The HHS Contraception Mandate vs. the Religious Freedom Restoration Act

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The HHS Contraception Mandate vs. the Religious Freedom Restoration Act—Introduction

There they go again—"they" being the anti-religious zealots who are now dominating the Obama administration's decision making.

Two weeks ago, in its ruling in the *Hosanna-Tabor* case, the Supreme Court unanimously rejected the Obama administration's position that the Constitution does not require a "ministerial exception" to the employment-discrimination laws. The Court specifically repudiated what even Justice Kagan called the Obama administration's "amazing" argument that the Religion Clauses have no bearing on the matter.

Unchastened, HHS Secretary Kathleen Sebelius last week renewed her declared "war" against the Catholic church in America and against faithful Catholics (as well as against other religious organizations and believers who share the Catholic opposition to contraceptives and/or abortifacients). Specifically, she announced that HHS, in implementing Obamacare, would require most health-insurance plans to include in the preventive services they cover all FDA-approved forms of contraception (including contraceptives that sometimes operate as abortifacients).

The HHS rule would allow (but not require) the HHS bureaucracy to establish exemptions from this mandate only for an extremely narrow category of "religious employers": an organization qualifies as a "religious employer" only if its purpose is the "inculcation of religious values," it "primarily employs persons who share the religious tenets of the organization, "*and* it "serves primarily persons who share the religious tenets of the organization." As the head of Catholic Charities USA observed, "the ministry of Jesus Christ himself" would not qualify for the exemption. Nor will Catholic Charities, Catholic Relief Services, Catholic hospitals, food banks, homeless shelters, most Catholic schools, and even many or most diocesan offices, much less Catholic business owners who strive to conduct their businesses in accordance with their religious beliefs.

The HHS rule has properly aroused criticism across the political spectrum for its trampling of religious liberty, as this vehement "J'Accuse" essay by Michael Sean Winters, "a liberal and a Democrat," illustrates. (For other examples, see the *Washington Post*'s house editorial and NRO's.) Unlike Winters, I'm not at all surprised that, when President Obama goes beyond talk to action, he sides with his "friends at Planned Parenthood and NARAL" and "treat[s] shamefully those Catholics who went out on a limb to support" him.

What I do find remarkable—even amazing (to reprise Justice Kagan's term)—is that the HHS mandate appears to be so clearly unlawful. In particular, I don't see how the Obama administration could actually believe that the HHS mandate is compatible with the federal Religious Freedom Restoration Act. (The Supreme Court held in *City of Boerne v. Flores* (1997) that Congress lacked the power to apply RFRA *against the states*, but the Court recognizes, as its decision in *Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal* (2006) makes clear, that RFRA applies against the federal government.)

RFRA provides that the federal government

> may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

This standard applies "even if the burden results from a rule of general applicability." The term "exercise of religion" is, in turn, defined broadly to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

RFRA, I'll note, is the Becket Fund for Religious Liberty's lead ground of attack on the HHS mandate in the two cases that it has filed on behalf of Belmont Abbey College and Colorado Christian University.

I will explain in follow-up posts why I don't see how the HHS mandate can be reconciled with RFRA.

The HHS Contraception Mandate vs. RFRA—"Exercise of Religion"

As the text of the Religious Freedom Restoration Act (presented in my introductory post) makes clear, there are four questions involved in determining whether the HHS mandate violates RFRA:

1. Does a person engage in an "exercise of religion" when he, for religious reasons, refuses to provide health insurance that covers contraceptives and abortifacients?

2. Does the HHS mandate "substantially burden" such exercise of religion?

3. Does application of the burden to the person further a "compelling governmental interest"?

4. Is application of the burden to the person the "least restrictive means" of furthering a compelling governmental interest?

If the answer to question 1 or question 2 is no, then there is no issue under RFRA and no reason to reach questions 3 and 4. If the answers to question 1 and question 2 are yes, then questions 3 and 4 come into play; if the answer to either question 3 or question 4 is no, then RFRA has been violated.

I'll address the first question in this post and the others in follow-on posts.

I don't see how anyone can seriously dispute that a person engages in an "exercise of religion" under RFRA when, for religious reasons, he performs, or abstains from performing, certain actions. (I'm not now addressing the distinct question whether and when a prohibition on that exercise of religion amounts to "prohibiting the free exercise [of religion]" in violation of the First Amendment.) Consider the "exercise of religion" involved in some leading Supreme Court cases: In *Sherbert v. Verner* (1963), an individual's religious beliefs forbade her from working on Saturdays. In *Wisconsin v. Yoder* (1972), the parents of teenaged children had religious beliefs that prohibited them from sending their children to high school. In *Thomas v. Review Board* (1981), a worker's religious beliefs barred him from participating in the production of armaments.

While the Court's decision in *Employment Division v. Smith* (1990) altered the standard for assessing which laws will be deemed to "prohibit[] the *free* exercise [of religion]" (and thus violate the First Amendment), it reaffirmed that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, *abstaining from certain foods or certain modes of transportation*." (And,

of course, even if *Smith* had narrowed the constitutional definition of "exercise of religion," the very point of RFRA was to restore the pre-*Smith* regime, so there would be no reason that *Smith*'s constitutional definition would narrow the meaning of RFRA's statutory term "exercise of religion.")

Indeed, HHS, in explaining its decision to allow the HHS bureaucracy to establish exemptions from the mandate for an extremely narrow category of "religious employers," states that "it is appropriate [for the bureaucracy to take] into account *the effect on the religious beliefs of certain religious employers* if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate." (See page 46623 of HHS's interim rule (emphasis added).) HHS is thus acknowledging that these employers are engaged in an "exercise of religion" (within the meaning of RFRA) when they refuse to provide health insurance that covers contraceptives. (Why else even contemplate a religious exemption?) Although HHS doesn't see fit to allow exemptions to take into account the effect on the religious beliefs of *other* employers, that doesn't change the fact that it implicitly concedes that other employers who refuse, for religious reasons, to provide health insurance that covers contraceptives are likewise engaged in an "exercise of religion."

In short, it's clear, for purposes of RFRA, that a person engages in an "exercise of religion" when he, for religious reasons, refuses to provide health insurance that covers contraceptives and abortifacients.

The HHS Contraception Mandate vs. RFRA—"Substantially Burden"

Does the HHS mandate "substantially burden" the "exercise of religion" by those persons and organizations who have religious beliefs that forbid them from providing contraceptives and abortifacients? Again, the answer is clearly yes.

Let's begin with what the "substantial burden" test means under the pre-*Smith* regime that RFRA restored statutorily. As the Court made clear in *Sherbert v. Verner*, the question is not limited to whether a law "directly compel[s]" a person to act contrary to his religious beliefs but extends as well to "indirect" burdens. Adell Sherbert was denied unemployment benefits because she refused to work Saturdays. The state was not directly compelling her to work on Saturdays—or to seek employment at all. Nevertheless, as the Court put it:

> The [agency] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

It is likewise clear that "substantial" is a very low threshold. In *Wisconsin v. Yoder*, for example, Jonas Yoder and Wallace Miller, the two fathers who refused to send their children to high school, "were fined the sum of $5 each."

Employers who violate the HHS mandate, and who thereby fail to provide the coverage HHS deems necessary under Obamacare, incur an annual penalty of roughly $2000 per employee. More precisely, as I understand it, the base penalty is $2000 x (number of full-time employees minus 30), and the base is increased each year by the rate of growth in insurance premiums. So, for example, Belmont Abbey College (one of the two plaintiffs already challenging the HHS mandate), which has 200 full-time employees, is facing an annual base penalty of $340,000. Colorado Christian University (the other plaintiff) has 280 full-time employees and is facing an annual base penalty of $500,000.

It's true, of course, that employers who object to the HHS mandate could avoid any fine by shutting down their operations. Likewise, Adell Sherbert could have stayed out of the labor market or worked part-time, and Jonas Yoder and Wallace Miller could have moved their families out of Wisconsin. The availability of that exit option plainly does not negate the "substantial burden" that each is subject to. To apply the *Sherbert* passage above to the HHS mandate:

The HHS mandate forces Catholic employers to choose between following the precepts of their religion and

incurring huge fines, on the one hand, and abandoning one of the precepts of their religion in order to stay in business, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Catholics for their opposition to contraceptives and abortifacients.

The HHS Contraception Mandate vs. RFRA—"Least Restrictive Means"

As discussed in my previous posts, the HHS mandate imposes a "substantial burden" on the "exercise of religion" of those individuals and organizations who, for religious reasons, oppose covering contraceptives and abortifacients in the health insurance plans they provide. Under the Religious Freedom Restoration Act, the HHS mandate can be applied to those employers only if the government can demonstrate that "application of the burden to the person ... (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." If the HHS mandate can't satisfy *both* these prongs, it violates RFRA.

I'll address the "least restrictive means" prong in this post.

The governmental interest that the HHS mandate is asserted to advance is increased access to contraceptives. For purposes of applying the "least restrictive means" test, I will take for granted (i.e., assume for the sake of argument) that that governmental interest is compelling and that imposing the HHS mandate on an objecting employer furthers that compelling governmental interest.

The question under the "least restrictive means" test is whether imposing the HHS mandate on an employer who has religious objections to providing insurance coverage for contraceptives and/or abortifacients furthers the governmental interest in increasing access to contraceptives *via the means that is least restrictive of the religious liberty of the objecting employer.* The obvious answer to this question is no.

HHS Secretary Sebelius's own announcement of the HHS mandate acknowledges that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." Pharmacies and doctors also provide contraceptive services. An enrollee who has insurance coverage for contraceptives and abortifacients will go to one of these providers to receive the covered services. All that the HHS mandate does is force objecting employers to subsidize these services through the insurance plans they sponsor.

One simple alternative means by which the government could increase access to contraceptives is to directly compensate the providers for the services. In other words, an individual would receive the services from a provider for free, and the government would compensate the provider. This means would clearly be less restrictive of the religious liberty of the objecting employer, as the employer would not be required to sponsor an insurance plan that subsidizes services that he has religious objections to. (It is true, of course, that the employer would have an interest as a taxpayer in not subsidizing objectionable services, but the obligation on an individual to pay a general income tax is far less restrictive of his religious liberty than the HHS mandate is.)

There are various other means of increasing access to contraceptives that are less restrictive of religious liberty than the HHS mandate is: for example, direct government provision of contraceptives; mandates on contraceptive providers; and tax credits or deductions or other financial support for contraceptive purchasers. (To be sure, there are plenty of reasons to oppose these alternatives, and I wouldn't support any of them. But the dispositive point under RFRA is that they are available as less restrictive means.)

Because the HHS mandate doesn't satisfy the "least restrictive means" test, it violates RFRA.

The HHS Contraception Mandate vs. RFRA—"Compelling Governmental Interest"

The fact that the HHS mandate flunks RFRA's "least restrictive means" test suffices to establish that the

mandate violates RFRA. But in the interest of completeness, let's address the other prong of the RFRA test: whether the government can demonstrate that application of the HHS mandate to an objecting employer "is in furtherance of a compelling governmental interest."

The governmental interest that the HHS mandate is asserted to advance is increased access to contraceptives. For purposes of applying RFRA, I readily take for granted the legitimacy of that governmental interest. But there remain the interrelated questions (a) whether that governmental interest is "compelling," and (b) whether imposing the HHS mandate on an objecting employer "is in furtherance" of a compelling interest.

According to a June 2010 Guttmacher Institute "fact sheet" on contraceptive use in the United States, "Nine in 10 employer-based insurance plans cover a full range of prescription contraceptives." Further, HHS Secretary Sebelius's announcement acknowledges that even when employers "do not offer coverage of contraceptive services" to their employees, "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support." Not to mention, of course, the countless pharmacies and doctors who dispense contraceptives. So no one can seriously maintain that there is a general problem of lack of access to contraceptives.

In this context, it is difficult to see how the government has a "compelling" interest in *marginally increasing* access to contraceptives by requiring employers to provide coverage of them in their health-insurance plans. As the Supreme Court stated just last year in an analogous context in the violent video-games case (emphasis added),

> Even if the sale of violent video games to minors could be deterred further by increasing regulation, *the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.*

Further, the proposition that the governmental interest in marginally increasing access to contraceptives is compelling is severely undercut by the fact that lots of employers have, for purely secular reasons, been exempted from the obligation that the HHS mandate imposes. Specifically, so-called "grandfathered" plans need not comply with the "minimum essential coverage" provisions of Obamacare, including the HHS mandate to cover contraceptives and abortifacients. In July 2010, in the very order in which HHS first set forth its interim final rules for coverage of preventive services under Obamacare (as well as in this contemporaneous HHS publication), HHS projected (as its "mid-range estimate") that 55% of large-employer plans would remain grandfathered in 2013 and that 34% of small-employer plans would remain grandfathered of that year. Large-employer plans accounted for 133 million enrollees, and small-employer plans accounted for 43 million enrollees, so HHS's "mid-range" projections anticipated that roughly *88 million* Americans would not be subject to Obamacare's "minimal essential coverage" provisions in 2013.

If the government genuinely regarded marginally increased access to contraceptives to be a compelling interest, what possible sense would it make to exempt grandfathered plans from the obligation to provide insurance coverage for contraceptives?

Similarly, under RFRA, how can the "application of the burden to the person"—that is, the application of the HHS mandate to an objecting employer—be deemed to be "in furtherance of a compelling governmental interest" when the government has found it unnecessary to apply the same burden to employers who don't have religious objections to the mandate? In this regard, I'll note that employers who employed fewer than 50 full-time employees during the preceding calendar year are not obligated to make any health-care insurance coverage available to their employees under Obamacare. 26 U.S.C. §4980H(c)(2). Like employers with grandfathered plans, they thus have no obligation to provide insurance that covers contraceptives and abortifacients, and they face no penalty for not doing so. (Unlike with grandfathered plans, if these employers don't provide qualifying insurance, their employees will be channeled into health exchanges, where the HHS mandate will apply.)

It would seem that HHS has a greater interest in punishing religiously based opposition to contraception and abortion than it has in increasing access to contraceptives. And that punitive interest is not legitimate, much less compelling, under RFRA.

(The points raised in this post would also establish that the HHS mandate is not a neutral and generally applicable law for purposes of Free Exercise analysis under *Employment Division v. Smith*. The Becket Fund's complaints in both the Belmont Abbey College case and the Colorado Christian University case include Free Exercise claims.)

The HHS Contraception Mandate vs. RFRA-Some Closing Observations

As Bishop David Zubik of the Diocese of Pittsburgh sums up the HHS mandate that requires most employers to cover contraceptives and abortifacients in their health-insurance plans:

> The Obama administration has just told the Catholics of the United States, "To Hell with you!"

As I have spelled out in the foregoing five posts, I believe that the HHS mandate, beyond being an assault on general principles of religious liberty, is an open-and-shut violation of the Religious Freedom Restoration Act. Experts in the field whom I have consulted heartily agree. If there is anyone who believes that my analysis is flawed, I would be happy to consider any counter-arguments, and I will, as usual, make any appropriate corrections to my analysis.

I would like to close this initial presentation with three points:

1. RFRA might often be violated inadvertently, when legislators or policymakers neglect to give adequate attention to how a law or regulation will affect an obscure religious minority or when the consequences are genuinely difficult to foresee in advance. Here, by contrast, the Obama administration knew exactly what it was doing. Both in advance of its August 2011 interim final rule and before its recent final announcement, the administration received thousands and thousands of comments about the impact that its rule would have on employers who had religious objections to covering contraceptives and abortifacients. The Obama administration's violation of RFRA is knowing and willful conduct that displays contempt for the religious views of those it seeks to coerce.

2. One must wonder what legal advice, if any, HHS Secretary Sebelius sought before finalizing the mandate. Did HHS lawyers actually advise whether the mandate violated RFRA? And, if so, what was their advice? Did HHS solicit the advice of the Department of Justice's Office of Legal Counsel? Or was it not important enough, or too inconvenient, to get well-informed legal advice?

3. Sebelius claims in her announcement that the HHS mandate "strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services." The Obama administration made a similar claim in the *Hosanna-Tabor* case, when it contended that its novel position that there was no "ministerial exception" to the employment-discrimination laws struck a proper balance. But as Chief Justice Roberts concluded his unanimous opinion,

> [T]he First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

So too, here on the HHS mandate, the Religious Freedom Restoration Act has struck the balance (the same balance, as this post of mine notes at the end, that the Free Exercise Clause requires under the circumstances): Employers whose religious convictions forbid them from providing coverage for contraceptives and abortifacients must be free not to do so.

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