

The Little Sisters Case And Religious Identity

Now that the dust has settled a bit on the unorthodox ruling from the U.S. Supreme Court in the Little Sisters of the Poor case ([Zubik v. Burwell](#)), it's time to consider the implications of the decision for religious organizations. The question religious organizations should be asking themselves is: "Are you "religious" enough?"

The Little Sisters of the Poor Claim an Exemption. The Little Sisters of the Poor (a religious community of Catholic nuns) faced government fines of about \$100 per day per employee for refusing to comply with the Affordable Care Act's notification requirement under the contraceptive mandate. The Act's rules provide a limited accommodation to organizations with religious objections to providing contraceptive coverage - but the rules also require them to provide written notice to the government or the insurer of those objections. The Little Sisters of the Poor believe that even giving such notice to the government substantially burdens their free exercise rights in that the notice triggers the government to step in to provide coverage. This makes the Little Sisters an affirmative actor in a chain of events that ultimately provides contraception to their employees - the very thing they are trying to avoid as a matter of conscience.

In an unusual move, the Supreme Court asked the parties to submit additional arguments on whether the coverage could be provided to employees "without any such notice" from the Little Sisters. The Little Sisters confirmed that this would not burden their religious exercise and the Government acknowledged that there could be modifications to the current procedures without impeding women's access to contraceptives.

The Court Says "Find a Solution." In response, the Supreme Court unanimously sent the case back to the lower court so that it and the parties could find a solution that would allow both the Little Sisters to freely exercise their religious beliefs *and* the Government to ensure that the employees had access to contraceptive coverage. Though both sides are claiming victory in this case, the Supreme Court essentially told the Government to find a better way to accommodate the Little Sisters.

The Court also barred the Government from fining the Little Sisters to the tune of over \$70 million.

While this interim result is encouraging for supporters of religious freedom, it does raise the question of how other religious nonprofits would fare. In fact, it's worth asking whether your organization would even be able to assert a free exercise claim as a "religious organization."

Do you qualify as a religious organization? Many religious organizations believe they are automatically exempt from laws, regulations, and government agency requirements simply because they call themselves faith-based or religious - but this is no guarantee. In order to claim an accommodation, federal regulations require an organization to "hold itself out" as a religious organization.

How can your nonprofit ensure that it "holds itself out" as a religious entity? At a minimum, your core documents - your articles of incorporation, bylaws, and even employee handbook - should bear the hallmarks of a religious mission, religious identity, and religious decision-making. To ensure your organization has done this properly, Gammon & Grange, P.C. offers Religious Identity Audits that help you:

Establish your organization's religious identity and purposes in all important organizational documents, such as your articles of incorporation, bylaws, and employee handbook;

-) Clearly articulate the religious bases for your organization's positions on foundational issues and off-the-job conduct;
-) Specify the religious character and basis for all of your organization's ministry activities;
-) Spell out the religious character and requirements of employment positions; and
-) Identify and document all of the "burdens" on your free religious exercise that result from the governmental actions.

Someday, you too may have to claim a religious exemption from a government regulation that substantially burdens your religious free exercise rights. Establishing a strong religious identity is the first step in being able to do so.



Scott J. Ward, *Owner* at Gammon & Grange, P.C and director of its Religious Liberties practice group, has over 25 years of experience representing religious nonprofits, para-church organizations, and churches to protect their legal rights and to better accomplish their religious and charitable missions.



Ashley L. Tuite, *associate* at Gammon & Grange, P.C., also specializes in providing comprehensive general counsel to nonprofit and exempt organizations, including protecting their constitutional and religious liberty interests.

Gammon & Grange, P.C. conducts Religious Identity Audits to strengthen the religious identity of faith-based nonprofits and would be happy to provide a no-cost initial consultation to determine whether your organization could benefit from the audit.

© 2016 Gammon & Grange, P.C. For more information, contact Gammon & Grange, P.C., ggalert@gg-law.com; 703-761-5000), a law firm serving nonprofit organizations and businesses throughout the United States and abroad. Readers may freely copy and distribute this Alert **in full without modification**.

Disclaimer: This memo is provided for general information purposes only and is not a substitute for legal advice. The transmission of this memo does not create an attorney/client relationship. No recipients of this memo should act or refrain from acting on the basis of this memo without seeking professional legal counsel. Gammon & Grange, P.C. expressly disclaims all liability relating to actions taken or not taken based on the content of this memo.