AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **November 2020**
From: **A. Eric Johnston**
Re: **Little Sisters of the Poor, Contraception and Religious Freedom**

Little Sisters of the Poor, etcetera v. Pennsylvania, etcetera was among the religious liberty cases decided by SCOTUS this year. For over 150 years, Little Sisters of the Poor Saints Peter and Paul Home, an order of nuns, has been providing charitable care to the elderly poor. Writing for the court, Justice Clarence Thomas said, "Consistent with their Catholic faith, the Little Sisters hold the religious conviction 'that deliberately avoiding reproduction through medical means is immoral.'"

When the Affordable Care Act ("ACA") was passed during the Obama Administration, "it exempted [only] churches from doing things that burdened their religious beliefs." The ACA was broadly worded and gave extensive rulemaking authority to the federal agencies involved in the administration of the law. After an outcry, the exemption was extended to other religious nonprofit entities. Ultimately, the exemption applied to "for profit businesses," such as established by the *Hobby Lobby v. Sebelius* (2014) case. The law was amended when the Little Sisters objected to providing contraceptives, but still required them to permit their insuring company to provide the service to employees. "They challenged the self-certification accommodation, claiming that completing the certification form would force them to violate their religious beliefs by 'tak[ing] actions that directly cause others to provide contraception or appear to participate in the Departments delivery scheme.'" The Trump Administration passed a new rule removing this requirement. However, the states of Pennsylvania and New Jersey objected saying that the rule had not been properly passed according to the Administrative Procedures Act ("APA"). These states pursued the Little Sisters in court.

The case finally reached SCOTUS. True to his judicial form, Justice Thomas wrote the APA was followed and the statute authorized plain language protecting the Little Sisters. He noted that the statute's contraceptive mandate is capable of violating the Religious Freedom Restoration Act ("RFRA"), but it was not necessary to reach that issue, since the rule met the procedured requirements of the APA and is constitutional.

Justice Alito concurred with the majority but said he believes that RFRA should be applied. The ACA did not exempt itself from RFRA. Congress could have said that RFRA did not apply. Alito wrote that if RFRA was used as the basis for the *Little Sisters* opinion, it would stop the prolonged legal battle. Justice Alito explained RFRA and asked:

> "Under RFRA, the federal government may not 'substantially burden a person's exercise of religion even if the burden results from the rule of general applicability,' unless it 'demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest.' . . . Applying RFRA to the contraceptive mandate thus presents three questions. First, would the mandate substantially burden an employer's exercise of religion? Second, if the mandate would impose such a burden, would it nevertheless serve a 'compelling interest'? And third, if it serves that interest, would it represent 'the least restrictive means of furthering' that interest?"

Justice Alito then goes on to answer his questions. First, he finds there is a substantial burden because there is a $100 per day fine for noncompliance and it is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives. Second, the government cannot prove a compelling interest since other entities are excused from providing contraceptives and women can get contraceptives on their own. Third, he reminds the court that in the *Hobby Lobby* case it was found that the government had "other means" for providing low cost contraceptives for women without imposing a substantial burden on the free exercise of religion by the objecting parties. The conclusion is quite clear that RFRA would find the rule to be constitutional.

The dissenters believed the Trump Administration had ulterior motives that would violate the APA in exempting the Little Sisters. Obviously, the Little Sisters are headed back to the lower courts. As you might expect, Justice Ruth Bader Ginsburg thought the case is about taking away women's rights saying, "Today, for the first time, the Court cast totally aside counter-veiling rights and interest in its zeal to secure religious rights to the *nth* degree." To the liberals, everything is about "reproductive rights and abortion." The liberals do not treat religious freedom as our first freedom. Rather, it is a second-class freedom to the demands of the secular liberal agenda. With Justice Amy Coney Barrett replacing Justice Ginsburg, we except the rights specifically guaranteed in the Constitution to be properly recognized, and while women's equal rights under law will be protected, there will not be the zeal to take unborn life.

This was not a clear win for the Little Sisters or for religious freedom. It is, however, more about the importance of religious freedom than reproductive rights. It was good to see Chief Justice Roberts and the four conservatives supportive of religious freedom. Consistency in SCOTUS opinions is important for religious freedom. It is, however, a continuous struggle.