Constitutional Challenges: Religious Liberty and the HHS Mandate

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Thank you. Thank you, everybody, for coming. It’s a pleasure to be here to talk about the HHS Mandate. In the eight minutes I have, what I’d like to do is give you a brief overview of what’s going on with the litigation, and then just flag two of the interesting legal issues in questions that the cases bring up.

The HHS mandate issued in August 2011 is a rule promulgated by the Department of Health and Human Services (HHS), the Department of Labor and the Internal Revenue Service (IRS),1 and that rule said that employers have to provide free coverage with no co-pay for certain things that are called “preventative services.” A sub-agency within HHS then decided that preventative services include all FDA-approved contraceptives, sterilizations and counseling and education related to those things.2

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At the time, the government issued what was considered, and still is considered, a very narrow religious exemption. In other words, the government was aware that this will burden some people's religion, and it said: We will have a religious exemption. That religious exemption is exceedingly narrow. It protects a religious employer who meets the following criteria:

First, the employer has to focus only on inculcation of the faith. That has to be the purpose of the religious employer's existence.

Second, the employer must hire primarily members of the same faith.

Third, the employer must serve primarily members of the same faith.

Finally, the employer must file taxes as either a church or a religious order. That's a definition that does cover some churches per se and some religious orders as such, but it doesn't cover many other things that we normally think of as religious organizations like The Catholic University of America, like a religious hospital or soup kitchen or school.

Litigation over the mandate and the narrow religious employer exemption began in November 2011 when we at the Becket Fund filed suit on behalf of Belmont Abbey College. At this point, there are, I believe, either 30 or 31 lawsuits challenging the mandate nationwide on behalf of more than 80 plaintiffs. Those organizations are—many of them Catholic, but not all of them Catholic.

There are several evangelical schools and evangelical organizations and businesses that have filed suit, and essentially while the Catholic plaintiffs say, "I can't be involved in paying for contraception or sterilization or drugs that cause early abortions," the evangelical plaintiffs typically say, "We have no problem with the standard contraceptives. Our problem is simply with


4. Id.


7. For a complete and updated listing of all of the HHS Mandate lawsuits, see http://www.becketfund.org/hhsinformationcentral/ (last visited Nov. 12, 2012).

the drugs and devices that cause early abortions."\(^9\) So there's some variety in the plaintiffs. Some of those plaintiffs are nonprofit organizations, 501(c)(3)s like Catholic University of America.

Some of them are for-profit organizations, essentially religious individuals who are in business and the businesses that they've started who say: Just because I went out to earn money doesn't mean I should give up my right to not be forced to violate my religious beliefs.\(^10\)

A handful of those cases so far have been dismissed by the federal courts as premature. I think it's three out of the thirty have been dismissed as premature, with essentially the courts saying: You're a little bit too early, come back to us a little bit later from now.\(^11\)

Two of them have had merits decisions; one going each way, so for the moment, we're still very early in the process.\(^12\)

I want to flag two issues for brief discussion. One is the accommodation that the president announced at his press conference last February, and I want to briefly talk about that and explain why I don't think it is sufficient.

Second, I want to explain what, to me, is the long-term problem for the government's case here, which is the total lack of a compelling interest to justify this type of mandate.

First, the accommodation, if you recall back last February when there was a lot of media focus on the mandate, there were several announcements, and

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9. _Id_. There is no dispute that the class of "FDA approved contraceptive methods" includes some drugs and devices that interfere with implantation of an already-fertilized human embryo. See, e.g., Kelly Wallace, _Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion_, iVillage.com (Aug. 2, 2011, 4:54 PM), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771 (quoting Secretary Sebelius: "These covered prescription drugs are specifically those that are designed to prevent implantation.").


there was a big Friday afternoon press conference with the president, and the
president claimed to be resolving the dispute by offering an accommodation.
And the announced accommodation went something like this:

We will not force the Catholic University of America to include the drugs
that cause the early abortions and the sterilization and so forth in its
insurance policy. However, we will say that as soon as Catholic University
gives that insurance policy to somebody that will automatically create a right
to receive those exact services from that exact insurance company to that
exact employee. So it wouldn’t be written in there. The claim is you don’t
actually have to provide it, we’re just going to make it happen by law, and
even better than that, you don’t have to pay for it because we’re going to
turn to the insurer and say: Insurer, you pay for it.

That was the announced accommodation.

A couple things that I think ultimately won’t fly about that
accommodation. One is it’s not the law. So it was announced at a press
conference, but that afternoon the government, in the federal register, simply
finalized the old rule that everyone had been complaining about, so there is
no new rule that establishes that accommodation. That accommodation
lives right now as simply a proposal at a press conference.

Secondly, the government has issued an advance notice of proposed
rulemaking which basically says:

Hey, everybody, tell me your thoughts about how we might get out of this
problem and solve the religious liberty problem we have here, and what the
government says is that that document solicits questions and ideas for how
they might solve the problem. But so far, they’ve come forward with no
actual notice of a proposed rule at all.

For some employers and some insurance providers, I think it’s possible
that the accommodation, if it actually becomes the law, could solve the
problem. In other words, for some religious objectors, I think it’s entirely
possible that as understood by their views and their faith and their religion
they would say:

Okay. At this point I’m far enough removed that I’m not actually
facilitating access to the drugs that cause early abortions or the devices that
do that and so forth, and therefore, it’s not a burden on my religion. And to
the extent there are folks in that category, I think the accommodation’s a

147) (adopting original narrow definition of religious employer as a final rule, without
change).

good thing for them, and I assume if any of them have filed lawsuits, then once that happens, they'll walk away from their lawsuits.

But I think for the vast majority of people who objected to the law, the proposed accommodation isn't good enough because it ultimately still leaves the employer in the position of facilitating access to the drugs. In other words, under the proposed accommodation, it is CUA's or anyone else's—and I don’t represent CUA, just to be clear—it is any religious employer's choice to provide insurance, selection of the insurance provider, and connection of the insurance provider with the employee, which triggers the right to get all these drugs for free.¹⁵

So ultimately, I think for many religious objectors, the proposed accommodation doesn't solve the problem because it still leaves them complicit in facilitating the flow of the drugs.

The second point I'd like to make is about the government’s compelling interest problem. I'd like to briefly start with a normative point, which is in a free and diverse and pluralistic country, it ought to be the general rule that the government shouldn't force people to violate their religious beliefs absent some compelling interest. I think that that's a general statement of a rule that I think most people recognize and that people that have different religious beliefs should be able to agree to. Unless there's a real serious need to do it, the government shouldn't be in the business of forcing people to violate their religion.

Now, after the Supreme Court's decision in Smith, that is not the standard for the free exercise clause.¹⁶ The Congress enacted a statute called the Religious Freedom Restoration Act in 1993 sponsored by Ted Kennedy, signed by Bill Clinton, which established the compelling interest test as the standard.¹⁷ I think as the cases move on, what we will see is exactly what the judge in Colorado found in the Hercules case on the mandate, which is that the government has an exceedingly weak claim of a compelling interest in forcing religious objectors to provide access to the drugs, and that's for a couple of reasons.¹⁸


First, the government can and does provide these drugs to millions of people every year directly without forcing unwilling people to be involved. They do that through Title X. They do that in every state in the union, they do it all across the country for millions of people.19

Secondly, the government, with the mandate, has actually exempted hundreds of millions—plans that cover hundreds of millions of people. There’s a grandfathering exception. In other words, if your plan is old enough, you don’t have to comply with the mandate.20 There’s an exemption for some religious employers. They don’t have to comply with the mandate.21 The idea that the government will eventually be able to convince the courts that even though they’ve exempted hundreds of millions of—plans that cover hundreds of millions of people over here, they really have a compelling interest in making this group of people provide the drug is a stretch. I don’t think they can do it.

I’ll stop there, but I beg somebody to ask me a question about for-profit employers later so that I can get into why they too have religious freedom rights. Thank you.


21. See, e.g., 26 U.S.C. §§ 5000A(d)(2)(a)(i)-(ii) (Supp. 2010) (individual mandate does not apply to members of “recognized religious sect or division” that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (Supp. 2010) (individual mandate does not apply to members of “health care sharing ministry” that meets certain criteria).