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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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[*] Professor Mark Rienzi was accompanied on a three person panel at the Brendan F. Brown Lecture by Dr. Stephen Schneck, Director, Institute for Policy Research & Catholic Studies and Associate Professor of Politics, The Catholic University of America and Ms. Emily Hardman, Communications Director, Becket Fund for Religious Liberty.

1. *See* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147.130). The Affordable Care Act authorized HHS to set forth the required preventative services. *See* 42 U.S.C. § 300gg–13(a)(4) (Supp. 2010).

2. *See* U.S. Dep't of Health and Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines (last visited Nov. 12, 2012) ("All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.").

At the time, the government issued what was considered, and still is considered, a very narrow religious exemption.[3] 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.[4]

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.[5]

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.[6] At this point, there are, I believe, either 30 or 31 lawsuits challenging the mandate nationwide on behalf of more than 80 plaintiffs.[7] Those organizations are—many of them Catholic, but not all of them Catholic.[8]

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

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3. *See* 76 Fed. Reg. at 46,621.

4. *Id.*

5. *See* Roman Catholic Archbishop of Washington v. Sebelius, No. 1:12-cv-00815 (D. D.C. filed May 21, 2012).

6. *See* Amended Complaint, Belmont Abbey Coll. v. Sebelius, No. 1:11-cv-01989-JEB (D. D.C. filed Mar. 19, 2012).

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).

8. *See* Wheaton Coll. v. Sebelius, No. 12-5273 (D. D.C. filed July 18, 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.").

10. *See e.g.*, Hobby Lobby v. Sebelius, No. 5:12-cv-01000-HE (W.D. Okla. filed Sept. 12, 2012).

11. *See* Belmont Abbey College v. Sebelius, No. 1:11-cv-01989-JEB (D. D.C. Nov. 10, 2012); Wheaton College v. Sebelius, No. 12-5273 (D. D.C. filed July 18, 2012); Nebraska v. U.S. Dep't of Health and Human Servs. No. 4:12-cv-03035 (D. Neb. filed Feb. 23, 2012).

12. *See* Newland v. Sebelius, No. 1:12-CV-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012); O'Brien v. U.S. Dep't of Health & Human Servs., 4:12-CV-476 CEJ, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012).

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.[13] 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.[14] 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

13. *See* 77 Fed. Reg. 8,725, 8,729 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (adopting original narrow definition of religious employer as a final rule, without change).

14. *See* Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147).

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]

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15. Roman Catholic Archbishop of Wash. v. Sebelius, No. 1:12-cv-00815, 27 (D. D.C. filed May 21, 2012).

16. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

17. *See* 42 U.S.C. § 2000bb (2006).

18. *See* Newland v. Sebelius, No. 1:12-CV-1123-JLK, 2012 WL 3069154, at *9 (D. Colo. July 27, 2012).

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.

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19. *See* U.S. Dep't of Health and Human Servs., *Title X Family Planning*, http://www.hhs.gov/opa/title-x-family-planning/ (last visited Nov. 12, 2012).

20. *See* 45 C.F.R. § 147.140(a)(1)(i) (2010); 26 C.F.R. § 54.9815-1251T(a)(1)(i)(2010); 29 C.F.R. § 2590.715-1251(a)(1)(i) (2010). HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014 and that a third of small employers with between 50 and 100 employees may do likewise. Healthcare.gov, *Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans* (June 14, 2010), http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html.

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).