVID-19, they have crafted a patchwork of rules about what counts as a public gathering, which gatherings are non-essential, and what precautions must be taken at essential public gatherings. The complexity of these rules has been pointed to by parties seeking court orders allowing religious gatherings that would otherwise violate governors’ emergency orders, arguing that exceptions for non-religious gatherings are evidence that the rules target or discriminate against religious gatherings. Thus, **attention should be paid in the arguments in the *Little Sisters of the Poor* case** to the way in which the Supreme Court Justices portray exceptions to the “contraception mandate” as either reasonable efforts on the part of the federal government to regulate in a very complicated context or as evidence that the government did not do enough to accommodate religious liberty – what some advocates term “religious persecution or discrimination”.
- The case also offers an opportunity for the Court to consider how religious liberty rights should be balanced against other fundamental rights; in this case, reproductive liberty. What we are seeing in the COVID-19 cases is that courts are treating government interests in protecting public health as extremely compelling when states have acted to ban “elective surgeries” such as surgical abortions, and fundamental constitutional rights to reproductive health care are treated as relatively negotiable by contrast. By comparison, in cases where churches have challenged state bans on public gatherings, many courts have second-guessed the state’s methods used to protect public health, and have moved aggressively to protect

religious liberty in the face of what they regard to be less compelling state policy. **Attention should be paid in the arguments in the *Little Sisters of the Poor* case** to how the right to religious liberty is being weighed in comparison to the right to reproductive health care. So, too, it will be instructive to hear how the parties and the Justices weigh the state's compelling interest in protecting health care when faced with a religious challenge thereto.

The Law, Rights, and Religion Project will be issuing a briefing paper in the next week that discusses and contrasts the religious liberty and reproductive rights challenges to emergency orders banning public gatherings and “elective surgeries”, explaining what’s at stake in these cases, and how the strategies pursued in the litigation fit into larger trends in religious liberty and reproductive rights law and policy. The briefing paper will be available on our [website](#) next week.

The [Law, Rights and Religion Project](#) is a law and policy think tank based at Columbia Law School that promotes social justice, freedom of religion, and religious plurality. The Project develops strategic thought leadership on the complex ways in which religious liberty rights interact with other fundamental rights.